

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

STATE OF WEST VIRGINIA,

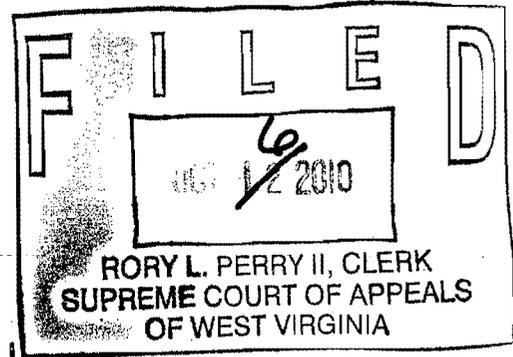
Appellee,

v.

SUPREME COURT NO. 35672

STANLEY MELVIN MYERS,

Appellant.



APPELLANT'S BRIEF IN SUPPORT OF
PETITION FOR APPEAL

Underlying Criminal Case No. 95-F-44
Related Underlying Case No. 09-C-457
From The Circuit Court Of Berkeley County, WV, The Honorable Gina Groh

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KIND OF PROCEEDING

This is the Appellant's Brief In Support Of Petition For Appeal, arising from the "Final Order Determining The Defendant To Be A Sexually Violent Predator" entered by the Circuit Court of Berkeley County, WV, on July 6, 2010, for Criminal Case No. 95-F-44. As such, the assignments of error presented in the Appellant's Brief are ripe for direct appellate review by this Court. This Brief is being filed in accordance with Rule 10(a), W.Va. Rules of Appellate Procedure, and is accompanied by the portions of the record Designated by the Appellant, which he deems to be relevant to the matter at hand.

NATURE OF THE RULING IN THE LOWER TRIBUNAL

The Circuit Court's "Final Order Determining The Defendant To Be A Sexually Violent Predator", entered on July 6, 2010, not only permitted the State to pursue its untimely filed "Motion To Determine The Defendant To Be A Sexually Violent Predator", but also granted the State's Motion by making such a determination, in spite of the Appellant's numerous Pro Se pleadings and Appellant's Counsel's arguments in opposition thereto. [Essentially the same assignments of error and issues of law presented herein, were the subject of a Petition For Writ Of Prohibition related to the underlying Criminal Case, which was refused by this Court on or about April 14, 2010, SER Stanley M. Myers v. Hon. Gina Groh, Supreme Court No. 100013.] The Appellant believes that the Circuit Court has acted outside of the prescribed timeframes in this matter, and that the Circuit court's ruling below does not comport with existing law, is clearly erroneous and is plainly wrong, as set forth in the Appellant's Assignments of Error and Discussion of Law attached hereto.

STATEMENT OF FACTS

1. On January 29, 2003, the office of the Berkeley County Prosecuting Attorney offered a plea agreement for the Appellant's consideration and acceptance in Case No. 95-F-44.

2. The plea agreement was binding under Rule 11(e)(1)(c) of the West Virginia Rules of Criminal Procedure.

3. The terms of the plea agreement included guilty pleas to the following charges: three (3) counts of Sexual Abuse in the First Degree, in violation of W.V. Code § 61-8B-7, and one count of Sexual Assault in the Third Degree, in violation of W.V. Code § 61-8B-5.

4. The agreement further required the Appellant to allow the Sentencing Court to find that he is a "sexual predator" and also to agree to "register for life as a sexual offender."

5. The Appellant accepted the terms of the written plea agreement on February 5, 2003.

6. On February 24, 2003, the Circuit Court of Berkeley County, presided over by the Honorable David A. Sanders, adopted the terms of the plea agreement.

7. The Court's Order, entered on March 25, 2003, reflects that, "this Defendant is a Sexual Predator"...and "he shall fulfill the registration requirements of the West Virginia Sexual Offender Registration Act including lifetime registration with the West Virginia State Police." The term "sexually violent predator" was not used and registration for the same was not required. [See also: TR. 6/28/10, pp. 63-64, 73-74, 102-105.]

8. The transcript of the proceedings for the Plea Hearing held on February 24, 2003, also reflects that the term “sexually violent predator” was not used and registration as such was not expressly stated or implied:

THE COURT: Register as a life-long registration with the State Police?

MR. QUASEBARTH: Yes, with the Court making a finding he is a sexual predator.

THE COURT: Yes. [TR. 2/24/03, p. 6]

THE COURT: The Court specifically does find also that you are a sexual predator... We will note that you have already seen the registration notification for the sexual offenders registration in the State of West Virginia and will note it is lifetime...[TR.2/24/03, pp. 50, 55]

9. The Judgment in the criminal case below, became final when the Appellant’s Petition for Writ of Certiorari was denied by the United States Supreme Court on January 10, 2005. The Appellant discharged his sentence of incarceration on June 13, 2006, more than four years ago, and first registered with the W. Va. State Police on June 14, 2006.

10. On or about the 29th day of May, 2009, at the Arraignment Hearing in another pending matter (Case No. 09-F-127), the State expressed its desire to reopen the Appellant’s old criminal case (Case No. 95-F-44), in order to find him to be a sexually violent predator.

11. At that Hearing, the State averred that it thought that the Court, at the time of Sentencing and at the State’s request, had made a determination that the Appellant was a “sexually violent predator”, but that the plea agreement and Sentencing Order failed to reflect such a determination, due to the State’s inadvertent “mistake” in the language of the plea agreement. The State alleged that it had only recently discovered that the Appellant was not registering with the State Police as a “sexually violent predator”.

12. As a result of the State’s expressed intention to reopen the Appellant’s old criminal case, the Appellant, on or about the 1st day of June, 2009, filed his Pro Se

Petition For Writ Prohibition in the Circuit Court of Berkeley County, WV, seeking to prevent the State from reopening his old case in an effort to find him to be a sexually violent predator. That Petition For Writ Of Prohibition was denied by the Circuit Court of Berkeley County, WV, by its Order Denying Writ Of Prohibition, entered on June 15, 2009. (Order, 6/15/2009, Case No. 09-C-457).

13. On June 12, 2009, the State of West Virginia filed its “Motion To Determine The Defendant To Be A Sexually Violent Predator”, requesting that the Circuit Court reopen the Appellant’s old criminal case and then, once again, make a determination that he is or is not a “sexually violent predator.”

14. The Appellant filed his Pro Se “Defendant’s Response To Motion To Determine The Defendant To Be A Sexually Violent Predator”, on or about June 16, 2009.

15. The Circuit Court of Berkeley County entered its Order Scheduling Status Hearing regarding the State’s Motion, on June 16, 2009, setting a Status Hearing for July 9, 2009. (Case No. 95-F-44).

16. The Appellant next filed his Pro Se “Defendant’s Motion To Dismiss The State’s Motion To Determine The Defendant To Be A Sexually Violent Predator” on or about June 22, 2009.

17. The Appellant then filed his Pro Se “Defendant’s Amended Motion To Dismiss State’s Motion To Determine The Defendant To Be A Sexually Violent Predator” on or about July 6, 2009.

18. A Status Hearing was held on the State’s Motion in the Circuit Court of Berkeley County, WV, on July 9, 2009, the Honorable Gina Groh presiding, at which

time both Counsel for the State and Counsel for the Appellant presented partial arguments to the Circuit Court.

19. Both Counsel submitted their proposed Orders to the Court on the sexually violent predator issue, as requested by the Circuit Court, on or before August 21, 2009.

20. The Appellant filed the "Defendant's Motion For Withdrawal Of A Plea Of Guilty", Case No. 95-F-44, on January 7, 2010, which Motion was denied by the Circuit Court.

21. The Appellant next filed a Pro Se Petition For Writ of Prohibition with this Court on or about January 11, 2010, (SER Stanley M. Myers v. Hon. Gina Groh, Supreme Court No. 100013], raising essentially the same errors now raised in the Appellant's Brief.

22. On February 25, 2010, additional arguments were made by Counsel and heard by the Circuit Court, after which the Circuit Court permitted the filing of the State's Motion.

23. Also on February 25, 2010, the Appellant's Counsel submitted the "Defendant's Application/Motion For Stay Of Proceedings And Stay Suspending The Execution Of Judgment Pending Appeal And Notice To State", seeking a **STAY ORDER** for the purpose of permitting the Appellant to file addition pleadings.

24. On March 8, 2010, the Circuit Court of Berkeley County, WV, entered its "Order Granting State's Motion To Determine The Defendant To Be A Sexually Violent Predator" in the underlying matter, ordering the Appellant to undergo a psychiatric examination aimed at assisting the Circuit Court in making its determination about the Appellant's sexually violent predator designation.

25. The Circuit Court's "Order Granting State's Motion..." was **STAYED** by that Court for a period of sixty (60) days, pending the preparation and filing of the Appellant's Petition For Appeal in this matter. (See: "Order Granting Stay", Case No. 95-F-44, Entered on March 8, 2010.)

26. However, after this Court refused the Appellant's Petition For Writ Of Prohibition on the jurisdictional issue presented therein, [SER Stanley Myers v. Hon. Gina Groh, Supreme Court No. 100013], by Order entered on April 14, 2010, the Circuit Court, on April 20, 2010, entered its "Order Lifting Stay..." in the underlying matter.

27. The Appellant next filed the "Defendant's Notice Of Assertion Of Fifth Amendment Right During Psychiatric Examination" in the underlying matter, on May 13, 2010.

28. At a hearing held on May 20, 2010, the Circuit Court, by Order entered on May 25, 2010, held that the Appellant could assert a 5th Amendment privilege during the course of said Court-ordered psychiatric examination, but reserved the right to draw adverse inferences from the Appellant's silence. The Court's "Order On Defendant's Fifth Amendment Assertion As To The Ordered Psychiatric Evaluation", [05/25/10] also reflects the Circuit Court's request for additional guidance from the parties as to the breadth and scope of the adverse inferences which the Circuit Court might draw.

29. On May 27, 2010, the West Virginia Sex Offender Registration Advisory Board submitted its Report to the Circuit Court, pursuant to W.Va. Code § 15-12-2a(e), setting forth its Findings and Recommendation as follows: "It is the Board's recommendation to the Court that Mr. Myers: 1. be required to register in the State of

West Virginia as a Sexually Violent Predator as set forth in the provisions of the West Virginia Code.”

30. At the Final Disposition Hearing held in this matter on June 28, 2010, the Circuit Court did find the Appellant to be a Sexually Violent Predator, requiring him to register as the same, as reflected in its “Final Order Determining The Defendant To Be A Sexually Violent Predator”, entered on July 6, 2010. It is that Order from which the Appellant now appeals.

ASSIGNMENTS OF ERROR AND MANNER DECIDED IN LOWER TRIBUNAL

Assignment Of Error Number One

IT WAS ERROR FOR THE CIRCUIT COURT OF BERKELEY COUNTY, WV, TO GRANT THE STATE’S MOTION, WHEN THE STATE OF WEST VIRGINIA WAS BARRED FROM BRINGING SAID ACTION BY THE STATUTE OF LIMITATIONS GOVERNING CIVIL ACTIONS IN THE STATE OF WEST VIRGINIA.

Assignment Of Error Number Two

IT WAS ERROR FOR THE CIRCUIT COURT OF BERKELEY COUNTY, WV, TO GRANT THE STATE’S MOTION, WHEN THE STATE WAS BARRED FROM BRINGING SAID ACTION BY THE DOCTRINE OF *RES JUDICATA*.

Assignment Of Error Number Three

IT WAS ERROR FOR THE CIRCUIT COURT OF BERKELEY COUNTY, WV, TO GRANT THE STATE’S MOTION, WHEN THE STATE WAS BARRED FROM BRINGING SAID ACTION BY THE DOCTRINE OF *COLLATERAL ESTOPPEL*.

Assignment of Error Number Four

IT WAS ERROR FOR THE CIRCUIT COURT OF BERKELEY COUNTY, WV, TO GRANT THE STATE’S MOTION, BECAUSE THE STATUTE IN QUESTION, W.Va. CODE § 15-12-2a, DOES NOT AFFORD THE CIRCUIT COURT AN UNLIMITED TIMEFRAME FOR SUCH ACTIONS, NOR DOES SAID STATUTE CONFER MULTIPLE OPPORTUNITIES UPON THE STATE OF WEST VIRGINIA TO BRING SUCH AN ACTION.

Assignment of Error Number Five

IT WAS ERROR FOR THE CIRCUIT COURT OF BERKELEY COUNTY, WV, TO GRANT THE STATE'S MOTION, WHEN THE FORCE AND EFFECT OF DOING SO HAS RESULTED IN THE CIRCUIT COURT UNILATERALLY MODIFYING THE APPELLANT'S BINDING PLEA AGREEMENT, WHICH HAD BEEN AGREED UPON BY THE STATE AND THE APPELLANT AND HAD BEEN PREVIOUSLY ACCEPTED BY THE COURT.

Assignment of Error Number Six

IT WAS ERROR FOR THE CIRCUIT COURT OF BERKELEY COUNTY, WV, TO GRANT THE STATE'S MOTION, WHEN BY DOING SO THE CIRCUIT COURT HAS VIOLATED THE CONSTITUTIONAL PROTECTIONS AFFORDED TO THE APPELLANT AGAINST DOUBLE JEOPARDY. **

Assignment of Error Number Seven

IT WAS ERROR FOR THE CIRCUIT COURT OF BERKELEY COUNTY, WV, TO GRANT THE STATE'S MOTION, WHEN BY DOING SO THE CIRCUIT COURT HAS VIOLATED THE CONSTITUTIONAL PROTECTIONS AFFORDED TO THE APPELLANT AGAINST *EX POST FACTO* APPLICATIONS OF THE LAW. **

Assignment of Error Number Eight

IT WAS ERROR FOR THE CIRCUIT COURT OF BERKELEY COUNTY, WV, TO GRANT THE STATE'S MOTION, WHEN THE STATE'S MOTION, AS WELL AS THE CIRCUIT COURT'S ORDER GRANTING IT, RELIED IN PART UPON THE CONTENTS OF THE APPELLANT'S 60-DAY PRE-SENTENCE EVALUATION REPORT, WHICH HAD BEEN PREPARED SOLELY FOR THE PURPOSE OF SENTENCING IN THE UNDERLYING MATTER, THE SENTENCE FOR WHICH HAD BEEN DISCHARGED SOME FOUR YEARS EARLIER. THE IMPROPER USE OF THE APPELLANT'S PRE-SENTENCE REPORT VIOLATED HIS CONSTITUTIONAL 5TH AMENDMENT RIGHT TO REMAIN SILENT.

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** The Appellant objected on the basis of the Double Jeopardy and *Ex Post Facto* issues before the Circuit Court at the final Disposition Hearing held in this matter on June 28, 2010. [TR. 6/28/2010, p. 18] Those errors are based upon his position that the alteration of his sentence as imposed under the terms of his binding plea agreement, by now requiring him to register as a “sexually violent predator”, constitutes an “additional sentence” or punishment. [See: “Defendant’s Motion For Withdrawal Of Guilty Plea”, p. 1, #3, p. 2, #6, Case No. 95-F-44, filed 01/07/2010, citing State v. Whalen, 2003, 588 S.E. 2d 677, n. #5] Apparently the Circuit Court disagrees that the imposition of sexually violent predator status upon the Appellant now, constitutes “punishment”, per se, or violates *ex post facto* laws. “...there is no double jeopardy since a sexually violent predator determination is a civil sex offender registration issue and not a criminal punishment; there is no ex post facto violation as the civil sex offender registration is held to apply prospectively and retroactively.” Final Order Determining The Defendant To Be A Sexually Violent Predator”, pp.2-3, Entered 07/06/2010.

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DISCUSSION OF LAW

I. It was error for the Circuit Court of Berkeley County, WV, to grant the State's Motion, when the State of West Virginia was barred from bringing said action by the statute of limitations governing civil actions in the State of West Virginia. [TR. 2/25/10, pp. 19-22, 26-27, 29-32, 34-35, 37-38, 40, 42]

The State contends that the provisions of the entire West Virginia Sex Offender Registration Act, W.V. Code § 15-12-1 et. seq., are **civil** in nature. Haislop v. Edgell, 210 W.Va. 80, 593 S.E. 2d 839 (2003) [State's "Motion To Determine The Defendant...", 6/12/09, #14]. The Circuit Court apparently agreed with the State's position. ["Final Order Determining The Defendant...", 7/06/10, pp. 2-3.] If we accept that premise, then the Registration Act and the summary proceeding for the determination of a sexually violent predator, as outlined in W.Va. Code § 15-12-2a, are subject to the statute of limitations prescribed by this State's Civil Codes. Therefore, the W.Va. Rules of Civil Procedure apply to the matter at hand, including Rule 60(b), which imposes a one-year statute of limitations in obtaining relief from a judgment or order, in situations involving mistake, inadvertence, surprise, excusable neglect, unavoidable cause, newly discovered evidence, fraud or misrepresentation. State ex rel. Bess v. Berger, 203 W. Va. 662, 510 S.E. 2d 496 (1998).

The State of West Virginia frankly admits that the Motion under consideration was filed, in part, because of a "drafting error" or **mistake** in its own written Plea Agreement. (State's Motion, 6/12/09, #7) The Appellant was Sentenced, based upon the Circuit Court's acceptance of said Plea Agreement on February 24, 2003, and the Order reflecting his Conviction and Sentence was entered on March 25, 2003. (Conviction and Sentence Order, 3/25/03, Case No. 95-F-44) Thus, the one-year statute of limitations prescribed by Rule 60(b), W.Va. Rules of Civil Procedure, expired on March 26, 2004.

Furthermore, the general statute of limitations for civil matters not involving damage to property or personal injury is also one year. However, that one-year period begins to run when the plaintiff, here the State, by exercising reasonable due diligence, should have known that a cause of action existed. W.Va. Code § 55-2-12(c); Miller v. Monongalia County Bd. Of Educ., 210 W.Va. 147, 556 S.E. 2d 427 (2001). The Appellant discharged his sentence of incarceration on June 13, 2006 and first registered as a sex offender on June 14, 2006. It is without dispute that the State could have discovered its mistake sometime during 2006, shortly after the Appellant was released from incarceration and began participating in the sex offender registration process. The State maintains that it “did not know” that the Appellant had not registered as a sexually violent predator,¹ (Motion, 6/12/09, #'s 9 &10), but the State could have, with reasonable due diligence, discovered that the Appellant had not, by simply consulting the Internet web site for registration of sex offenders in West Virginia, www.wvstatepolice.com. W.Va. Code § 15-12-10 [effective date October 1, 2006], requires sexually violent predators to register **every three months**, in January, April, July and October. When the Appellant did not register as a sexually violent predator in October of 2006, the State could easily have become aware of that fact and brought its cause of action at that time. Assuming that the earliest date the State could have become aware that the Appellant had not registered as a sexually violent predator was October,

¹ Obviously, the State somehow knew **at the time of Indictment** in Case No. 09-F-127 (May 20, 2009), that the Appellant was not registering as a sexually violent predator, since he was charged with a violation of W.Va. Code § 15-12-8(c), as opposed to § 15-12-8(e). [See: True Bill Of Indictment, Case No. 09-F-127] [See also: TR. 2/25/10, pp. 29-30, 33]

2006, the one-year statute of limitations for the State to initiate summary proceeding to determine whether or not the Appellant is a sexually violent predator would have expired **October, 2007**. Therefore, the State is now without excuse for not having timely initiated its summary proceeding, in conformance with the prescribed civil statute of limitations. As a result, this Honorable Court should find that the State of West Virginia did not bring its Motion To Determine The Defendant To Be A Sexually Violent Predator within the timeframe mandated by this State's Civil Codes, and that because the State's Motion fell outside of the prescribed statute of limitations, the Circuit Court erred by Granting it.

II. It was error for the Circuit Court of Berkeley County, WV, to grant the State's Motion, when the State was barred from bringing said action by the doctrine of *res judicata*. [TR. 2/25/10, pp. 17, 19-20, 22, 26, 33, 38; TR. 6/28/10, p. 18]

Should the State of West Virginia claim that it has not, heretofore, made an attempt to find that the Appellant should be determined to be a sexually violent predator, the Appellant contends that the doctrine of *res judicata* bars the State from doing so now.²

² While the State may allege such a claim, it is the Appellant's position that the sexually violent predator issue was placed squarely before the Circuit Court for its consideration. [See: Discussion of Law, Argument # III.] In that case, *res judicata* would also bar its reconsideration, as a part of the same cause of action, as well.

The doctrine of *res judicata* applies to both criminal and civil proceedings. Highsmith v. Com., 489 S.E. 2d 239, 242 (Va. 1997); Morgan v. Com., 507 S.E. 2d 665, 666 (Va. 1998). Three elements must be satisfied before an action may be barred under the doctrine of *res judicata*. **First**, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. **Second**, the two actions must involve the same parties or persons in privity with those same parties. **Third**, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented in the prior action. Blake v. Charleston Area Medical Center, 261 W.Va. 469, 498 S.E. 2d 41 (1997); State ex rel. Shrewsberry v. Hrko, 206 W.Va. 646, 527 S.E. 2d 508 (1999). The Appellant believes that he can meet all three of the requisite elements.

First, the judgment of the Circuit Court was reflected in its Conviction and Sentence Order, entered on March 25, 2003. That judgment became “final”, when the Appellant’s Petition For Writ of Certiorari was denied by the U.S. Supreme Court on January 10, 2005, regarding the sole issue of the assessment of jury costs.

Second, the parties in the two actions under consideration are identical, State of West Virginia v. Stanley M. Myers. That is without dispute.

Third, the cause of action in the Appellant’s prior criminal action is identical to the one in the State’s present Motion, both of which bear the same caption and case number (99-F-44). The determination of sexually violent predator status, as prescribed

by W.Va. Code § 15-12-2a, is inextricably linked to the prior criminal case in two important ways: (1) The sexually violent predator determination is dependent upon a conviction of an underlying sexually violent offense [W.Va. Code § 15-12-2a(a)]; and, (2) The determination is to be initiated by the State, but made by the **original sentencing court**. [W.Va. Code § 15-12-3a]. In fact, the State of West Virginia, in its proposed “Order Permitting Filing Of State’s Motion...”, Case No. 95-F-44, filed on August 21, 2009, acknowledges the same. “...since the proceeding to determine whether a qualifying defendant is a sexually violent predator is to be made to the sentencing court, W.Va. Code § 15-12-2a, it is evident that the legislature intended such a proceeding to be *attached to the criminal case.*”(italics added) [“Order Permitting Filing...”, 8/21/09, p.6.] The State may argue that W.Va. Code § 15-12-2a mandates that a determination **shall** be made and may allege that one has not been made, but that argument cannot preclude the application of *res judicata* in this instance. In fact, not only does the doctrine of *res judicata* bar the parties from re-litigating the same points previously in controversy and decided in a case, it also bars all future litigation of **any point or issue which the parties might have brought forward at the time of the initial litigation**. Rowe v. Grapevine Corp., 206 W.Va. 703, 527 S.E. 2d 814 (1999); Slider v. State Farm Mutual Auto Insurance Co., 210 W. Va. 476, 557 S.E. 2d 883 (2001) Although all the requisite elements were in place, the State may now claim that it simply failed to invoke the Circuit Court’s jurisdiction by not filing a pleading seeking to initiate a sexually violent predator determination proceeding against the Appellant after his sentencing in March of 2003, and also failed to do so after the Appellant was originally sentenced in the same criminal matter, in February of 1997. [That conviction was eventually reversed by this

Court. State ex rel. Myers v. Painter, 213 W.Va. 32, 576 S.E. 2d 277 (2002).] Having allegedly failed, after two opportunities to seek such a determination, the State should not be afforded yet another opportunity to do so now. Carelessness or afterthought on the part of the State cannot excuse its failure to have brought the sexually violent predator determination action at the proper time, so as to avoid the bar erected by *res judicata*. In re: Nicholas Estate, 107 S.E. 2d 53 (W.Va. 1959). Neither can negligence, inadvertence or even accident protect the State's failure from the prohibitions imposed by the doctrine of *res judicata*. In re: United Carbon Co. Assessment, 190 S.E. 546 (W.Va. 1937) This Court has been abundantly clear about the fact that the doctrine of *res judicata* plainly establishes that there cannot be a rehearing of a question, once decided, nor can there be a retrial of any question which might have been asserted in a former suit or action, within the scope of the pleadings permitted therein. Moran v. Lecony Smokeless Coal Co., 18 122 W.Va. 405, S.E. 2d 808 (1942). Certainly, the State would have been permitted to have brought its Motion to the table, by law, on two previous occasions, immediately after sentencing, and if it did not do so then, neither should it be permitted to do so now. The basis for the doctrine of *res judicata* is simply that, at some point in time, all litigation must come to an end. If the State is permitted to file a Motion at any time, or to file multiple such Motions, seeking to initiate a proceeding for the determination of sexually violent predator status, such action begs the question, "When, if ever, does litigation come to an end?"

III. It was error for the Circuit Court of Berkeley County, WV, grant the State's Motion, when the State was barred from bringing said action by the doctrine of collateral estoppel. [TR. 2/25/10, pp. 17, 23-24, 30, 38; TR. 6/28/10, pp. 19-20, 104-105, Final Order, 7/06/10, p. 3]

Should the State now aver that the State's present Motion To determine The Defendant To Be A Sexually Violent Predator constitutes a separate and distinct cause of action, different from the Appellant's prior criminal case (Case No. 95-F-44), the Appellant contends that the State's present Motion is barred by the doctrine of *collateral estoppel*.

The doctrine of *collateral estoppel* requires that the proponent must establish five particular elements: (1) The issue sought to be precluded is identical to one previously litigated; (2) the issue must have been actually determined in the prior proceeding; (3) determination of the issue must have been a critical and necessary part of the decision in the prior proceeding; (4) the prior judgment must be final and valid; and, (5) the party against whom estoppel is asserted must have had a full and fair opportunity to litigate the issue in the previous forum. Tuttle by Tuttle v. Arlington County Sch. Bd., 195 F. 3d 698 (4th Cir. 1999). The doctrine of *collateral estoppel*, like that of *res judicata*, is applicable in both civil and criminal proceedings. Highsmith v. Com., *supra*; Morgan v. Com., *supra*. The primary difference between the two doctrines is that *collateral estoppel* involves a second cause of action or suit which differs from the first, and the issue or matter in question must have actually been decided in the former cause of action.

Examining the five essential elements which must be met by the proponent of *collateral estoppel*, in the context of the instant case, reveals the following:

First, the issue at hand in the State's present Motion is the determination of whether the Appellant is or is not a "sexually violent predator". That issue was previously placed before the Circuit Court of Berkeley County, WV, in State v. Stanley

Myers, Case No. 95-F-44, as a part of a plea agreement, at the Plea/Sentencing Hearing held therein on February 24, 2003. The State admits as much in its Motion: “The State avers that it was the intent of the plea agreement in Case No. 95-F-44 that the Defendant be found by the Court to be a ‘sexually violent predator’, pursuant to W.Va. Code § 15-12-2a, but that the State’s drafting error in the plea agreement used the term ‘sexual predator’, an error replicated by the sentencing court in its finding.” [Motion, 6/12/09, # 7.] The written Plea Agreement was prepared by the State, agreed to by the Appellant and accepted by the Circuit Court. The term “sexually violent predator” was not used in the written Plea Agreement or in the Circuit Court’s Order of Conviction And Sentence, nor does it appear in the transcript of the proceedings held on February 24, 2003. It is the Appellant’s position that the parties had entered into a binding plea agreement which had clear terms and conditions. The agreement was that the Circuit Court would make a finding that the Appellant was a “sexual predator”, but not a “sexually violent predator”. That agreement, was, in fact, a stipulation and waiver by the parties of the requirements of WV Code § 15-12-2a, such that the State was not required to file a written pleading, the Circuit Court was not required to conduct a summary proceeding/hearing and the Circuit Court would make a specific finding. While W.Va. Code § 15-12-2a(a) permits the sentencing court to make a finding that the Appellant is or is not a “sexually violent predator”, the finding by the Circuit Court that the Appellant is a “sexual predator” **is not** a finding that the Appellant is a “sexually violent predator”, as the term is used in the statute. [TR. 6/28/10, pp. 63-64.] Therefore, the finding of the Circuit Court, by proxy, was that he **is not** a “sexually violent predator”. Furthermore, the State made reference to the fact that the Appellant’s psychological evaluation had already been completed. [TR.

2/24/2003, p. 49] (See also: Assignment of Error #VIII.) Since the Petitioner was not requesting probation as a part of the Plea Agreement, that reference could only have been made with respect to a “sexually violent predator” determination by the Circuit Court.

Second, it is clear that the issue of whether or not the Appellant is a “sexually violent predator” was actually determined in the prior proceeding. The Circuit Court’s Order of Conviction And Sentence, entered on March 25, 2003, reflects that, “...this Defendant is a sexual predator...and he shall fulfill the registration requirements of the West Virginia Sexual Offender Registration Act including lifetime registration with the State Police.” [Order, 3/25/2003, p. 2.] Again, the term “sexually violent predator” was not used by the Circuit Court and registration for the same was not required.

Third, the determination of the sexually violent predator status of the Appellant was, indeed, a necessary part of the decision in the Petitioner’s prior criminal proceeding. In fact, the language of W.Va. Code § 15-12-2a(a) makes such a determination mandatory for those convicted of qualifying sexually violent offenses, as was the Appellant, once the State has brought the issue to the Court’s attention. “The Circuit Court that has sentenced a person for the commission of a sexually violent offense...shall make a determination whether: (1) A person is a sexually violent predator;...” W.Va. Code § 15-12-2a(a). Furthermore, the determination of sexually violent predator status would be a critical part of the decision in the prior proceeding, in that it would have an impact upon determining what therapeutic regimens would be recommended and available to criminal defendants while incarcerated, influence what restrictions would be placed upon them while on probation or parole, and would prescribe what registration requirements would

be imposed on them upon their release.

Fourth, the Circuit Court's judgment in the Appellant's prior criminal action, Case No. 95-F-44, became "final" on January 10, 2005, when the U.S. Supreme Court denied his Petition For Writ of Certiorari. [See: 543 U.S. 1075, 125 S. Ct. 925, 160 L. Ed. 2d 813 (Jan. 10, 2005).] There is nothing in the record to indicate that that judgment is in any way not a valid one.

Fifth, certainly the State of West Virginia has had a full and fair opportunity to litigate the issue of the Appellant's sexually violent predator status in his prior criminal proceedings for Case No. 95-F-44. In fact, the State has had two such prior opportunities and has apparently now decided that it is unsatisfied with its own failures. [See: Discussion Of Law, Argument # II.] All the requisite elements for the determination of sexually violent predator status were in place on both prior occasions.

The Appellant, as stated heretofore, believes that the State is now barred from making a sexually violent predator determination, by virtue of the doctrine of *collateral estoppel*.

IV. It was error for the Circuit Court of Berkeley County, WV, to grant the State's Motion, because the statute in question, W.Va. Code § 15-12-2a, does not afford the Circuit Court an unlimited timeframe in such actions, nor does the statute confer multiple opportunities upon the State to bring such an action. [TR. 2/25/10, pp. 16-24, 37, 32-34, 38-43; TR. 6/28/10, p. 105; Final Order, 7/06/10, p. 3]

The Appellant asserts that the statute related to the determination of sexually violent predator status, W.Va. Code § 15-12-2a, is time-limited and, at this late date, the Circuit Court committed error by entertaining and/or ruling upon any pleading with respect thereto, which had been filed by the State in relation to the Appellant.

While a casual reading of W.V. Code § 15-12-2a appears to indicate that no time limit exists for the State to file its pleading requesting a summary hearing for a court determination of sexually violent predator status, after a closer inspection of all the relevant statutes, the Petitioner believes that that is not the case. W.V. Code § 15-12-2a must be read *in para materia* with the pertinent provisions of other sections of the West Virginia Code. For example: W.V. Code § 15-12-3a, Petition for removal of sexually violent predator designation, states in pertinent part that: “A proceeding seeking to remove a person’s designation as a sexually violent predator may be initiated by the filing of a petition by **the person so designated in the original sentencing court.**” The implication here is that **the person** was designated to be a sexually violent predator **in (by) the original sentencing court**, a clear indication that such a designation occurred at or shortly after sentencing. [If the statute meant merely that **the petition must be filed in the original sentencing court**, it would have read: “...by the filing of a petition in the original sentencing court, by the person so designated”, or, “...by the filing of a petition by the person so designated, (comma) in the original sentencing court.”] Furthermore, W.Va. Code § 15-12-3a is reserved solely for cases which have been remanded because the underlying conviction has been reversed or vacated, and which must, therefore, be re-opened by law. The notion of a limited timeframe for the court determination of sexually violent predator status is further supported by the language of W.V. Code § 15-12-2(e)(1) and (f)(1)(2) & (3). Those paragraphs disclose that the Notice required to be sent to the State Police and the informing of the person about his/her duty to register by authorities, should occur **before the person is released from confinement** by discharge of sentence, to parole, or on probation. Such notice and duty to inform also encompasses those who

have previously been determined to be sexually violent predators. [subsection (f); See also: W.Va. Code § 62-12-2(f)&(g)]

The Appellant also relies upon the plain language of W.Va. Code § 62-12-26(a) and (c) to further support his position that the determination that a person is or is not a sexually violent predator must have been made **before** that person is released from a period of probation, from parole or from a sentence of incarceration, which resulted from his/her underlying conviction of a sexually violent offense. W.Va. § Code 62-12-26(a), provides in pertinent part:

That a defendant designated after the effective date of this section as amended and reenacted...as a sexually violent predator pursuant to the provisions of section two-a, article twelve, chapter fifteen of this code shall be subject, in addition to any other penalty or condition imposed by the court, to supervised release for life.

Subsection (c) of the same statute clarifies the timeframe during which the sexually violent predator determination should have been made.

The 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 so convicted, whichever expires later. [**emphasis added**]

Thus, the language of the statute clarifies the intent of the Legislature, that the determination of a sexually violent predator designation should have already been made **prior to** release from probation, release from parole or discharge of sentence of incarceration. In the instant case, the Appellant discharged his sentence of incarceration on **June 13, 2006**. However, the State did not bring its “Motion To Determine The Defendant To Be A Sexually Violent Predator” until June 12, 2009, some **three years after** the Appellant had discharged his sentence of incarceration.

Taken together as a whole, the statutes indicate that the determination of sexually violent predator status by the court should be made by the original sentencing court, **sometime after sentencing** but also **sometime before** the person's release from probation, parole or confinement.³ Such an interpretation is consistent with § 81-14-11 of the W.Va. Code of State Regulations, which states that:

11.1 Following the conviction of a person required to be registered or **when receiving knowledge that a person required to be registered is being released from incarceration**, the Prosecuting Attorney may initiate proceedings seeking to establish that a person is a sexually violent predator. (**emphasis added**) [Effective Date: May 31, 2007]

Therefore, it would appear that W.Va. Code § 15-12-2a does not afford the Circuit Court an unlimited time frame nor confers upon the State unlimited opportunities for the bringing of a sexually violent predator proceeding. Any other interpretation of the statute would not comport with the doctrines of *res judicata* and *collateral estoppel*. While the Circuit Court in its "Order Granting State's Motion...", relied upon the wisdom of this Honorable Court as set forth in Hensler v. Cross, 216 W.Va. 330, 558 S.E. 2d 339 (2001), to stand for the proposition that the Sex Offender registration Act is a purely "regulatory" statute, as opposed to a "punitive" one, [Order, p.6, #6.], that rationale should not be applied to **all** of the provisions contained in **every section** of the Act. It is obvious, for

³ There are currently twenty designated sexually violent predators residing or working in the State of West Virginia (not including the 5 or 6 who remain incarcerated). Nearly all of those determinations were made in other States – Virginia, Ohio and Florida. A review of the relevant statutes from those States and the other States bordering West Virginia reveals that the determination of sexually violent predator status, in all of those States, must be made prior to the discharge of the registrant's underlying sentence. Ohio Revised Code §§ 2941.148, 2950.09; Maryland Annotated Code, Article 27, Section 792(b)(1); Pennsylvania Consolidated Statutes, Title 42, § 9795.4; Virginia Annotated Code § 37.2-905; Florida Statutes, Title 29, Chapter 394.910 et. seq. That was also apparently true in West Virginia, when the determination of sexually violent predator status was first considered. W.Va. Code § 61-8F-2(j), Repealed 1999. [See also: Allen v. Illinois, 92 L.Ed. 2d 296, 302 (1986); Kansas v. Hendricks, 138 L.Ed. 2d 501 (1997); Sejing v. Young, 148 L.Ed. 2d 734, 741 (2001).] "[T]he Federal Government would not have...the power to commit a person who...has been released from prison and whose period of supervised release is also completed." United States v. Comstock, et. al., 560 U.S. ____ (May 17, 2010)

example, that W.Va. Code § 15-12-8 is punitive, and not simply regulatory, because it prescribes a punishment for failure to properly register. While the registration requirements, in and of themselves, are regulatory, retroactive and prospective, it would be improper to impose such a description upon the provisions of W.Va. Code § 15-12-2a. The provisions contained in that section speak only to what is expected of the Circuit Courts and the prosecuting attorneys, not to any particular obligation that is placed upon the registrant. Most assuredly, the Legislature did not intend for every Circuit Court and prosecuting attorney in this State to re-open all past criminal cases, no matter how old, involving qualifying sexually violent offenses, and to make a determination as to whether or not those registrants are or are not sexually violent predators. That would require the Circuit Courts of the 23rd Judicial Circuit alone to re-open roughly forty (40) cases (some now more than 20 years old), for which no such determination has been previously made. [See Appendix A.] Certainly, the principle of judicial economy would not tolerate such action. In fact, this Honorable Court has historically frowned upon re-visiting old criminal cases, where the judgment has already been satisfied wholly or in part, simply for the purpose of cleaning up errors made by the Circuit Court or the State. State ex rel. Hill v. Parsons, 194 W. Va. 688, 461 S.E. 2d 194 (1995).

For the reasons stated herein above, the Appellant believes that the Circuit Court of Berkeley County, WV, has exceeded the statutory timeframe when, by its “Final Order Determining The Defendant...”, it has permitted the State to re-open his old criminal case at this late date, for the purpose of seeking a sexually violent predator determination.

V. It was error for the Circuit Court of Berkeley County, WV, to grant the State’s Motion, when the force and effect of doing has resulted in the Circuit Court unilaterally modifying the Appellant’s binding plea agreement, which had been agreed upon by the State and the Appellant and had been

accepted by the Circuit Court. [TR. 2/25/10, pp. 5-19, 24-29, 31, 33-36, 38-43; TR. 6/28/10, pp. 101-104, 106, 110; Final Order 7/06/10, p. 3]

The Appellant asserts that allowing the State to now re-open his original criminal case to make a determination that he is a “sexually violent predator” will result in the Appellant being required to register as a “sexually violent predator”, while his binding plea agreement merely states that he is a “sexual predator” and “is required to register for life as a sexual offender.” Furthermore, the Appellant contends that it was not legal or permissible for the State of West Virginia to seek to unilaterally alter the terms of his plea agreement and accompanying Order of Conviction and Sentence, or for the Circuit Court to have permitted the State to attempt to now do so. The end result has had the force and effect of modifying a valid, binding plea agreement, and on appeal, the Appellant should be afforded the opportunity to demand specific performance of his binding plea agreement or be allowed to withdraw his previous plea of guilty. As the Court held in State ex rel. Brewer v. Starcher, 195 W. Va. 189, 465 S.E. 2d 185, 192 (1995):

Because a plea agreement requires a defendant to waive fundamental rights, we are compelled to hold prosecutors and courts to the most meticulous standards of both promise and performance... Thus, when a defendant enters a plea agreement with the prosecution, the Circuit Court must ensure the

defendant receives what is reasonably due him under the agreement.

While it is unfortunate that the State now claims to have made a “drafting error” in its proffered plea agreement, which was “carried over” by the Circuit Court into its Order of Conviction And Sentence, that fact does not empower the State or the Circuit Court to change the language of those documents (and thus the terms agreed to by the Appellant), to conform to the State’s present wishes.

The language of the State's proffered Plea Agreement was not vague, so as to leave any doubt in the mind of the Appellant (and apparently in the mind of the State Police) about the sexually violent predator designation. The State should not now be allowed to complain that it was "not what it meant or intended." In fact, if any time a plea agreement fails to be specific enough so as to appear vague and ambiguous, it should be interpreted in the light most favorable to the criminal defendant. As the Court held in State v. Hayhurst, 207 W. Va. 259, 531 S.E.2d 324, 337, (2000):

The State bears the primary responsibility for insuring precision and unambiguity in a plea agreement because of the significant constitutional rights the defendant waives by entering a guilty plea. If a plea agreement is imprecise or ambiguous, such imprecision or ambiguity will be construed in favor of the defendant. (citing SER Forbes v. Kaufman, 404 S.E. 2d 763, 768, (W.Va. 1991))

The Circuit Court initially agreed with the Appellant's position on this issue, in its Order Denying Petition For Writ Of Prohibition, (before reversing course in its "Order Granting State's Motion...", 3/08/10, pp. 6-7), wherein it stated: "...a circuit court has no authority to vacate or modify, *sua sponte*, a validly accepted plea under Rule 11(e)(1)(c) because of subsequent events that do not impugn the validity of the original plea agreement.' Brewer v. Starcher, 195 W. Va. 185, 465 S.E. 2d 185, 195 (1995). Assuming *arguendo* that the change from 'sexual predator' to 'sexually violent predator' would alter the obligations arising from Mr. Myers' plea agreement, this Court would

⁴ Although Rule 36, W.Va. Rules of Criminal Procedure, permits the Circuit Court to correct "clerical mistakes" in judgments, Orders or other parts of the record, that certainly does not include modifying the terms of a plea agreement, as they were stated in the written plea offer and in the official transcribed record. State ex rel. Hall v. Liller, 536 S.E. 2d 120 (W.Va. 2000) No where in the written plea agreement or in the transcript of the proceedings held on February 24, 2003, was the term "sexually violent predator" used by the State or the Circuit Court. [TR. 2/24/2003]

have no power to modify the agreement.” [Order, June 15, 2009, Case No. 09-C-457] To now designate the Appellant to be a “sexually violent predator” would alter his legal obligations, by requiring him to: supply additional information to the State Police [W.Va. Code 15-12-2(f)], register four times per year as opposed to one [W.Va. Code § 15-12-10], surrender his driver’s license in exchange for a coded one [W.Va. Code § 17B-2-3a(b)(1)], and be subjected to a lifelong period of supervised release and possible re-incarceration [W.Va. Code § 62-12-26(a)&(g)].

This Court, in the same year in which the Appellant’s plea agreement was accepted by the Circuit Court, ruled that defense counsel, prosecutors and judges should advise a criminal defendant regarding the specific provisions of the Sex Offender Registration Act that may apply to his/her case, particularly in the context of a plea of guilty. State v. Whalen, 214 W. Va. 299, 588 S.E. 2d 677 (2003). The Appellant herein, was at no point in time, during the course of the Circuit Court’s consideration and acceptance of his plea agreement, advised that he would be required to register as a “sexually violent predator”, but was specifically advised that he would be required to “register for life as a sexual offender”.

Should the Circuit Court now be permitted to designate the Appellant to be a sexually violent predator, that designation would automatically impose upon him the mandatory terms of W.Va. Code § 62-12-26(a)&(g)—that he should be subjected to lifelong supervised release and possible re-incarceration, if said period of supervised release is subsequently revoked, facts not disclosed in his plea agreement.

In United States v. Good, 25 F. 3d 218 (4th Cir. 1994), the 4th Circuit Court of Appeals held that it was error for the District Court to fail to explain the significance of

supervised release to the defendant prior to accepting his guilty plea. That error was held to be “harmless”, simply because the defendant had been advised that he would be subjected to a period of supervised release, and the length of the combined sentence of incarceration and supervised release was actually less than the maximum term which the defendant had been told that he could receive. The case *sub judice* can be distinguished from Good, Id., in that the Appellant was not advised, at the time of the acceptance of his binding plea agreement, that he would be subjected to any period of supervised release. Furthermore, he was advised that his maximum sentence would be twenty years, and the Appellant fully discharged that sentence on June 13, 2006. Now, however, the Appellant faces lifelong supervised release and the specter of possible re-incarceration for revocation of the same. The Court, in Moore v. United States, 592 F. 2d 753 (4th Cir. 1979), explained that, as a part of a plea agreement, the defendant should be advised that a term of supervised release (special parole) would be added to any prison term received, the length of said term of supervised release, and the consequences resulting from a violation of the terms of supervised release (i.e., re-incarceration). Otherwise, the voluntariness of the defendant’s plea agreement, from the perspective of having been knowingly and intelligently entered into, would come into question. [See also: U.S. v. Roberts, 5 F. 3d 365 (9th Cir. 1993)] In the instant case, the Appellant was not advised, as a part of his plea agreement, that he would be subjected to any period of supervised release, that the period of supervised release would be life long, and that he could be re-incarcerated for violating the terms of said supervised release. For that reason, the Appellant herein asserts that his plea of guilty was not knowingly and intelligently entered into, and should, therefore, be considered “involuntary”. As such, the Appellant

should now be permitted to withdraw his guilty plea in underlying Case No. 95-F-44, or in the alternative, to demand that the State fully honor and comply with the terms of the original plea agreement as it then stood—without a sexually violent predator designation.

Because the Circuit Court’s “Final Order Determining The Defendant To Be A Sexually Violent Predator” substantially alters the terms of his valid, binding plea agreement, the Appellant believes that said Order breaches the plea agreement and should, therefore, be vacated and/or voided by this Court, as a matter of law.

VI. It was error for the Circuit Court of Berkeley County, WV, to grant the State’s Motion, when by doing so, the Circuit Court has violated the Constitutional protections afforded to the Appellant against Double Jeopardy, as provided by the 5th Amendment to the U.S. Constitution, and Article 3, Section 5 of the W.Va. Constitution. [TR. 2/25/10, pp. 6-7, 9, 23, 25, 31-32, 39; TR. 6/28/10, pp. 18-19; Final Order, 7/06/10, pp. 2-3]

The Circuit Court’s “Order Granting State’s Motion...” Entered on or about March 8, 2010, is unclear as to which mechanism the Circuit Court has chosen to use to make a sexually violent predator determination with respect to the Appellant. That Order appears to indicate that the Circuit Court has in some way clarified or altered the provisions of the Appellant’s previously accepted binding plea agreement and related Sentencing Order in this matter. [Order, 3/08/10, pp. 6-7. See also: Assignment Of Error V.] There are also indications that the Circuit Court has proceeded through the entire panoply of steps required for the determination of a sexually violent predator designation, as prescribed by W.Va. Code § 15-12-2a. [TR. 6/28/10, pp. 104-105.] While the Appellant finds the use of both approaches somewhat confusing, he chooses here to address the latter one.

Since the Circuit Court has determined that the Appellant is a sexually violent predator, as set forth in the Circuit Court’s “Final Order Determining The Defendant To

Be A Sexually Violent Predator”, the Appellant is subject to the provisions of W.Va. Code § 62-12-26(a)&(g), because the Circuit Court’s determination was made **after** the effective date of the statute (October 1, 2006). Thus, a lifelong period of supervised release has been imposed upon the Appellant [§ 62-12-26(a)], as well as the possibility of re-incarceration, should his supervised release later be revoked. [§ 62-12-26(g)(3)].

Supervised release, and its subsequent revocation and associated periods of re-incarceration, have been generally held by the Courts to be punitive in nature,⁵ although the Circuit Court’s “Final Order Determining The Defendant...” indicates that no new punishment is being imposed upon the Appellant as a result of determining that he is a sexually violent predator. [Final Order, pp. 2-3.] Supervised release has been held to be a part of the penalty for the original, underlying offense. As the US Supreme Court held in Johnson v. United States, 529 U.S. 694, 120 S. Ct. 1795, 146 L. Ed. 2d 727, 736 (2000):

...serious constitutional questions...would be raised by construing revocation and re-imprisonment as punishment for the violation of the conditions of supervised release...Treating post-revocation sanctions as part of the penalty for the initial offense, however (as most courts have done), avoids these difficulties...(sanctions for violating the conditions of supervised release are **part of the original sentence**) [citing United States v. Wyatt, 102 F. 3d 241, 244-245 (7th Cir. 1996)] [**emphasis added**]

⁵ The punitive nature of W.Va. Code § 62-12-26(a) is confirmed by its own language “...shall be subject, **in addition to any other penalty** or condition imposed by the Court, to supervised release for life.” [**emphasis added**] Furthermore, W.Va. Code § 62-12-26 is found among the Criminal Procedure statutes. However, W.Va. Code § 62-12-26 is the subject of a Constitutional challenge in a case which is currently pending before this Court. [See: State v. Charles J. James, Supreme Court No. 35557, Fall 2010 term.]

...serious constitutional questions... would be raised by construing revocation and re-imprisonment as punishment for the violation of the conditions of supervised release... Treating post-revocation sanctions as part of the penalty for the initial offense, however (as most courts have done), avoids these difficulties... (sanctions for violating the conditions of supervised release are **part of the original sentence**) [citing United States v. Wyatt, 102 F. 3d 241, 244-245 (7th Cir. 1996)] [**emphasis added**]

The Appellant herein, has previously discharged his sentence of incarceration on June 13, 2006. As such, his punishment for his underlying offenses ended at that time. The Double Jeopardy Clause, found in the 5th Amendment to the U.S. Constitution, and in Article 3, Section 5, W.Va. Constitution, guarantees that a criminal defendant is protected against a second prosecution for the same offense after conviction, and the same Clause also prohibits multiple punishments for the same offense. Syllabus Point 2, State v. Brown, 212 W.Va. 397, 572 S.E. 2d 920 (2002). Now, however, the Circuit Court, by making a finding that he is a sexually violent predator, has exposed the Appellant to an additional penalty of lifelong supervised release and the possibility of re-incarceration for his underlying offense. That additional penalty constitutes, in its purest form, *double jeopardy*, by imposing two punishments, one some four years after the discharge of the other, for the same underlying offenses.

VII. It was error for the Circuit Court of Berkeley County, WV, to grant the State's Motion, when by doing so the Circuit Court has violated the Constitutional protections afforded to the Appellant against *Ex Post Facto* applications of the law, as embodied in Article I, Section 9, of the U.S. Constitution, and Article 3, Section 4, of the W.Va. Constitution.
[TR. 2/25/10, pp. 6-7; TR. 6/28/10, pp.18-19; Final Order, 7/06/10, pp. 2-3.]

Once again, in spite of the two different approaches for making a determination that the Appellant is or is not a sexually violent predator found in the Circuit Court's "Order Granting State's Motion...", entered on March 8, 2010, the Appellant now chooses to present his argument based on the latter approach, that the Circuit Court has

employed the full panoply of steps found in W.Va. Code § 15-12-2a, in making its determination.

Should the Circuit Court now be permitted to enforce its “Final Order Determining The Defendant To Be A Sexually Violent Predator”, and impose upon him all of the conditions and penalties which such a finding implies, the Appellant will have become subject to the provisions of W.Va. Code § 62-12-26(a)&(g), because the Circuit Court’s determination has been made **after** the effective date of that statute (October 1, 2006). Thus, a lifelong period of supervised release has been imposed upon the Appellant [§ 62-12-26(a)], as well as the possibility of re-incarceration, should his supervised release later be revoked. [§ 62-12-26(g)(3)].

One of the most basic tenets of Constitutional law, as embodied in the *Ex Post Facto* Clause, is that legislation, particularly of the criminal sort, is not to be applied retroactively. Richmond v. Levin, 219 W.Va. 512, 637 S.E. 2d 610 (2006). Obviously, W.Va. Code § 62-12-26(a) is located in this State’s statutes related to **Criminal Procedure**. Although subsection (a) refers to “...any defendant convicted **after** the effective date of this section...”, (which would, of course, make it inapplicable to the Appellant), that portion of the statute appears to be in conflict with a latter portion of subsection (a), which states: “*Provided however*, That a defendant **designated** (as a sexually violent predator) **after the effective date of this section**...shall be subject...to supervised release for life:” (which would be applicable to the Appellant). [**emphasis added**] In general, under *ex post facto* principles, a law which is passed after the commission of an offense which increases punishment, lengthens a sentence or operates to the detriment of the accused, cannot be applied to him. State v. Wood, 194 W.Va. 525,

460 S.E. 2d 771 (1995). However, the application of W.Va. Code § 62-12-26(a) to the Appellant in this instance, would be retroactive in its application, would increase his punishment and potentially lengthen his sentence of incarceration, and, therefore, violates *ex post facto* prohibitions. The US Supreme Court, in Johnson, *supra*, at 736, held that:

Since post-revocation penalties relate to the original offense, to sentence Johnson to a further term of supervised release...would be to apply this section retroactively (and to raise the remaining *ex post facto* question, whether that application makes him worse off.)

The Appellant believes that because the Circuit Court has now designated him to be a sexually violent predator, that subjects him to the mandatory, lifelong supervised release and possible re-incarceration provisions of W.Va. Code § 62-12-26(a)&(g), but does so at the expense of violating the *Ex Post Facto* Clause, because his conviction occurred and sentence was imposed and discharged before the effective date of W.Va. Code § 62-12-26(a)&(g), Revised. [effective date 10/01/06] The Appellant's position on this issue is further supported by the findings of the US Supreme Court in Greenfield v. Scafati, 390 U.S. 713, 88 S. Ct. 1409, 20 L. Ed. 2d 250 (1968), a case in which that Court affirmed the ruling of a lower Court which forbade, on the basis of *Ex Post Facto* grounds, the application of a Massachusetts statute imposing sanctions for violation of parole to a prisoner originally sentenced before its enactment. Such is the current posture of the Appellant, in that, because the Circuit Court has now designated him to be a sexually violent predator, he will be subject to lifelong supervised release and possible re-incarceration, as a result of a statute which did not become effective until nearly four months after he had discharged his sentence of incarceration for his original offenses.

VIII. It was error for the Circuit Court of Berkeley County, WV, to grant the State's Motion, when the State's Motion, as well as the Circuit Court's Order granting the same, relied in part upon the contents of the Appellant's 60-Day

Pre-sentence Evaluation Report, which had been prepared solely for the purpose of sentencing in the underlying matter, the sentence for which had been discharged some four years earlier. The improper use of the Appellant's pre-sentence report, therefore, violated his Constitutional 5th Amendment Right to remain silent. [TR. 6/28/10, pp. 12-15, 47-51, 54-55, 68-70, 97-98, 101, 108, 110-111, 113; Final Order, 7/06/10, pp. 2-5.]⁶

The issue of the State's improper use of the Appellant's 60-Day Pre-sentence Evaluation Report has been previously raised and argued before this Court.⁷

In the Respondent's "Response To Petition For Writ Of Prohibition", filed by Respondent's Counsel in that matter, on or about January 11, 2010, Counsel for the Respondent, (the same Counsel representing the State of West Virginia in this matter), cited numerous cases from other jurisdictions which stand for the proposition that a criminal defendant is not entitled to a Miranda-type⁸ warning prior to an interview conducted in the furtherance of completing a pre-sentence mental evaluation.⁹ Nearly all of those cases did concede that the same criminal defendant did possess a 5th Amendment Right to remain silent during the course of the pre-sentence interview. However, that right was considered to be "waived", if it had not been directly asserted or invoked by the defendant. Generally, the waiver of any fundamental Constitutional right must be a knowing, intelligent and voluntary waiver. Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); Gardner v. Broderick, 392 U.S. 273, 88 S. Ct. 1913, 20

⁶ The Appellant first raised the issue of the improper use of his Pre-sentence Report in the determination of sexually violent predator status in the Circuit Court, in the "Defendant's Response To Motion To Determine The Defendant To Be A Sexually Violent Predator", p.3, #6, Case No. 95-F-44, filed 6/16/2009.

⁷ SER Stanley Myers v. Hon. Gina Groh, Supreme Court No. 35473, denied/remanded, June 4, 2010.

⁸ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

⁹ There are cases which did not arrive at the same conclusion. See: Jones v. Cardwell, 686 F. 2d 754, 756 (9th Cir. 1982), a case in which the defendant's pre-sentence report was deemed to have violated his 5th Amendment Rights because the interviewer had extracted, and the pre-sentence report contained, statements which the defendant had made regarding the commission of other crimes for which he had not been convicted, similar to the pre-sentence report in the case *sub judice*.

right was considered to be “waived”, if it had not been directly asserted or invoked by the defendant. Generally, the waiver of any fundamental Constitutional right must be a knowing, intelligent and voluntary waiver. Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); Gardner v. Broderick, 392 U.S. 273, 88 S. Ct. 1913, 20 L.Ed. 2d 1082 (1968). In the cases cited by the Respondent’s Counsel (now the State), the criminal defendants had, for the most part, been advised by their pre-sentence report interviewers, either verbally or in writing, or in some cases advised by their attorneys, that they did not have to answer the questions put to them during the course of the pre-sentence interview. Those same defendants were advised that the **purpose** of the interview was to prepare a report which was to be used exclusively for sentencing for the underlying crimes for which they had just been convicted.

The Appellant’s case may be distinguished from those cases cited by the Respondent’s Counsel (now the State). While it may have been possible for the Appellant to have waived his 5th Amendment right with respect to the use of his 60-Day Pre-sentence Report **at his Sentencing Hearing** in Case No. 95-F-44, because he did not object to its use at the time of sentencing and had not previously asserted his 5th Amendment right (because he had not been advised by his pre-sentence interviewer or his Counsel that he could assert it), a knowing and intelligent waiver of the Appellant’s 5th Amendment right would not necessarily have followed with respect to the instant issue—the use of the Appellant’s 60-Day Pre-sentence Report to support the State’s “Motion To Determine The Defendant To Be A Sexually Violent Predator”. The Appellant had no way of anticipating that his 60-Day Pre-sentence Report would or could later be used for another

purpose. The Appellant was not advised by his pre-sentence interviewer or by his trial Counsel (who was later found to be ineffective), that his pre-sentence report might later be used for any other purpose, other than for sentencing for his underlying convictions. In fact, W.Va. Code § 15-12-2a provides a specific mechanism which a Circuit Court may use for conducting mental/psychiatric evaluations for a person being considered for a sexually violent predator determination, rather than relying upon a previously prepared pre-trial or pre-sentence evaluation.¹⁰

The Appellant's situation is similar to that of the defendants in Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981); Pens v. Bell, 902 F. 2d 1404 (9th Cir. 1990); and, U.S. v. Harrington, 923 F. 2d 1371 (9th Cir. 1991). [See also: United States v. Cortes, 922 F. 2d 123, 126-27 (2nd Cir. 1990)] In those cases, the defendants' statements given during the course of psychiatric evaluations were later used against them for a purpose other than their originally intended purpose. Those Courts agreed that such a scenario violated those defendants' constitutional rights. In Harrington, supra, at 1377, the Court stated that:

Here, the Oregon statute assured Harrington that, except for the Oregon state crimes of which he then stood convicted, his statements would not "be used against [him] in any civil proceeding or in any other criminal proceeding." Or. Rev. Stat. § 161.735(4)...Here, Harrington's statements were used against him in a federal sentencing proceeding. The use of Harrington's statements, however, does violate federal constitutional law. His statements were made against the backdrop of the Oregon statute which assured him his statements would not be used against him in future criminal proceedings.

¹⁰ While W.Va. Code § 62-8F-2(j) once provided that the determination of whether or not a defendant is a sexually violent predator was to be made based upon the results of a pre-sentence report prepared pursuant to W.Va. Code § 62-12-2, that has not been the case since that statute was repealed in 1999.

In like fashion, the Appellant's trial Counsel had assured him that the language of W.Va. Code § 62-12-2(e) protected him from the future use of his statements made during the course of his pre-sentence evaluation (with the exception of at his upcoming sentencing in Case No. 95-F-44), in any court proceedings. Otherwise, with his direct appeal then pending before this Court and the possibility of a new trial on the table, the Appellant would certainly have chosen to have remained silent. To the extent that the Appellant's statements contained in his 60-Day Pre-sentence Report might be considered by the State to be **non-incriminating** because they are not being used, in this instance, at trial in a criminal proceeding, the Appellant disagrees with that position. W.Va. Code § 62-12-2(e) provides protection for the criminal defendant against **all disclosures** made by him/her, during the course of a pre-sentence evaluation, whether those disclosures are incriminating or not. Because the Sex Offender Registration Advisory Board and the Circuit Court have substantially relied upon the contents of his 60-Day Pre-sentence Report in making a sexually violent predator recommendation and determination, [TR. 6/28/10, pp. 12-15, 47-51, 54-55, 68-70, 97-98, 101, 108, 110-111, 113; Final Order, 7/06/10, pp. 2-5], the Appellant will now, as a result of being determined to be a sexually violent predator, be subjected to additional punishment, i.e., lifelong supervised release and possible re-incarceration for revocation of the same. ¹¹ W.Va. Code § 62-12-

¹¹ In addition to the Appellant's 60-Day Pre-sentence Evaluation Report, the State, much to the surprise of the Appellant and his Counsel, also apparently provided the Sex Offender Registry Advisory Board with a copy of the Appellant's psychological evaluation conducted by Psy Med at the Mount Olive Correctional Complex in 2003. [TR. 6/28/10, pp. 58-61, 67-68.] That report was prepared solely for the purpose of the Appellant's consideration for parole, which is a protected liberty interest. However, the State has utilized that report instead to eradicate the liberty which the Appellant had possessed until recently, by now subjecting him to the supervised release and re-incarceration provisions of W.Va. Code § 62-12-26(a)(c)&(g). The Appellant was not advised by the W.Va. Division of Corrections that said psychological evaluation report would be used for any purpose other than his consideration for parole.

26(a)(c)&(g). The Appellant believes that the use of and reliance upon the contents of his 60-Day Pre-sentence Evaluation Report for the purpose set forth herein, constitute plain error on the part of the State and the Circuit Court, because it violates the protections provided to him by the 5th Amendment, against the un-cautioned use of his statements.

CONCLUSION AND PRAYER FOR RELIEF

This Court should recognize that the purely regulatory sections of W.Va. Code § 15-12-1 et. seq., the “West Virginia Sex Offender Registration Act”, which deal strictly with sex offender registration requirements, must be distinguished from certain other sections of the statute, such as § 15-12-2a which deals solely with the Court determination of sexually violent predator status. For example: W.Va. Code § 15-12-2(b) dictates that persons who have been convicted in other States of sexual offenses, the elements of which are essentially the same as those requiring registration in West Virginia, must also register in this State, if they either reside or work in West Virginia. The same registration requirements would be applicable, if the offenders from other States are being supervised in West Virginia while on probation or parole. However, **no provision** is found in W.Va. Code § 15-12-2a which would permit a Circuit Court of this State to determine that a person convicted in another State for a sexually violent offense, similar to those defined by W.Va. Code § 15-12-2(i)(1)(2)&(3), is a sexually violent predator, as defined by W.Va. Code § 15-12-2(k). [i.e., “**The Circuit Court that has sentenced a person** for the commission of a sexually violent offense...shall make a determination...” W.Va. Code § 15-12-2a(a). (**emphasis added**)] In fact, the language of the statute appears to forbid the Circuit Courts of this State from making such a determination. Why is that the case?

There can be only one logical and rational explanation for what might otherwise appear to be a serious legislative omission or oversight. The Circuit Courts of this State maintain jurisdiction to make a determination about the sexually violent predator status of an offender **only while** that offender remains “under sentence” **and** “in custody” pursuant to a judgment imposed by a Circuit Court of this State. An offender convicted in another State of an offense having elements identical to those of the sexually violent offenses set forth in W.Va. Code § 15-12-2(i), even if subject to supervision on probation or parole in this State, is not, has not been and never will be “under sentence” and “in custody” pursuant to a judgment of the Courts of this State, for the involved underlying convictions. Similarly, at the time at which the State brought its “Motion To Determine The Defendant To Be A Sexually Violent Predator”, June, 2009, the Appellant was not “under sentence” and “in custody” pursuant to the judgment of a Circuit Court of this State, since he had previously discharged the sentence for his underlying conviction in June of 2006, some three years earlier.

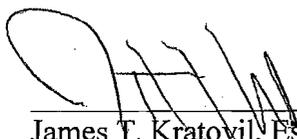
Simply put, because the Appellant is no longer “in custody” for the original offenses involved in Circuit Court Case No. 95-F-44, he is powerless, under the law, to re-open that Case on his own behalf, for any reason. The Appellant is left to wonder then, how either the State or the Circuit Court can now revisit that old Criminal Case, for which he has discharged his sentence more than four years ago, in a way which is detrimental to him? [TR. 2/25/10, pp. 42-43]

The Appellant respectfully requests that the Honorable West Virginia Supreme Court of Appeals, after having reviewed the Briefs submitted by Counsel and having heard oral arguments on the same, will **GRANT** his Petition For Appeal in this matter,

and will forthwith, Enter an Order reversing the Judgment of the Circuit Court of Berkeley County, WV, vacating and/or voiding that Court's "Final Order Determining The Defendant To Be A Sexually Violent Predator", entered in the underlying matter on July 6, 2010.

**Stanley M. Myers, Appellant
By Counsel.**

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, James T. Kratovil, Esq., Counsel for the Appellant, hereby Certify that I have Served a true and complete copy of the foregoing Appellant's Brief In Support Of Petition For Appeal upon Counsel for the Appellee, as listed below, by X First Class U.S. Mail delivery, postage prepaid/ 2 facsimile, on this 4th day of October, 2010.

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Appendix A

Qualifying "Sexually Violent Offenses" Pursuant to W.Va. Code § 15-12-2(i) By County of Registration

Qualifying Sexually Violent Offense	Berkeley County	Jefferson County	Morgan County
1 st degree sexual assault W.Va. Code § 61-8B-3	1	3	4
2 nd degree sexual assault W.Va. Code § 61-8B-4	4	1	2
Sexual assault of spouse W.Va. Code § 61-8B-6	0	0	0
1 st degree sexual abuse W.Va. Code 61-8B-7	16	6	3
Totals	21	10	9

Total number of qualifying offenses/cases in the 23rd Judicial Circuit = 40.

These numbers include those registrants currently residing/working in the Counties indicated.

These numbers do not include those persons still incarcerated, who have not yet registered with the State Police