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APPEAL NO. 100313-

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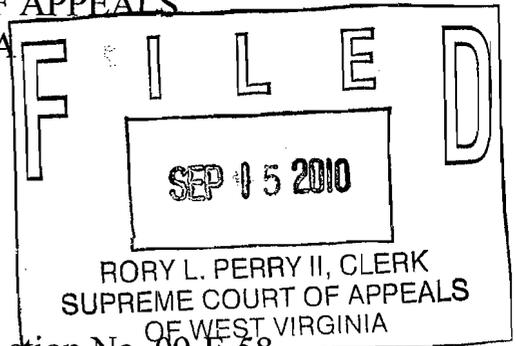
IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

JERRY LEE HEDRICK,

Appellant,

v.

Civil Action No. 09-F-58
Circuit Court of Mineral County



STATE OF WEST VIRGINIA,

Appellee.

FROM THE CIRCUIT COURT OF MINERAL COUNTY WEST VIRGINIA

**TO THE HONORABLE JUSTICES
OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**APPELLANT'S RESPONSE TO
APPELLEE'S APPEAL BRIEF**

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ARGUMENT AND DISCUSSION OF LAW

I.

Appellee's interpretation of on Apprendi and its progeny is misguided, as said cases clearly support Appellant's assertions that W. Va. Code § 62-12-26 is unconstitutional on numerous grounds as alleged herein.

The State of West Virginia has asserted that the Appellant relies “entirely on the ruling of the United States Supreme Court in the case of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.E.2d 435 (2000)” to establish the claim that *W. Va. Code* §62-12-26 is violative of Petitioner’s constitutional right to due process pursuant to the Fifth Amendment and Fourteenth Amendment to the United States Constitution and Article 3, §§ 10 and 14 of the West Virginia Constitution along with his constitutional right to notice and a trial by jury pursuant to the Sixth Amendment to the United States Constitution and Article 3, § 14 of the West Virginia Constitution. In addition to *Apprendi*, however, Appellant relies upon its entire progeny including *Blakely v. Washington*, 542 U.S. 296, 303-304; 124 S. Ct. 2531; 159 L. Ed. 2d 403 (U.S. 2004) in which the United States Supreme Court has found,

“[T]he ‘statutory maximum’ for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the Defendant. In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.” *Blakely* at 303-304.

In allowing the circuit court to impose additional incarceration on a Defendant by making additional findings of fact which had not been determined by a jury, *W. Va.*

Code § 62-12-26 is clearly improper. With regard to the revocation procedures for the supervised release, *W. Va. Code* § 62-12-26(d) authorizes the supervising court to:

“ . . . 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, pursuant to the West Virginia Rules of Criminal Procedure applicable to revocation of probation, finds by clear and convincing evidence that the defendant violated a condition of supervised release . . .” *Id.*

Clearly, incarceration resulting from a violation of the supervised release provisions of *W. Va. Code* § 62-12-26 et seq. is not based upon facts reflected in the jury verdict or admitted by the defendant and, therefore, is not constitutionally permissible under *Apprendi* and its progeny, including *Blakely*.

Additionally, *W. Va. Code* §62-12-26 is unconstitutional pursuant to both the United States Constitution and the West Virginia Constitution because said statute denies Petitioner his constitutional rights to due process, notice, and trial by jury. *W. Va. Code* § 62-12-26(a) provides in pertinent part,

“[A]ny Defendant convicted after the effective date of this section of a violation of section twelve, article eight, chapter sixty-one of this code or a felony violation of the provisions of article eight-b, eight-c or eight-d of said chapter 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 for a Defendant convicted after the effective date of this section as amended and reenacted during the first extraordinary session of the Legislature, 2006, of a violation of section three or seven, article eight-b, chapter sixty-one of this code and sentenced pursuant to section nine-a of said article, shall be no less than ten years: . . . Provided further, That, pursuant to the provisions of subsection (g) of this section, a court may modify, terminate or revoke any term of supervised release imposed pursuant to subsection (a) of this section.” *Id.*

Essentially, the sentencing court has sole discretion on a reduced burden of proof to incarcerate an individual for a period of up to fifty (50) years. Further supporting the position that the Appellant should be afforded these procedural safeguards, the Legislature determined that a violation of a similar supervision provision for sexual offenders pursuant to *W. Va. Code* § 15-12-1 et seq., (the “Sex Offender Registration Act”) should be proven beyond a reasonable doubt following an indictment and trial by jury, with all of the constitutional rights that every criminal Defendant is afforded pursuant to the principles of our criminal justice system. Subjecting criminal defendants to a substantial term of incarceration without the opportunity of notice, trial, and the resultant constitutional protections afforded to the criminally accused, *W. Va. Code* § 62-12-26 is unconstitutional on its face and the silence of the Appellee’s brief as to this issue speaks volumes.

Finally, Appellee's reliance upon *State v. Haught*, 218 *W. Va.* 462, 624 S.E.2d 899 (2005) and *State v. Rutherford*, 223 *W. Va.* 1, 672 S.E.2d 137 (2008) is surprising given the fact that they seem to support Appellant's assignments of error. Specifically, in *Rutherford*, this Court adopted the ruling in *Apprendi*, drawing a distinction between *W. Va. Code* §§ 60A-4-406¹ and 60A-4-408 and finding that the statute properly required a trial by jury and proof beyond a reasonable doubt for the elements enumerated in *W. Va. Code* § 60A-4-406 because it involved more than simply proving the fact of a prior conviction as addressed in *W. Va. Code* § 60A-4-408. Further, in *Haught*, this Court ruled that the West Virginia kidnaping statute provided Defendants with the opportunity to have the sentencing court make findings to reduce their sentence rather than enhance it. "We believe it is perfectly reasonable to construe *W. Va. Code* § 61-2-14a as a statute that provides for the possible reduction of a Defendant's sentence based on any additional findings by the trial Judge and not one that permits the enhancement of a Defendant's sentence." *Haught* at 467. Clearly, an enhancement of Appellant's sentence imposed by the Circuit Court under §62-12-26 in the future without a separate finding of guilt beyond a

¹*W. Va. Code* § 60A-4-406 relates to distribution to persons under the age of eighteen by persons over the age of twenty-one; distribution by persons eighteen or over in or on, or within one thousand feet of a school or college; and increasing the mandatory period of incarceration prior to parole eligibility. Said information is required to be alleged in the Indictment and the accused is permitted to have the same proven beyond a reasonable doubt at a trial by jury. In the alternative, *W. Va. Code* § 60A-4-408 provides for enhanced penalties for prior convictions.

reasonable doubt would neither be based upon a prior conviction and cannot reasonably be said to reduce his sentence. Accordingly, the statute is unconstitutional.

PRAYER FOR RELIEF

WHEREFORE, based upon the foregoing, the Petitioner, Jerry Lee Hedrick, respectfully requests that this Honorable Court grant his Petition for Appeal, find that *W. Va. Code* § 62-12-26 is unconstitutional, overturn the portion of Petitioner's sentencing order entered by the Circuit Court of Mineral County that requires Petitioner to be subject to supervised release following the discharge of his sentence for the underlying offense, and award any additional relief that this Honorable Court deems fair and just.

Respectfully submitted,

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Petitioner

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CERTIFICATE OF SERVICE

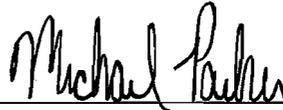
This is to certify that the undersigned has this date served a true copy of the foregoing upon all other parties to this action by:

_____ Hand delivering a copy hereof to the parties listed below:

or by

 X Depositing a copy hereof in the United States Mail, first class postage prepaid, properly addressed to the parties listed below.

Dated at Elkins, West Virginia, this 14th day of September, 2010.



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