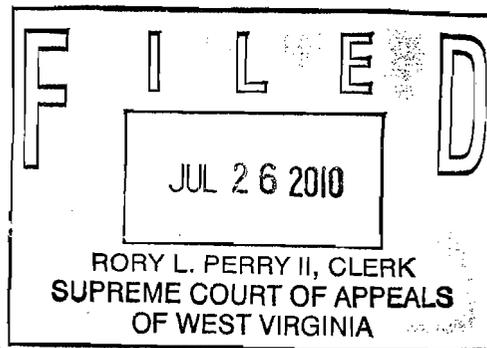


No. 35557

IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

CHARLESTON



STATE OF WEST VIRGINIA,

Appellee,

v.

Supreme Court No. 35557

Circuit Court No.: 09-F-47 (Ohio County)

CHARLES JAMES

Appellant.

APPELLANT'S BRIEF

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Justices:

Hon. Robin Jean Davis, Chief Justice

Hon. Brent D. Benjamin

Hon. Margaret L. Workman

Hon. Menis Ketchum

Hon. Thomas E. McHugh

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NATURE OF THE RULING BELOW

This is an appeal of the sentencing taken from the Circuit Court of Ohio County following a plea of guilty, pursuant to *State ex rel. Kennedy v. Frazier*, 178 W.Va. 10, 357 S.E.2d 43 (1987) to the criminal offense of First Degree Sexual Abuse. Accordingly, the Appellant accepted his statutory sentence of not less than one nor more than five years in the West Virginia State Penitentiary. The plea agreement preserved for the Appellant the right to challenge the constitutionality of W.Va. Code § 62-12-26 requiring extended supervision for certain sex offenders. The Court denied Appellant's motion to declare the aforementioned statute unconstitutional and imposed the additional punishment of thirty (30) years extended supervision. From this ruling the Appellant petitioned this Court on the issues of: (1) whether W.Va. Code § 62-12-26, requiring extended supervision for sex related convictions, is unconstitutional under both the Federal and State Constitutions; and (2) whether the Circuit Court abused its discretion in imposing a thirty (30) year period of extended supervision.

On May 5, 2010 this Court granted the Appellant's petition for appeal. By letter dated June 25, 2010, postmarked June 28, 2010, and received thereafter by this office, Counsel was instructed to file the foregoing brief.

STATEMENT OF FACTS

This case comes before the Court by way of information alleging the offense of Sexual Abuse in the First Degree pursuant to W.Va. Code § 61-8B-7(a)(1).

The events underlying the indictment arise out of an incident allegedly occurring on or about January 10, 2009 wherein a female juvenile made

allegations against the Appellant involving inappropriate touching of the female's breasts. The Appellant denies the allegations.

A preliminary hearing was held in the matter on March 4, 2009 after which the Magistrate found probable cause, binding the case over for presentment to the Ohio County Grand Jury. Based upon the accuser's testimony, if presented, the Appellant, at a minimum, faced a possible indictment for the offenses of First Degree Sexual Abuse which carries a penalty of incarceration of not less than one nor more than five (1-5) years in the West Virginia Penitentiary and Sexual Abuse by a Custodian which carries a possible penalty of not less than ten nor more than twenty (10-20) years. Not wanting to risk conviction on the more serious offense, the Appellant elected to enter a plea to First Degree Sexual Abuse pursuant to State ex. rel. Kennedy v. Frazier, 178 W.Va. 10, 357 S.E.2d 43 (1987)¹.

Prior to the August 10, 2009 plea hearing, Counsel for Appellant filed a motion challenging the constitutionality of W.Va. Code § 62-12-26. Following the Court's acceptance of Appellant's Kennedy plea, but before sentencing, Counsel for Appellant argued the motion. The Court, in denying the motion, acknowledged that the statute ought to be examined "under a microscope of both the United States and West Virginia Constitutions." (Transcript. pg 32, lines 15-17). The Court then proceeded to impose a period of supervision for thirty (30) years.

Appellant requests review of the constitutionality and applicability of W.Va. Code § 62-12-26—Extended supervision for certain sex offenders.

¹ Syl. Pt. 1 provides "[a]n accused may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even though he is unwilling to admit participation in the crime, if he intelligently concludes that his interests require a guilty plea and the record supports the conclusion that a jury could convict him."

The Appellant primarily argues the statute is unconstitutional in that it assigns multiple punishments for the same offense in violation of the guarantee against double jeopardy.

The Appellant additionally advances constitutional issues relating to cruel and unusual punishment and due process concerns found in, what the Court below appropriately characterized as “the more Draconian provisions of the act.” (Transcript pg 32, lines 22-23).

As a secondary argument, the Appellant argues the Court abused its discretion in imposing a thirty (30) year period of extended supervision under W.Va. Code § 62-12-26.

ASSIGNMENTS OF ERROR

I. W.Va. Code § 62-12-26 requiring extended supervision following convictions for certain offenses is unconstitutional under the double jeopardy provisions of both the Federal and State Constitutions.

A. W.Va. Code § 62-12-26 requiring extended supervision following convictions for certain offenses is unconstitutional under both the Federal and State Constitutions in that it is violative of the constitutional proscription against imposition of multiple punishments for the same offense.

B. W.Va. Code § 62-12-26 fails to allow for credit for time served while on supervised release in violation of the Constitutional principle of double jeopardy.

II. W.Va. Code § 62-12-26 violates the Constitutional prohibition on cruel and unusual punishment in that the statute itself is cruel and unusual and the sentence imposed both shocks the conscience of the court and imposes an unconstitutionally disproportionate sentence.

III. W.Va. Code § 62-12-26 requiring extended supervision following convictions for certain offenses is unconstitutional under both the Federal and State Constitutions in that it is violative of the procedural due process provisions.

A. W.Va. Code § 62-12-26 is unconstitutional in that the additional penalty far exceeding the statutory penalty may be imposed by summary proceeding while removing from the jury the assessment of facts that increase the prescribed range of penalties.

B. W.Va. Code § 62-12-26 is unconstitutionally vague in that it fails to provide the Appellant with adequate notice of prohibited conduct allowing for the creation of arbitrary and capricious rules with no standardized supervisory guidelines leading to selective and discriminatory enforcement.

IV. The Circuit Court abused its discretion in imposing a thirty (30) year period of extended supervision under W.Va. Code § 62-12-26.

STATEMENT OF THE STANDARD OF REVIEW

With respect to Appellant's first three assignments of error, "[t]he constitutionality of a statute is a question of law which this Court reviews *de novo*." Syl. pt. 1, State v. Rutherford, 223 W.Va 1, 672 S.E.2d 137 (2008). With respect to Appellant's fourth assignment of error, "the Supreme Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. pt. 1, in part, State v. Lucus, 201 W.Va. 271, 496 S.E.2d 221 (1997) *cited in State v. Middleton*, 220 W. Va. 89, 640 S.E.2d (2006).

INTRODUCTION

The Appellant is challenging the constitutionality of W.Va. Code § 62-12-26, which imposes a second mandatory non-discretionary consecutive sentence of 10-50 years in prison, suspended for something called supervised release.

At the outset, the Appellant recognizes his arduous journey of demonstrating the unconstitutionality of legislation. As recognized by this Court,

In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain

constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt. Syllabus Point 1, State ex rel. Appalachian Power Co. v. Gainer, 149 W.Va. 740, 143 S.E.2d 351 (1965).

Syl. Pt. 2, State v. Rutherford, 223 W.Va. 1, 672 S.E.2d 137 (2008). This Court has also declared that “[t]he provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution . . .” Id at Syl. pt. 3; and Syl pt. 2, Pauley v. Kelly, 162 W.Va. 672, 255 S.E.2d 859 (1979).

Frankly, the thought of *almost plenary* powers vested in the legislative body combined with the highest burden of proof afforded by our law—that is, proof *beyond a reasonable doubt*—is as serious an affront and danger to the traditional concept of separation of powers as any tenet of law heretofore proffered.

In contravention, Appellant asserts that equally applicable to this Court is the well settled principle that;

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply. Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. That it thus reduces to nothing what we have deemed the greatest improvement on political institutions -- a written constitution

Marbury v. Madison, 5 U.S. 137, 177-178, 2 L.Ed. 60, 73-74 (1803).

Finally, in deciding this landmark case, Justice Marshall opined:

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

Id at 177-78, 73-74.

West Virginia adheres to this principle of judicial review.

It cannot be denied that of the various structural elements in the Constitution, judicial review allows the judiciary to play a role in maintaining the design contemplated by the framers. To be sure, the resolution of specific cases, such as this one, has proved difficult, but judicial review has been established beyond question and, although we may differ in applying its principles, its legitimacy is undoubted. *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803). What Justice Scalia recently stated in *Platt v. Spendrift Farm, Inc.*, ___ U.S. ___, ___, 115 S. Ct. 1447, 1453, 131 L. Ed. 2d 328, 342 (1995), applies with equal force in West Virginia: "Article III establishes a 'judicial department' with the 'province and duty . . . to say what the law is' in particular

cases and controversies. . . . The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the . . . Judiciary the power, not merely to rule on cases, but to *decide* them[.]" (Citation omitted; emphasis in original).

Randolph County Board of Education, v. Chris Adams, et al. 196 W. Va. 9; 467

S.E.2d 150 (1995).

ARGUMENT

I

W.Va. Code § 62-12-26 requiring extended supervision following convictions for certain offenses is unconstitutional under the double jeopardy provisions of both the Federal and State Constitutions.

The Appellant first argues that W.Va. Code § 62-12-26 is unconstitutional under the double jeopardy provisions of both the Federal and State Constitutions for two reasons: (1) the statute imposes multiple punishments for the same offense; and (2) the statute expressly denies credit for time served while on supervised release.

A.

W.Va. Code § 62-12-26 requiring extended supervision following convictions for certain offenses is unconstitutional under both the Federal and State Constitutions in that it is violative of the constitutional proscription against imposition of multiple punishments for the same offense.

W.Va. Code § 62-12-26 imposes a second mandatory non-discretionary consecutive sentence of 10-50 years in prison, suspended for supervised release. This sentence takes effect after completion of the first statutory sentence. W. Va. Code § 62-12-26 requires no additional facts other than

those for which the Appellant has already been convicted and sentenced. If a revoked, the defendant would be sentenced to serve the second penalty. On its face, W.Va. Code § 62-12-26 is an additional punishment for the same offense.

The Fifth Amendment, to the United States Constitution provides, in part, “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . .” U.S. Const. Amend V. This provision was made applicable the States through the Fourteenth amendment to the United States Constitution. See Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1956) and State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (1992). The Fourteenth Amendment is the cornerstone in making applicable the equal protection of the law to all citizens by providing “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the law.” U.S. Const. Amend XIV, Section 1.

Article III, Section 5 of the Constitution of West Virginia similarly provides, “[n]or shall any person, in any criminal case, . . . be twice put in jeopardy of life or liberty for the same offence.” [sic].

The double jeopardy provisions of both the United States Constitution and the West Virginia State Constitution have been interpreted to provide three distinct protections: “[1] immunity from further prosecution where a court having jurisdiction has acquitted the accused. [2] It protects against a second prosecution for the same offense after conviction. [3] **It also prohibits multiple punishments for the same offense.**” See Syl. pt 1, Conner v. Griffith, 160 W.Va. 680, 238 S.E.2d 529 (1977) (emphasis added). See also, North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) and Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1956) (holding that the Fifth Amendment guarantee against double jeopardy consists of three separate constitutional protections (1) it protects against a second prosecution for the same offense after conviction; (2) It protects against a second prosecution for the same offense after acquittal; and (3) it protects against multiple punishments for the same offense.)

The Appellant seeks refuge within this third Constitutional guarantee because W.Va. Code § 62-12-26 requiring extended supervision for sex offenders is an additional punishment for the same offense. Counsel for Appellant argued at sentencing that Mr. James was essentially sentenced 2 ½ times for the same offense. (citing the statutory penalty of 1-5 years in the penitentiary; the extended supervision under W. Va. Code § 62-12-26; and the administrative registration requirements of W.Va. Code § 15-12-1 et seq. (Transcript. pg 26, lines 17-24).

At its very core, West Virginia Code § 62-12-26 imposes a second criminal sentence of up to fifty years *in addition to* the sentence provided in the underlying offense *and* the administrative registration requirements set forth in W.Va. Code § 15-12-1 et seq. The pertinent language reads, “. . .shall, as part of the sentence imposed at final disposition, be required to serve, ***in addition to any other penalty or condition imposed by the court,*** a period of supervised release of up to fifty years: Provided, that the period of supervised release imposed by the court pursuant to this section . . . shall be no less than ten years.” W.Va. Code § 62-12-26(a) (emphasis added)².

This code section then imposes a number of conditions, including the standard conditions of probation³, for the designated period of supervision. W.Va. Code § 62-12-26)(b-f). Interestingly, W.Va. Code § 62-12-11 limits probation to five (5) years.

This period of supervised release does not begin until *after* the initial sentence is complete. As clearly stated, “[t]he period of supervised release imposed by the provisions of this section ***shall begin upon the expiration*** of any period of probation, the expiration of any sentence of incarceration or the expiration of any period of parole supervision imposed or required of the person

² While the legislature couches the additional sentence in terms of “supervised release” the actual sentence is a definite term of years of incarceration suspended for “supervised release.”

³ The Appellant maintains that the statute’s general legislative use of the term “probation” was of intentional design solely to give the statute’s infringement on individual liberty an appearance of “grace.” For example, in the instant case, the Court is legislatively forced to impose up to a 50 year sentence of its choosing—suspended of course. In reality, using the term probation rather than parole allows the denial of credit for time served.

so convicted, whichever expires later.” W.Va. Code § 62-12-26(c) (emphasis added).

West Virginia Code § 62-12-26(g)(3) further provides that a court may “revoke a term of supervised release and require the defendant to serve in prison all or part of the term of supervised release without credit for time previously served on supervised release if the court . . . finds by clear and convincing evidence that the defendant violated a condition of supervised release.”

A plain reading of the statute suggests that its effect is to grant the judiciary power to impose an additional sentence of up to fifty (50) years suspended for “extended supervision.” This supervision begins AFTER the Appellant completes his original sentence for the same offense. The statute then grants the court the power to revoke the suspension and sentence the Appellant. Essentially imposing what is tantamount to a life sentence following only a summary hearing. The court may extend the original term of the supervised release and modify any of the terms during the period of release. W.Va. Code § 62-12-26(g)(2).

Additionally, the Appellant points out that unlike statutory schemes providing for sentence enhancements (i.e. W.Va. Code § 60A-4-408 permitting sentencing enhancements for certain repeat drug offenders based on the fact of previous convictions; W.Va. Code § 60A-4-406 permitting sentencing enhancements based on factors such as age and proximity of drug sales to schools; and even W.Va. Code § 61-11-18 permitting recidivist actions based

on prior convictions), the punishment imposed under § 62-12-26 is NOT based on any additional facts or elements apart from the underlying conviction.

To be clear, the legislative scheme actually imposes a second determinate sentence of up to fifty (50) years⁴. This second determinate sentence is then suspended for something called “supervised release”. This period of supervised release begins after a defendant completes the statutory sentence linked to the underlying conviction. This supervised release and its terms may then be modified in any way, including, increasing the period of supervised release, at any time. The determinate sentence is then, for lack of a better word, suspended for supervised release. Any violation of the terms may then be revoked by summary hearing. The defendant may then serve the entirety of the suspended sentence. As has been clearly demonstrated, supervised release is, in effect, a new additional sentence.

B.

W.Va. Code § 62-12-26 fails to allow for credit for time served while on supervised release in violation of constitutional principles of double jeopardy.

W.Va. Code § 62-12-26 fails to allow for credit for time served while on supervised release in violation of constitutional principles of double jeopardy. The statute’s express failure to credit time served is so offensive to the

⁴ In the present case, the Appellant received thirty (30) years. However, considering the Court retains a thirty year option on increasing the years on supervised release, the Appellant will refer to the potential fifty year possibility. See W.Va. Code § 62-12-26(g)(2).

constitutional principle of double jeopardy, that it demands a finding that the statute is unconstitutional.

Specifically, West Virginia Code § 62-12-26(g)(3) provides, in part, that a court may “revoke a term of supervised release and require the defendant to serve in prison all or part of the term of supervised release ***without credit for time previously served*** on supervised release” (emphasis added).

As previously noted, the Fifth Amendment, to the United States Constitution provides, in part, “. . .nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb” U.S. Const. Amend V. This provision was made applicable to the States through the Fourteenth Amendment to the United States Constitution. Similarly, Article III, Section 5 of the West Virginia State Constitution provides, in part, “[n]o person shall be . . .twice put in jeopardy of life or liberty for the same offense.”

The Appellant recognizes that the legislature has brought the criminal code of this State into new territory. Supervised release is a new legal classification in the State of West Virginia. The default position, born of legislative convenience, seems to categorize the supervised release as “probation.” See W.Va. Code § 62-12-26(e). The Appellant maintains this categorization is little more than legal fiction created to dilute the few remaining due process protections afforded those convicted of sex related offenses. The statute itself does not expressly state that the supervised release is *probation*. In fact, the Appellant argues the statute falls outside the normal terms of probation or parole. That being said, the Appellant argues that W.Va.

Code § 62-12-26, actually imposes more severe restraints on his freedom for the next thirty to fifty years than traditional probation or even parole. In that sense, any person upon whom such a release is imposed ought to receive, at a minimum, credit for the period spent on supervised release. The failure to grant credit for time served renders the statute unconstitutional.

W.Va. Code § 62-12-26 provides for a definite, determinate sentence of up to fifty (50) years. The determinate sentence is suspended in lieu of supervised release—under the watchful eye of the state. The court then holds an option to modify, increase, or revoke this determinate sentence.

To be clear, supervised release is neither probation nor parole. It is, in effect, a new *consecutive* sentence operating under a new legal term—*supervised release*.

W.Va. Code § 62-12-26 is directly tied to the deprivation of individual liberty. These restraints are beyond those restrictions typically imposed upon a probationer under W.Va. Code § 62-12-9. For example, but not by way of limitation, the default conditions governing release on probation are the probationer (1) not violate the criminal law; (2) not leave the state without permission; (3) comply with conditions; (4) residency restrictions (i.e. minor/victim); and (5) pay fees. See W.Va. Code § 62-12-9(a). Any other conditions are discretionary. See W.Va. Code § 62-12-9(b) (“In addition the court *may* impose . . .”).

In contravention, W.Va. Code § 62-12-26 imposes, in addition to the default liberty restrictions governing release on probation, the supplementary

limitations on freedom, including but not limited to: (1) prohibitions on “[e]stablishing a residence or accepting employment within one thousand feet of a school or child care facility . . .” See W.Va. Code § 62-12-26(b)(1); (2) required participation in offender treatment programs or counseling unless deemed no longer appropriate. See W.Va. Code § 62-12-26(e); (3) as an alternative to incarceration, “order the person being supervised to remain at his or her place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices.” See W.Va. Code § 62-12-26(g)(4). Appellant would further note that home confinement may be imposed under other conditions not directly characterized as *alternatives to incarceration*.

In addition to the above, “Sex Offender Conditions” have been made available through the West Virginia Division of Probation Services. (See Exhibit A). This draconian publication imposes even greater restrictions on those being supervised. Examples of what may be imposed include, but are not limited to, the following: approval of any employment and restriction of certain types of employment (i.e. home service calls and delivery—which may or may not also include careers in the residential home labor field); curfew restrictions; prohibition on alcohol consumption; prohibitions on visiting establishments which serve alcohol, whether it be a bar or restaurant; inability to leave the state (the Appellant is originally from Ohio); ordered into specific treatment programs; prohibitions on possessing legal pornography; reporting incidental contact with persons under age 18 (presumably this may include most cashiers at grocery

stores and fast food restaurants); restrictions from being within two blocks of any location where children are known to congregate; forced medication; forced waivers of confidentiality and release of medical information; forced disclosures of dating, intimate, or sexual relationships; prohibitions on dating, intimate, or sexual relationships with any person having children under the age of eighteen (without mentioning whether the children under that age actually reside with the person); submission to polygraph testing at the their expense; and finally submission to electronic monitoring.

Supervised release is not probation and as such should not be compared to probation. The restrictions are more severe than those of both probation and parole. Denying credit for time spent during this potentially intense supervision curtailing and restricting individual freedom of movement, contract, and general liberties violates double jeopardy. Fortunately, this Court has already addressed a similar issue.

The State of West Virginia recognized that double jeopardy is implicated in cases of parole revocations. As this Court has held, “[t]he failure to credit on the underlying sentence the time served on parole prior to the revocation of parole constitutes a multiple punishment for the same offense, and is a violation of the Double Jeopardy Clause of the West Virginia Constitution, Article III, Section 5.” Syl. pt. 2, Conner v. Griffith, 160 W.Va. 680, 238 S.E.2d 529 (1977).

As this Court in Conner, *supra*, stated:

Time spent serving a sentence does not depend on the manner or location in which it is served. There are, to be sure, different

degrees of confinement recognized in any penal system. The fact that some confinements are less restrictive than others should have no bearing in computing the time served on the sentence.

Id. at 689, 534.

Interestingly, the conditions of release on parole as set forth in W.Va. Code § 62-12-17 are actually quite similar to those conditions governing release on probation pursuant to W.Va. Code § 62-12-9⁵. This Court recognizes parole is entitled to credit while probation is not. Supervised release is neither probation nor parole, but by including general references to *probation* and incorporating statutory language *without credit for time served on supervised release*, the legislature is attempting to legitimize a constitutional proscription which double jeopardy clearly prohibits.

The Appellant points out that the distinguishing factors between probation and parole have been considered by this Court in finding that failure to credit time spent on parole is a violation of double jeopardy. This Court has refused to make the same finding in cases of probation revocation. As this Court previously explained:

In West Virginia there are fundamental statutory differences between probation and parole in the relationship they bear to the underlying criminal sentence. The term of probation has no correlation to the underlying criminal sentence, while parole is directly tied to it. In effect, there is a probation sentence which operates independently of the criminal sentence

Syllabus Point 1, Jett v. Leverette, 162 W. Va. 140, 247 S.E.2d 469 (1978).

⁵ See Jett v. Leverette, 162 W. Va. at 148, 247 S.E.2d at 473 (1978) (McGraw dissenting)

In *Leverett*, this Court refused to extend double jeopardy to the concept of probation—as they had previously to parole as set forth in *Conner, supra*. However, in refusing to extend, this Court noted several distinguishing factors:

Parole is made available only after the convicted defendant has undergone imprisonment and demonstrated, through his good conduct under confinement, a rehabilitative trend. Parole carries with it an initial period of confinement. This is generally absent from probation.

Leverett at 141-142. In the present case, W.Va. Code § 62-12-26 only takes effect upon expiration of the statutory penalty. See W.Va. Code § 62-12-26(c). In that sense, the Appellant will have served an initial statutory period of confinement or will have expired his parole period.

Probation differs from parole in that the judge is authorized to tailor the probation conditions to meet the particular needs of the individual case, while parole conditions are generally uniformly set by the parole board for all parolees. The opportunity for less restrictive conditions is therefore more available in probation than parole.

Leverett at 143-144. In the present case, as noted above, the conditions governing supervised release are more restrictive than both probation and parole. Moreover, many of the restrictions are mandatory and therefore not subject to individual tailoring by the Court. Even the most minimal restrictions under W.Va. Code § 62-12-26 are already in excess of those imposed on probationers. Therefore, less restrictive conditions are unavailable under conditions of supervised release.

Moreover, under our probation statute a maximum term of five years is set as the outer limit for probation time. This probation term has no direct relationship to the amount of time required on the underlying criminal sentence . . . Parole is different in that it operates in conjunction with the underlying criminal sentence. No

separate period of parole is specified by the statute and in this sense the parolee is serving out the remainder of his criminal sentence.

Leverett at 144-145. In the present case, the person may be placed on supervised release for up to fifty (50) years, in the Appellant's case a minimum of ten (10) years, far surpassing the five (5) year limitation on probation. Additionally, the non-discretionary term of supervised release and potential sentence is directly related to the determinate sentence of incarceration which may be imposed upon violation of the terms of release. See W. Va. Code 62-12-26(g)(3) ("The Court may . . . revoke . . . and require the defendant to serve in prison all or part of the term of supervised release without credit for time served."). Furthermore, the period of supervised release is based solely upon conviction of the underlying criminal offense⁶ and therefore directly linked to the conviction. As with parole, the Court imposes a sentence of up to fifty (50) years for his underlying conviction and the legislative scheme then mandates that the person subject to supervised release *serve out the remainder of his supervised release*. The difference is, unlike parole, the person must serve the sentence without credit for time spent on supervised release.

Further, statutory differences exist between probation and parole in regard to eligibility. Probation is not available for a person who has a prior felony conviction within five years of his current felony conviction. Nor is probation available if the person is convicted of or pleads guilty to a felony for which the maximum penalty is life imprisonment. No such parallel restrictions are imposed on eligibility for parole.

⁶ Except the person being supervised is not being credited for time spent on the supervised release.

Leverett at 145. In the case of supervised release, all persons convicted under qualifying statutes are required to participate. See W.Va. Code § 62-12-26(a) (“any defendant convicted after the effective date of this section of a violation of section twelve, article eight, chapter sixty-one . . .”).

While the present statute is not one of probation or even parole, it is clear that the terms of supervised release are more akin to release on parole. Still, W.Va. Code § 62-12-26 extends beyond the traditional meanings of those typical grants of legislative and executive functions. It would be a legal anomaly—to say the least—if this Court, recognizing the applicability of the double jeopardy provision to legislative grants to the executive in parole cases, denied that same protection to grants to the judiciary in supervised release cases with more severe restrictions on liberty.

W. Va. Code § 62-12-26 violates the constitutional guarantee against double jeopardy to the extent that it denies credit for time spent on supervised release.

II.

W.Va. Code § 62-12-26 violates constitutional prohibitions on cruel and unusual punishment in that the statute itself is cruel and unusual and the sentence imposed both shocks the conscience of the court and imposes an unconstitutionally disproportionate sentence

It is readily apparent that a person subject to terms and conditions involuntarily imposed upon him and monitored by the Court for 10-50 years incurs substantial restraints on his freedom. Even more disturbing is that this restraint begins after the defendant completes his statutory sentence, runs concurrent with administrative registration requirements under W.Va. Code §

15-12-1, and carries with it a possible life sentence triggered by a minor violation decided without a jury on a standard of clear and convincing evidence.

In the present action, the Appellant first argues that imposition of W.Va. Code § 62-12-26 is cruel and unusual. In the alternative, the Appellant argues the imposition of supervised release is unconstitutionally disproportionate.

The Eighth Amendment of the Constitution of the United States prohibits the infliction of cruel and unusual punishments. See U.S. Const. Amend. 8, (“excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”). The principle of proportionality is similarly implicit within the Eighth Amendment. See generally Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed2d 637 (1983).

Similarly, Article III, Section 5 of the West Virginia Constitution provides, in part, that “[e]xcessive bail shall not be required. . . nor cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offense.” In further elaboration, the West Virginia Supreme Court of Appeals has held

Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: “Penalties shall be proportioned to the character and degree of the offense.”

Syl. pt. 8, State v. Vance, 164 W.Va. 216, 262 S.E.2d 423 (1980). This Court further explained that “[a] criminal sentence may be so long as to violate the proportionality principle implicit in the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution.” *Id* at Syl. pt. 6.

Finally, a “[p]unishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense.” Syl. pt. 5, State v. Cooper, 172 W.Va. 266, 304 S.E.2d 851 (1983).

To that end, Appellant reminds the Court:

There are two tests to determine whether a sentence is so disproportionate to a crime that it violates our constitution. The first is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further.

State v. Cooper, 172 W.Va. 266, 272, 304 S.E.2d 851, 857(1983).

A.

Cruel and Unusual

The Appellant first argues that the present statute itself is per se cruel and unusual.

W.Va. Code § 62-12-26, in essence, imposes an additional non-discretionary delayed sentence of not less than ten nor more than fifty years in the West Virginia State Penitentiary suspended upon conviction for any offense under section twelve, article eight, chapter sixty-one or a felony violation of article eight-b, eight-c or eight-d of the same statute⁷. See W.Va. Code § 62-12-26.

⁷ Interestingly, this statute, seemingly applicable only to *sex offenders* casts a wider net, pulling into the required supervision non-sex offenses under 61-8D-1 et. seq.

As this Court has recognized:

The phrase "cruel and unusual punishment", as used in the *Eighth Amendment to the Constitution of the United States* and in *Article III, Section 5, of the Constitution of West Virginia*, is difficult to define. This difficulty has been mentioned in numerous cases. The Court said: "The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.

SER Pingley v. Coiner, 155 W.Va. 591, 186 S.E.2d 220 (1972) *quoting from* Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L. Ed. 2d 630 (1958) (citations omitted).

Though addressing the issue of prison conditions, this Court in Pingley wrestled with the definition of *cruel and unusual* before recognizing the term itself to be a fluid concept focusing on human dignity. See State v. Vance, 164 W.Va. 216, 231, 262 S.E.2d 423, 432 (1980) ("In *State ex rel. Pingley v. Coiner*, 155 W.Va. 591, 186 S.E.2d 220 (1972), we acknowledged that the term 'cruel and unusual punishment' is flexible and tends to broaden as society becomes more civilized and humane"). See also, Drake v. Airhart, 162 W.Va. 98, 245 S.E.2d 853 (1978) and Weems v. United States, 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793 (1910).

As if the stigma of administrative lifetime registration as a sex offender is not enough, under W.Va. Code 15-12-1 et. seq., the legislature now imposes control and restraint over every aspect of the life of person subject to supervised

release—for life. From pragmatic experience practicing indigent criminal defense, the statutory scheme created here, when coupled with the registration requirements, will transform common experiences such as employment, relationships, social events, freedom of travel, and the like into impossibilities. In other words, mere conviction of an offense defined by W.Va. Code § 62-12-26(a) acts as an involuntary forfeiture of the Appellants life, liberty, and pursuit of happiness—at least for the next 30 – 50 years. The Appellant will be unable to put the event behind him—despite having served out the statutory penalty. The statute may act to force already indigent persons to quit employment or change residences at a moment's notice—without regard to financial ability, contracts, etc. This statute imposes lifetime terms and conditions long after the original sentence has been carried out—these terms and conditions commonly include: [approval of any employment and restriction of certain types of employment (i.e. home service calls and delivery—which may or may not also include careers in the residential home labor field); curfew restrictions; prohibition on alcohol consumption; prohibitions on visiting establishments which serve alcohol, whether it be a bar or restaurant; inability to leave the state (the Appellant is originally from Ohio); ordered into specific treatment programs; prohibitions on possessing legal pornography; reporting incidental contact with persons under age 18 (presumably this may include most cashiers at grocery stores and fast food restaurants); restrictions from being within two blocks of any location where children are known to congregate; forced medication; forced waivers of confidentiality and release of medical information; forced disclosures of dating,

intimate, or sexual relationships; prohibitions on dating, intimate; Prohibitions against sexual relationships with any person having children under the age of eighteen (without mentioning whether the children under the age of actually reside with the person); submission to polygraph testing at the persons on release expense; and finally submission to electronic monitoring.]

While the Appellant understands why elected legislators enact statutes like W.Va. Code § 62-12-26, the Appellant does not deserve to be branded with a scarlet letter and then burned upon the altar of political expediency and public grandstanding. All elected officials swear an allegiance to the Constitution—even if that means sacrificing the electorate.

As previously mentioned, the Appellant has been sentenced two and one half times. He has accepted the statutory penalty of not less than one nor more than five years. He has accepted that he is required to register for life as a convicted sex offender. However, the lifetime scrutiny of every aspect of his life—kept in check by a 30 year hammer—is overkill. Mr. James will serve his sentence and would like to one day move beyond the present, a task made impossible under the thumb of the State.

B.

Unconstitutionally Disproportionate

The Appellant next argues that the statute itself should be deemed constitutionally impermissible inasmuch as the penalty range, in light of the circumstances, is unduly harsh and unconstitutionally disproportionate as applied to his case. In Cooper, supra, this Court held that a determination of whether a sentence is constitutionally disproportionate may be subjective or

objective. The subjective test inquires into whether the sentence for the particular crime shocks the conscience of the court and society such that it is so offensive that it cannot pass a societal and judicial sense of justice. See State v. Cooper, 172 W.Va. at 272 (1983). If the sentence in fact shocks the conscience of the court, the inquiry ends.

In the present instance, the Appellant maintains that the imposition of thirty (30) years of extended supervision not only shocks the conscience but additionally fails to achieve the legislative intent and serves no useful purpose.

That being said, the Appellant points out that the underlying offense for which the penitentiary sentence was imposed carries a statutory penalty of not less than one nor more than five years (1-5). The Appellant is presently eligible for parole. However, with the additional penalty of thirty years supervision, the Appellant, may, in theory, receive a definite term of thirty (30) years—far in excess of the one to five (1-5) year penalty deemed legislatively appropriate for the original conviction. This additional thirty year sentence may be imposed by summary hearing upon a clear and convincing standard of proof by a judge rather than a jury of the Appellant's peers. Under the subjective prong of Cooper, supra, the Appellant maintains that requiring the Appellant to actually serve thirty years of extended supervision following a *Kennedy* plea shocks the conscience of the court and society such that it is so offensive that it cannot pass a societal and judicial sense of justice.

If, however, the Court is disinclined to find the Appellant's sentence so *offensive that it cannot pass a societal and judicial sense of justice* as set forth in Cooper, then the Appellant asks the Court to consider the objective test set forth in Wanstreet, *supra*,

[I]n determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction."

Syl. pt. 5, Wanstreet v. Bordenkircher, 166 W.Va. 523, 276 S.E.2d 205 (1981).

The Appellant maintains that the sentence imposed fails to achieve the legislative intent, is overbroad, and serves no useful purpose. Unfortunately, in articulating the reasons for imposition of the thirty year period of supervision, the only apparent factor for the Court was the accuser's age being thirteen. Beyond that observation, the record is void as to any other basis. The law is new and so there are no comparison cases. The present case involves a thirty year period of extended supervision when the matter (1) was resolved by way of a Kennedy plea on a charge carrying 1-5 years to avoid risking a conviction for an offense carrying 10-20 years; (2) was little more than a "he said/she said" with no physical evidence; (3) consisted of only an allegation of fondling of the accuser's breast; and (4) there is no significant criminal history of the Appellant. Finally, the Appellant has not been designated a sexually violent predator under W. Va. Code § 15-12-2a.

If the legislative goal of The Child Protection Act of 2006 is “greater intervention among and punishment and monitoring of individuals who create a risk to our children's safety and well-being” as set forth in W. Va. Code § 15-11-2, then why are the registration requirements of W.Va. Code § 15-12-1 et. seq. insufficient? Why were the reforms implemented to “modify the Sex Offender Registration Act to ensure more effective registration, identification and monitoring of persons convicted of sexual offenses -- article twelve [§§ 15-12-1 et seq.], chapter fifteen of this code” not sufficient to accomplish this goal? (See W. Va. Code § 15-11-2(b)(2). Why is the legislative scheme regarding “sexually violent predators” not sufficient to identify and monitor offenders? Why did the Legislature elect to use “broad reaching measures” to accomplish its goal? The Appellant certainly understands the need to protect children. However, this statute is so unconstitutionally disproportionate to his underlying offense that it cannot survive scrutiny.

III.

W.Va. Code § 62-12-26 requiring extended supervision following convictions for certain offenses is unconstitutional under both the Federal and State Constitutions in that it is violative of the procedural due process provisions.

Appellant maintains that W.Va. Code § 62-12-26 violates, generally, the procedural due process protections of both the Federal and State Constitutions. Specifically, the statute is unconstitutional on its face for (1) removing from the jury consideration of facts increasing a range of penalties and (2) creating a vague system of non-standardized rules leading to arbitrary and discriminatory

enforcement. Both challenges are in contravention of the rights afforded pursuant to the 14th Amendment to the United States Constitution proscribing states from depriving any person of life, liberty, or property without due process of law.

A.

W.Va. Code § 62-12-26 is unconstitutional in that the additional penalty far exceeding the statutory penalty may be imposed by summary proceeding while removing from the jury the assessment of facts that increase the prescribed range of penalties

West Virginia Code § 62-12-26, in essence, imposes a second criminal sentence of up to fifty years upon an accused *in addition to* the sentence provided in the underlying offense as well as the administrative registration requirements set forth in W.Va. Code § 15-12-1 et seq.

Specifically, West Virginia Code § 62-12-26(g)(3) provides that a court may “revoke a term of supervised release and require the defendant to serve in prison . . . without credit for time previously served on supervised release if the court . . . *finds by clear and convincing evidence* that the defendant violated a condition of supervised release.” (emphasis added).

Either this statute is a second sentence violating the double jeopardy prohibition on multiple punishments for the same offense, or it is an enhancement increasing the proscribed range of penalties for the underlying

offense *without* requiring additional facts apart from crime for which the defendant was convicted⁹.

Essentially, this statute grants the Court non-discretionary authority to increase the penalty range by fifty (50) years. No additional facts apart from the conviction are required. To that end, it appears the statute does little more impose a suspended life sentence, govern the release with nearly impossible conditions, and allow revocations based upon clear and convincing evidence. Such a prospect is so dangerous and contrary to the principles of due process and the fundamental rights of life and liberty that it cannot be sanctioned.

Article III, Section 10 of the West Virginia State Constitution, provides that “[n]o person shall be deprived of life, liberty, or property, without due process of law, **and** the judgment of his peers.” (emphasis added). U.S. Const. Am.6 as incorporated through the 14th Amendment mandates “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” Moreover, it is axiomatic that a jury determination as to guilt on each and every element of the offense is required before sentence is imposed. The United States Supreme Court has determined “[t]hat it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by

⁹ Appellant maintains that statute violates double jeopardy. The fact that no additional facts exist for implementation of the supervised release period highlights the point that it is a second sentence. If the legislature wants to make sexual abuse in the first degree a life sentence—then they have the power to amend W.Va. Code § 61-8B-7.

proof beyond a reasonable doubt.” See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). The Appellant would also remind the Court that “[t]he provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution.” Syl pt. 2, Pauley v. Kelly, 162 W.Va. 672, 255 S.E.2d 859 (1979).

The West Virginia Legislature, through West Virginia Code § 62-12-26, has done exactly what both the Federal and State Constitutions prohibit. There are NO additional facts for anyone to consider—it is, simply put, a second consecutive sentence for the same offense. The Appellant was never convicted of any offense justifying a thirty year sentence. He only stands convicted of one felony count containing the statutory penalty of one to five years—which he is serving. This second prison sentence is imposed, modified, enlarged, conditions changed, and revoked summarily *without* judgment of the defendant’s peers, *without* requiring proof of beyond a reasonable doubt, and *without* any new facts. In fact, the statute blatantly removes any fact or additional elements beyond those facts existing under the original charge. Therefore, whether by plea of guilty or verdict following trial on the underlying offense, the sole decider of the second penalty, and its revocation, is the Judge.

Finally, by way of comparison, other state statutes allow for the finding of additional facts by juries before a sentencing enhancement is appropriate (W. Va. Code § 60A-4-406 permitting sentencing enhancements based on factors

such as age and proximity of drug sales to schools; and even W.Va. Code § 61-11-18 permitting recidivist actions based upon prior convictions).

W.Va. Code § 62-12-26 imposes a mandatory consecutive sentence without attaching that sentence of any new crime and denies a defendant of any right to trial.

B.

W.Va. Code § 62-12-26 is vague in that it fails to provide the Appellant with adequate notice of prohibited conduct allowing for the creation of arbitrary and capricious rules with no standardized supervisory guidelines leading to selective and discriminatory enforcement

The Fifth Amendment to the United States Constitution guarantees that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. Const. amend V. It is axiomatic that this provision is made applicable to the State of West Virginia through the Fourteenth Amendment.

Similarly, the State of West Virginia has vested its citizens with due process protections through Art. 3, § 10 of the West Virginia Constitution mandating that “[n]o person shall be deprived of life, liberty, or property without due process of law, and the judgment of his peers.” This proscription gives rise to principles of vagueness. There are primarily two reasons for this rule. First, “[v]ague laws may trap the innocent by not providing a fair warning.” Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222, 227 (1972). Second, “if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.” Grayned, 408 U.S. at 108, 92 S.Ct. at 2299, 33 L.Ed.2d at 227 (1972). Similarly, in State ex rel.

Hechler v. Christian Action Network, 201 W.Va. 71, 491 S.E.2d 618 (1997), the West Virginia Supreme Court has provided that “[t]here are two main rationales for the vagueness doctrine: First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Id.* at 84 *citing* Grayned v. City of Rockford, 408 U.S. 104 (1972).

W.Va. Code § 62-12-26 is unconstitutionally broad in that it fails to provide adequate notice of prohibited conduct, allowing for the creation of arbitrary and capricious rules with no standardized supervisory guidelines, leading to selective enforcement.

In addition to various specific supervisory guidelines, W.Va. Code § 62-12-26 provides,

(e) a defendant sentenced to a period of supervised release shall be subject to any or all of the conditions applicable to a person placed upon probation pursuant to the provisions of section nine of this article: *provided*, That any defendant sentenced to a period of supervised release pursuant to this section shall be required to participate in appropriate offender treatment programs or counseling during the period of supervised release unless the court deems such to no longer be appropriate or necessary and makes express findings in support thereof.

West Virginia Code § 62-12-9(a)(3) mandates generally that a probationer “. . . complies with the conditions prescribed by the court for his or her supervision by the probation officer.” This same code section further demands, “[i]n addition the court may impose, subject to modification at any time, any other conditions which it may deem advisable . . .” See W. Va. Code § 62-12-9(b).

Finally, the statute allows for supervision by the Court’s probation officer or the community corrections program. There is no guarantee on uniformity of conditions. For example, in the present case, the Court could not even provide conditions, stating instead “[n]ow, I don’t know if we know enough as to what conditions can be imposed or should be imposed because there are so many things that are taking place . . .there are too many unanswered questions at this point as far as—but I believe that the conditions can be reviewed, assuming that it’s held to be constitutional, by Mr. Ball with Mr. James, at the time he is released.” (TR page 35, lines 6-23). The Court made these statements despite a statutory requirement that:

The court shall direct that the probation officer provide the defendant with a written statement at the defendant’s sentencing hearing that sets forth all the conditions to which the term of supervised release is subject and that it is sufficiently clear and specific to serve as a guide for the defendant’s conduct and for such supervision as is required.

W.Va. Code § 62-12-26(h).

Despite an attempt through the extended supervision statute to create clear and specific terms, the inconsistencies between W.Va. Code § 62-12-26(h) and §§ 62-12-9(a)(3) and 62-12-9(b) necessarily creates two distinct problems impacting fundamental due process rights as set forth above: (1) the ability of the

Court through its probation officer or community corrections program to create different “rules” and standards, without providing legislative safeguards against arbitrary and capricious terms, throughout the State potentially yielding varying levels of *supervision*¹⁰; and (2) wide discretion granted to probation officers or community corrections officers in deciding what arbitrary violations may warrant revocations lends to selective arbitrary and discriminatory enforcement, resulting in incarceration of up to fifty (50) years for some offenders but not others. In other words, some jurisdictions may elect to revoke for minor violations while others elect not to revoke. Terms and conditions may vary from one jurisdiction to another, and even between supervisors (probation versus community corrections).

Finally, most conditions incorporate *discretion* of the supervisor, and W.Va. Code § 62-12-26 allows for continuing review and modification of the terms. The danger for unfair, non-uniform, arbitrary and capricious application is present.

IV.

The Circuit Court abused its discretion in imposing a thirty (30) year period of extended supervision under W.Va. Code § 62-12-26.

In the alternative, the Appellant maintains that the imposition of thirty years supervision under W.Va. Code § 62-12-26 was an abuse of discretion. In general, “[s]entences imposed by the trial court, if within statutory limits and if not based on some impermissible factor, are not subject to appellate review.”

¹⁰ At the time of this filing, the Court is still in the process of swearing in supervised release officers.

Syl. pt. 2, State v. Booth, 224 W.Va. 307, 685 S.E.2d 701 (2009) (citation omitted).

Appellant argues (1) the Court did not rely upon any factors justifying imposition of a thirty year period of supervision and (2) imposition of thirty years in the present case is unconstitutionally disproportionate.

It is axiomatic that penalties should be proportionate to offense committed. The difficulty for any court is how to balance the sentence delivered against the offense committed while tempered by the individual circumstances. In that vein the Appellant requests review of the sentence imposed. It is important to note that the Appellant is not taking exception to the statutorily imposed sentence of not less than one nor more than five years.

The Appellant recognizes the wide discretion provided to the Circuit Court in imposing a sentence. That being said, however, the Appellant notes that there must at first be some basis for the discretion so exercised by the Court. In the present case, before imposing the period of thirty years, the Court only pointed out:

What I'm trying to do is to get a period of time that would be applicable to similar cases, and I think a period of 50 years that's going to be applied would best be preserved for sexual offenses against infants, against toddlers. . . In this case, we don't have that. Still a person who was 13 years of age, so there is a sense of maturity . . . so that's why I'm going to impose a period of 30 years of supervised release.

Transcript, pg 34, lines 5-14.

No pre-sentence investigation was completed inasmuch as the Appellant waived its preparation as part of the plea agreement. Therefore, the thirty

years was based solely upon the facts for which the Appellant was already convicted and sentenced.

Imposition of a second determinate sentence of thirty (30) years, without more, amounts to an abuse of discretion.

Alternatively, the Appellant argues that the imposition of thirty years of supervised release is unconstitutionally disproportionate to the underlying offense.

To this end, the Appellant incorporates by reference the argument set forth under assignment of error II(b) beginning on page 32 herein.

CONCLUSION/ RELIEF REQUESTED

The case presented before this Honorable Court shows that good intentions by the legislature could have horrific effects if not drafted carefully and with sufficient definiteness. Extreme multiple punishments for people accused of sexual assault are always easy popular positions for politicians. The judicial branch must interpret those politically driven statutes to determine the fairness and justness of the statute as to the citizens. The Judiciary must embrace its obligation under the concept of judicial review stabled in 1803 with Marbury v. Madison, 5 U.S. 137, 176-177, 2 L.Ed. 60, 73 (1803).

As previously stated, Mr. James primarily argues that the statute is a blatant violation of that constitutional guarantee against multiple punishments for the same offense under the double jeopardy provisions of both the Federal and State Constitutions. Additionally, Mr. James argues the statute is per se

cruel and unusual as well as disproportionate. The remaining constitutional infirmity surrounds the general due process prohibitions against vagueness and denial of right to a judgment of their peers.

Mr. James requests that this Honorable Court find that the statute as drafted is unconstitutional.

In the alternative, Mr. James requests that this Court find the imposition of thirty years of extended supervision to be an abuse of discretion.

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WV State Bar Identification #9149

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of July 2010 that service of the foregoing Appellants brief together with exhibit "A" was made upon the Respondent, the State of West Virginia, by hand delivering a true copy to Scott R. Smith, Prosecuting Attorney for Ohio County at his office 1500 Chapline Street, Wheeling, WV 26003 and by mailing a true copy thereof by United States mail, postage prepaid, to its counsel, Thomas W. Smith, Senior Deputy Attorney General of West Virginia, at Building 1, Room E 26, 1900 Kanawha Boulevard East, Charleston, West Virginia 25305-0220, his last-known address.

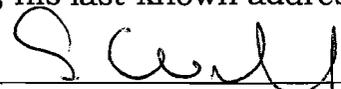

Public Defender

EXHIBIT A

“Sex Offender Conditions”

SUPREME COURT OF APPEALS OF WEST VIRGINIA
Division of Probation Services

SEX OFFENDER CONDITIONS

(Conditions in bold print are statutorily mandated for all adult sex offenders and juveniles transferred to, and convicted under, the criminal jurisdiction of the court for a sex offense. Other conditions (nos. 6, 18, and 19) are statutorily mandated in certain circumstances. Pay special attention to the Notes under these three conditions. Use other conditions as appropriate to the case.)

____ 1. Unless otherwise authorized you shall maintain a single, verifiable residence within _____ County. Any change of address must be approved by your probation officer.

____ 2. You are required to inform all persons living at your place of residence about all of your sex related conditions of probation.

____ 3. You shall maintain full-time employment or perform community service as approved by your probation officer until fully employed. Your probation officer must first approve any employment, or community service and locations, and may contact your employer at any time. You will not work in certain occupations that involve being in the private residences of others, such as, but not limited to, door-to-door sales, soliciting, home service visits or delivery.

____ 4. As an adult you shall register with the West Virginia State Police as a sex offender within three (3) days of being released to probation supervision in accordance with WV Code § 15-12-2.

____ 5. You shall not establish a residence or accept employment within one thousand (1,000) feet of a school or childcare facility or within one thousand (1,000) feet of the residence of a victim or victims of any sexually violent offense for which you have been convicted in accordance with WV Code § 62-12-26 (b)(1).

____ 6. You may not live in the same residence as any minor child, nor exercise visitation with any minor child or have any contact with the victim of the offense if the offense is a violation of WV Code § 61-8-12, § 61-8B-1 et seq., or § 61-8D-1 et seq., without petitioning the court for a modification of this condition and being granted permission to do so in accordance with WV Code § 62-12-9(a)(4); and if you were convicted of a sexually violent offense, only if the court further makes a finding that such residency or other living accommodation meets the specific conditions and requirements of WV Code § 62-12-26(b)(2). Contact includes face-to-face, telephonic, written, electronic, or any indirect contact via third parties.

[Note: This condition is statutorily mandated for any conviction for any offense under WV Code § 61-8-12, § 61-8B-1 et seq., or § 61-8D-1 et seq. where the victim was a minor. At the discretion of the sentencing court, this condition may be imposed for other sex offenders as well.]

___7. You shall attend, actively participate in, and successfully complete a court-approved sex offender treatment program as directed by the court and in accordance with WV Code § 62-12-2. Prompt payment of any fees is your responsibility and you must maintain steady progress toward all treatment goals as determined by your treatment provider. Unsuccessful termination from treatment or non-compliance with other required behavioral management requirements will be considered violation of your probation. You will not be permitted to change treatment providers without the prior written permission of your probation officer or subsequent to a written Order from the Court.

___8. You shall not be present at nor enter within two blocks of any park, school, playground, swimming pool, daycare center, or other specific locations where children are known to congregate unless approved by your probation officer.

___9. You shall not participate in any activity which involves children under 18 years of age, such as, but not limited to youth groups, Boy Scouts, Girl Scouts, Cub Scouts, Brownies, 4-H, YMCA, youth sports teams, baby sitting, volunteer work, or any activity your probation officer deems inappropriate.

___10. You must report any incidental contact with persons under age 18 to your probation officer within 24 hours of the contact.

___11. You shall not possess obscene matter as defined by WV Code 61-8A-1 or child pornography as defined in 18 U.S.C. § 2256(8), including but not limited to: videos, magazines, books, DVD's, and material downloaded from the Internet. You shall not visit strip clubs, adult bookstores, motels specifically operated for sexual encounters, peep shows, bars where partially nude or exotic dancers perform, or businesses that sell sexual devices or aids.

___12. You shall not miss any appointments for treatment, psychotherapy, counseling, or self-help groups such as any 12 Step Group, Community Support Group, etc., without the prior approval of your probation officer. You shall comply with the attendance policy for attending appointments as outlined by your probation officer.

___13. You shall continue to take any medication prescribed by your physician until otherwise directed.

___14. You shall sign a waiver of confidentiality, release of information, and any other document required that permits your probation officer and other behavioral management or treatment provider to collaboratively share and discuss your behavioral management conditions, treatment progress, and probation needs, as a team. This permission may extend to: (1) sharing your relapse prevention plan and treatment progress with your significant others and/or your victim's therapist as directed by your probation officer or treatment provider(s); and (2) sharing of your modus operandi behaviors with law enforcement personnel.

____15. You shall be subject to a curfew at the direction of your probation officer.

____16. You shall notify your probation officer of your establishment of any dating, intimate and/or sexual relationship.

____17. You shall not engage in a dating, intimate or sexual relationship with any person who has children under the age of 18.

____18. You shall submit to polygraph testing in accordance with WV Code § 62-11D-2 to assist your probation officer in monitoring your compliance with your conditions of probation and treatment, which shall be at your own expense, unless you have been judicially determined to be unable to pay for such tests.

[Note: This condition is statutorily mandated for any convicted sex offender determined by the court to be a sexually violent predator under WV Code § 15-12-2a. At the discretion of the sentencing court, this condition may be imposed for other sex offenders as well.]

____19. You shall submit to electronic monitoring in accordance with WV Code § 62-11D-3, which shall be at your own expense, unless you have been judicially determined to be unable to pay for such monitoring, with a curfew of _____.

[Note: This condition is statutorily mandated for any convicted sex offender determined by the court to be a sexually violent predator under WV Code § 15-12-2a. At the discretion of the sentencing court, this condition may be imposed for other sex offenders as well.]

____20. Others as appropriate to the case:

Probationer

Date

Attorney

Date

Parent (if applicable)

Date

Probation Officer

Date