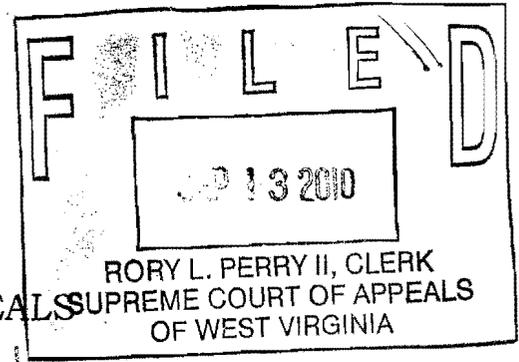


No. 35557

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 REPLY BRIEF

Shayne M. Welling
Public Defender
First Judicial Circuit Public Defender Corp.
Board of Trade Building
P. O. Box 347
Wheeling, West Virginia 26003
E-Mail: Shayne@wheelingpdc.org
Phone (304) 232-5062
Fax (304) 233-7342
WV State Bar Identification #9149

TABLE OF CONTENTS

TABLE OF AUTHORITIESiii

INTRODUCTION.....1

REPLY ARGUMENT

Appellee’s reliance on 18 U.S.C. § 3583 is misplaced.....2

**W.Va. Code § 62-12-26 is multiple punishment
 for the same offense.....5**

**The failure to credit time served on supervised
 release violates double jeopardy.....9**

Cruel and unusual punishment.....10

Applicability of *Apprendi*.....11

West Virginia Code § 62-12-26 is unconstitutionally vague.....12

**The Circuit Court abused its discretion in imposing
 a thirty year period of extended supervision.....12**

CONCLUSION.....13

CERTIFICATE OF SERVICE.....14

TABLE OF AUTHORITIES

West Virginia Cases:

Conner v. Griffith, 160 W.Va. 680, 238 S.E.2d 529 (1977).....9

Pauley v. Kelly, 162 W.Va. 672, 255 S.E.2d 859 (1979).....10

State ex. rel. Games-Neely v. Silver, -- W.Va. --, -- S.E.2d --,
2010 W.Va. LEXIS 56 (2010).....7

State of West Virginia v. Gill, 187 W.Va. 136, 416 W.Va. 136 (1992).....7

State of West Virginia v. Jarvis, 199 W.Va. 635, 487 S.E.2d 293 (1997).....8

U.S. Supreme Court and Federal Cases:

Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).....2, 11, 12

Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180,
76 L.Ed. 3065 (1932).....7

Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673 (1982).....7

Mistretta v. United States, 488 U.S. 361, 109 S.Ct. 647,
102 L.Ed.2d 714 (1989).....4, 5, 8

Ohio v. Johnson, 467 U.S. 493, 104 S.Ct. 2536 (1984).....7

United States v. Johnson, 529 U.S. 53, 120 S.Ct. 1795 (2000).....6

United States v. Huerta-Pimental, 445 F.3d 1220 (2006).....10

United States v. Soto-Olivas, 44 F.3d 788 (1995).....10

Constitutions and Statutes:

18 U.S.C. § 3583.....passim

28 U.S.C. § 991.....3

W.Va. Code § 62-12-26.....passim

W.Va. Const. Article III, Section 5.....10

W.Va. Const. Article III, Section 10.....2

Am. 6, U.S. Const.....2

Miscellaneous:

Hoffman, Peter J, *History of the Federal Parole System*.....4

Sentencing Reform Act of 1984.....3

I.
Introduction

At the outset, the appellant recognizes, as the appellee pointed out, his heavy burden in challenging the constitutionality of W.Va. Code § 62-12-26. And while the appellant appreciates the arguments of the State, the appellant respectfully disagrees with those positions.

The appellee begins his brief with sharp criticism surrounding appellant's lack of "effort[s] to describe the repugnance of his client's behavior, and his ongoing threat to the community." (fn 4, pg 3, Brief of Appellee). The facts in this case are not complex. Moreover, there has never been a judicial or psychological finding to support an "ongoing threat to the community." Other than appellant's final argument relative to abuse of discretion, there is no need for appellee to embellish the facts in an effort to trigger emotion or place righteous indignation on display.

In contravention, this case is about an objective review of draconian statute. West Virginia Code § 62-12-26 appeals, not to reason, but to a media inspired and constituent driven hysteria that harshly punishes persons convicted of sex related offenses. To that end, all Appellant asks this Court is for a meaningful objective review of the statute under both the Federal and State Constitutions.

Appellee further argues in his introduction that many of the issues are not ripe for consideration or require a "crystal ball" for consideration by this Court. (Appellee's brief at 4). The ability to predict the future is not necessary to decide this case. Though yet to take effect, appellant's thirty year punishment has

already been imposed. Appellant faces the consequences now. Appellant makes clear in his arguments that the statute imposing the punishment is unconstitutional in that it violates Double Jeopardy; prohibition against cruel and unusual punishments; the Sixth Amendment to the U.S. Constitution together with Article III, Section 10 of the West Virginia Constitution and the doctrine set forth in Apprendi v. New Jersey, 530 U.S. 466 (2000); is unconstitutionally vague. Finally, in the alternative, appellant argues the Circuit Court abused its discretion and requests remand on that issue.

Appellant, in his brief reply, will only address those matters warranting a specific reply. In all remaining appellee arguments, appellant elects to rest on the record, his previously filed petition for appeal and appeal brief, while preserving his request for oral argument on some future date before submission to the Court for consideration.

II.
Appellee's reliance on 18 U.S.C. § 3583 is misplaced

The appellant first addresses the appellee's heavy reliance on 18 U.S.C. § 3583. In fact, appellee's entire argument seems to be grounded in the overarching theory that the West Virginia extended supervision is part of the original sentence and therefore constitutional as it relates to the majority of appellant's arguments (i.e. double jeopardy, cruel and unusual, and applicability of *Apprendi*). The appellee then goes on to pepper his argument with examples of where Federal Courts issued holdings relative to the constitutionality of Federal Supervised Release as set forth in 18 U.S.C. § 3583. In fact, throughout appellee's brief, references are made to 18 U.S.C. § 3583 beginning with

appellee's introduction wherein appellee points out that the statutory language of several of the § 3583 provisions are identical to the West Virginia statute.

Unfortunately, there is one single fatal distinction—that is, 18 U.S.C. § 3583 served to replace the Federal Parole Commission and the concept of federal parole which was abolished as part of the complete Federal sentencing overhaul found in the *Sentencing Reform Act of 1984*. This act eliminated indeterminate sentences and shifted the responsibility for post-conviction release to the judiciary by eliminating the executive branch function¹. The result is that federal inmates now, having only the ability to work off approximately 54 days per year, serve nearly 85% of their sentences followed by supervised release under 18 U.S.C. § 3583. In other words, the Federal Supervised Release provision of 18 U.S.C. § 3583 is, for all intents and purposes, tantamount to *Federal parole*. West Virginia, by comparison, continues to recognize the availability of traditional parole to state court offenders². Just as federal supervised release pursuant to 18 U.S.C. § 3583 is part of the original federal sentencing scheme, State grants of parole are part of the original sentence in State Court. Therefore, in the Federal system, supervised release is part of the original sentence—in West Virginia supervised release is, exactly what Appellant has been arguing—a new sentencing scheme combining the worst of everything (probation, incarceration, and parole).

¹ Other than the ability to appoint members to the Sentencing Commission. See 28 U.S.C. § 991.

² It would appear our Legislature simply adopted parts of the Federal Statute without considering its purpose or function....and more importantly its relationship to the parole process.

Even a cursory review of the Federal Statute should have raised flags when the West Virginia Legislature elected to begin the period of supervised release upon the expiration of probation, incarceration, or parole while the Federal Statute begins to run "after imprisonment." (Compare W.Va. Code § 62-12-26(c) with 18 U.S.C. § 3583(a)).

The United States Supreme Court has declared:

The Act, as adopted, revises the old sentencing process in several ways: . . . it consolidates the power that had been exercised by the sentencing judge and the Parole Commission to decide what punishment an offender should suffer. This is done by creating the United States Sentencing Commission, directing that Commission to devise guidelines to be used for sentencing, and prospectively abolishing the Parole Commission. 28 U. S. C. §§ 991 994, and 995(a)(1).

Mistretta v. United States, 488 U.S. 361, 367; 109 S.Ct. 647, 652 ; 102 L.Ed.2d 714, 727-728 (1989).

The significant impact on appellee's overall argument is that Federal authority cited by the appellee referencing the constitutionality of Federal Supervised Release 18 U.S.C. § 3583 together with general implications that if the Federal statute has been held constitutional then the State statute should likewise be found constitutional is flawed logic. The Federal decisions base their holdings on the complete restructuring of the Federal sentencing structure by abolishing the executive parole authority over the disposition of indeterminate sentences, converting punishments to determinate sentencing and giving the Courts control over the now defunct parole process by calling it *supervised release*.

West Virginia has not implemented such an overhaul of its sentencing structure. Therefore, the Federal sentencing structure as it relates to supervised release under 18 U.S.C. § 3583 is not comparable to what the West Virginia Legislature has created under W.Va. Code § 62-12-26.³

The appellee's argument attempting to compare the Federal Supervised Release statute and the current W.V a. Code § 62-12-26 fails to take into account the purpose behind the Federal Court's reasoning—that being the restructuring and resulting shift in Federal Sentencing.

This fundamental distinction eviscerates the very foundation upon which appellee's argument is built.

III.

W.Va. Code § 62-12-26 is a multiple punishment for the same offense

Appellee argues the imposition of supervised release is not a multiple punishment for the same offense. Appellee's primary position is that supervised release is "part of the sentence authorized by the fact of conviction; not as a separate punishment triggered once a criminal defendant's original sentence is terminated." (Appellee's brief at 9.) The appellant disagrees.

First, as noted above, the Federal Court's reasoning for holding that federal supervised release is part of the original sentencing is due to the Sentencing Reform Act of 1984 and the resulting shift from executive to judicial control over post-conviction release. The same reasoning cannot be applied in the present

³ For a discussion on the evolution of the Sentencing Reform Act of 1984 see Mistretta v. United States, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) and Hoffman, Peter J, *History of the Federal Parole System* <http://www.justice.gov/uspc/history.htm>

case inasmuch as West Virginia has not adopted a similar omnibus shift in its sentencing structure.

The West Virginia Legislature attempted to avoid the double jeopardy pitfall by drafting this statute to include, in part, that a Circuit Court “shall, as part of the sentence imposed at final disposition, . . .” (See W.Va. Code § 62-12-26(a) and then later drafting, in part, that the punishment “shall begin upon the expiration of any period of probation, . . . sentence of incarceration or the expiration of any period of parole supervision.” See W.Va. Code § 62-12-26(c). This is not, as appellee attempts to imply, some brilliant statutory construction on the part of the West Virginia Legislature to avoid double jeopardy. Rather it is evidence of a fundamental lack of understanding by the West Virginia Legislature concerning the interplay of the Federal sentencing structure, probation, parole, and our own State sentencing structure. In the Federal Sentencing structure, Congress and the Sentencing Commission recognize only (1) probatable offenses or (2) incarceration. There is no parole. It is exactly because Congress eliminated the concept of *Federal Parole* that supervised release became an integral part of continuing the public policy of using [Federal] Supervised Release “to soften the transition from life inside jail to life on the outside.” (Appellee’s brief at 18 citing United States v. Johnson, 529 U.S. 53, 59 (2000) (“Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration.”)). Appellant fails to see how thirty years of extended supervised release under the

current conditions will “improve the odds of a successful transition from the prison to liberty.” *Id.* at 708-709.⁴ It will instead produce the opposite.

A second fundamental error in appellee’s reasoning, and the cases cited therefore, is the present case does not involve the typical analysis involving double jeopardy considerations vis-à-vis multiple punishments arising out the same set of facts and legislative intent to impose cumulative sentences resulting from convictions of two or more separate statutes. For example, this case is not concerned with allegations that the defendant violated two separate statutes arising out of similar facts culminating in multiple punishments; or lesser/greater included offenses. Nor is this a case concerned with multiple punishments imposed after a single trial. See Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 3065 (1932) (announcing the traditional analysis whether a set of facts give rise to one or two offenses by determining whether each offense contained provisions requiring proof of a fact which the other does not.); Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673 (1982) (involving cumulative sentences imposed following convictions for first-degree robbery and armed criminal action); Ohio v. Johnson, 467 U.S. 493, 104 S.Ct. 2536 (1984) (permitting prosecution of murder and aggravated robbery in a single prosecution though conviction may result in cumulative punishments imposed during single trial); State of West Virginia v. Gill, 187 W.Va. 136, 416 W.Va. 136 (1992) (addressing multiple punishments imposed after a single trial

⁴ In fact, reason suggests intense supervision and restrictions over the course of thirty years will actually decrease the odds of successful transition considering many rules likely to result in re-incarceration are for non-criminal conduct.

resulting in convictions of different statutes based upon legislative intent to declare an offense as a separate and distinct offense.); and more recently, State ex. rel. Games-Neely v. Silver, -- W.Va. --, -- S.E.2d --, 2010 W.Va. LEXIS 56 (2010) (allowing prosecution for both first degree arson and arson resulting in serious bodily injury).

Rather, this case involves a second punishment for the same conviction. The Defendant was convicted of a single offense of Sexual Abuse in the First Degree. The statutory punishment for a single violation of Sexual Abuse in the First Degree is not less than one nor more than five years in the West Virginia State Penitentiary. The Defendant was sentenced to serve not less than one nor more than five years in the penitentiary. W.Va. Code § 62-12-26 imposes, in the present case, a second punishment consisting of thirty (30) years supervised release. This supervised release begins after the completion of the statutory penalty.

As appellee correctly points out, “[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.” (Appellee’s brief at 9, citing Syl. pt. 1, State v. Jarvis, 199 W.Va. 635, 487 S.E.2d 293 (1997)). A plain reading of this statute expresses a clear legislative *intent to punish*. That punishment is set to begin following exhaustion of the underlying statutory penalty and is not based upon additional facts. It is not based upon violation of a separate statute. It is simply a second punishment for the same offense.

This Court ought to extend the full force and effect to the Legislature's clear and unambiguous attempted constitutional coup—by declaring the statute a clear multiple punishment in violation of the constitutional guarantee against double jeopardy.

IV
The failure to credit time served on supervised release violates double jeopardy

Appellant additionally argues that his position is actually strengthened by appellee's reliance upon Federal Case Law interpreting 18 U.S.C. § 3583. For that purpose, appellant reincorporates his argument set forth more fully in his previously filed appeal brief

As has been previously noted, it is clear that 18 U.S.C. § 3583 was intended by Congress to replace the Federal Parole System abolished by the Sentencing Reform Act of 1984. See Mistretta v. United States, 488 U.S. 361, 367; 109 S.Ct. 647, 652 ; 102 L.Ed.2d 714, 727-728 (1989). In that sense, the Federal Supervised Release Statute relied upon by appellee actually serves the same purpose as traditional parole. The State of West Virginia continues to adhere to the traditional purpose of parole.

The State of West Virginia has already 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).

Therefore, as previously noted, to the extent that 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 . . .” it violates, if not the Federal Constitution, then at least the Double Jeopardy Clause of the West Virginia Constitution⁵, Article III, Section 5. (emphasis added).

V. Cruel and Unusual Punishment

Appellee initially argues appellant’s challenge on the grounds of cruel and unusual was not preserved for review. Specifically, appellee maintains that the challenge below was not “as broad as the one he is arguing before this Court.” (Appellee’s reply at 15). Appellant raised the issue of cruel and unusual punishment in his initial brief to the Circuit Court. Appellant next raised the issue of cruel and unusual punishment in his petition for appeal. It appears the only issue is the scope of Appellant’s argument. If this Court finds the *per se* argument was not properly preserved, Counsel will withdraw the argument and present it during a future challenge should this effort to have W.Va. Code § 62-12-26 declared unconstitutional fail.

⁵ 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).

That being said, Appellant believes the remainder of appellee's brief does not warrant specific response and therefore elects to rest on the record, his previously filed petition for appeal, appeal brief, while preserving the right to oral argument on some future date before submission to the Court for consideration.

VI Applicability of *Apprendi*

Appellee argues that the United States Supreme Court's opinion in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000) is inapplicable relative West Virginia Code § 62-12-26.

As appellee correctly noted, *Apprendi* holds that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Id.* at 490. However, appellee is mistaken in his reliance on United States v. Huerta-Pimental, 445 F.3d 1220 (2006) and United States v. Soto-Olivas, 44 F.3d 788 (1995) in supporting his position that West Virginia Code § 62-12-26 does not violate the Six Amendment principles of *Apprendi*. Interestingly, in *Huerta-Pimental*, the Third Circuit made clear that its opinion focused on 18 U.S.C. § 3553 as a part of the federal sentencing structure as a whole by noting, “[s]upervised release is an integral part of the federal sentencing structure, similar in purpose and scope to its predecessor, parole.” Huerta-Pimental, 445 F.3d at 1222 (2006)

Again, the cases cited by appellee interpret the Federal Cases light of the Federal Supervised Release as set forth in 18 U.S.C. § 3583. The Federal

Supervised Release statute served to replace Federal Parole. The Federal Court's reasoning for holding that federal supervised release is part of the original sentencing is due to the Sentencing Reform Act of 1984 and the resulting shift from executive to judicial control over post-conviction release. The same reasoning cannot be applied in the present case inasmuch as West Virginia has not adopted a similar omnibus shift in its sentencing structure.

In light of the above, the Court is then faced with determining whether the supervised release created by virtue of W. Va. Code § 62-12-26 is a second sentence in violation of double jeopardy or a sentence enhancement in violation of *Apprendi*.

Appellant maintains W.Va. Code § 62-12-26 violates both in that it creates a second sentence and then allows a Circuit Court to increase "the prescribed range of penalties to which a criminal defendant is exposed." by permitting revocation under a clear and convincing standard without a jury. See W.Va. Code § 62-12-26(g)(3). Appellant maintains W.Va. Code § 62-12-26 violates the principles of *Apprendi* as set forth more fully in appellants appeal brief.

VII

West Virginia Code § 62-12-26 is unconstitutionally vague

Appellant believes appellee's brief does not warrant specific response on this point and therefore elects to rest on the record, his previously filed petition for appeal, appeal brief, while preserving his request for oral argument on some future date before submission to the Court for consideration.

VIII
The Circuit Court abused its discretion in imposing a thirty year period of extended supervision

Appellant believes appellee's brief does not warrant specific response on this point and therefore elects to rest on the record, his previously filed petition for appeal, appeal brief, while preserving his request for oral argument on some future date before submission to the Court for consideration.

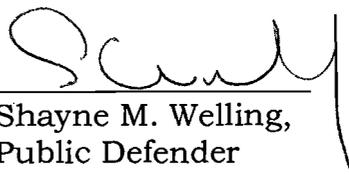
Appellant further agrees with appellee that the proper remedy in an abuse of discretion on sentencing challenge is remand for re-sentencing.

IX
Conclusion

For the foregoing reasons together with the record, the appellant's previously filed petition for appeal and appeal brief, your appellant again requests this Court to find W.Va. Code § 62-12-26 unconstitutional.

CHARLES JAMES
Respectfully submitted,

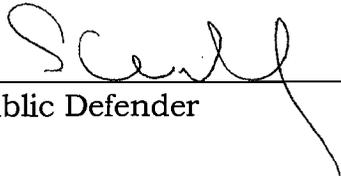
By:


Shayne M. Welling,
Public Defender

Shayne M. Welling, Esquire
Public Defender
First Judicial Circuit Public Defender Corp.
Board of Trade Building
P. O. Box 347
Wheeling, West Virginia 26003
Phone (304) 232-5062
Fax (304) 233-7342
WV State Bar Identification #9149

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of September 2010 that service of the foregoing Appellants reply brief was made upon the Appellee, 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, Robert D. Goldberg, Esq., Assistant 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