

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA,

Appellee/Plaintiff below,

v.

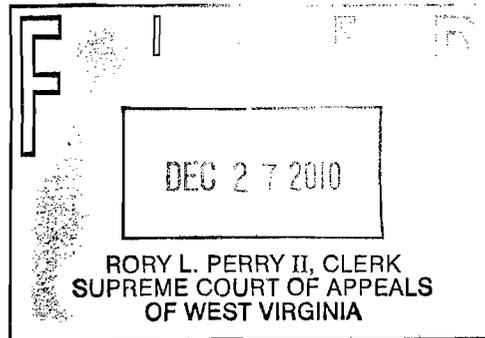
Docket No.: 35672

[Berkeley County Case No.: 95-F-44]

STANLEY MELVIN MYERS,

Appellant/Defendant below.

APPELLEE STATE OF WEST VIRGINIA'S BRIEF



Christopher C. Quasebarth
Chief Deputy Prosecuting Attorney
State Bar No. 4676
380 W. South Street, Ste. 1100
Martinsburg, West Virginia 25401
304-264-1971
cquasebarth@berkeleycountycomm.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. ASSIGNMENTS OF ERROR.....1.

II. STATEMENT OF THE CASE.....2-10.

III. SUMMARY OF THE ARGUMENT.....11-12.

IV. ARGUMENT.....13-52.

A. THE CIRCUIT COURT PROPERLY RULED THAT THERE WAS NO STATUTE OF LIMITATIONS FOR BRINGING A MOTION TO DETERMINE WHETHER ONE IS A SEXUALLY VIOLENT PREDATOR.....13-20.

B. THE CIRCUIT COURT PROPERLY RULED THAT THERE WAS NO *RES JUDICATA* BARRING THE MOTION TO DETERMINE THE APPELLANT A SEXUALLY VIOLENT PREDATOR.....20-22.

C. THE CIRCUIT COURT PROPERLY RULED THAT THE STATE WAS NOT COLLATERALLY ESTOPPED FROM PURSUING THE MOTION TO DETERMINE THE APPELLANT A SEXUALLY VIOLENT PREDATOR.....22-24.

D. THE CIRCUIT COURT PROPERLY RULED THAT W. VA. CODE § 15-12-2a PROVIDES NO TIME LIMITATION FOR BRINGING A MOTION TO DETERMINE WHETHER ONE IS A SEXUALLY VIOLENT PREDATOR.....25-34.

E. THE CIRCUIT COURT PROPERLY RULED THAT FINDING THE APPELLANT TO BE A SEXUALLY VIOLENT PREDATOR WAS NOT A MODIFICATION OF THE PLEA AGREEMENT.....34-40.

F. THE CIRCUIT COURT PROPERLY RULED THAT FINDING THE APPELLANT TO BE A SEXUALLY VIOLENT PREDATOR WAS NOT A VIOLATION OF DOUBLE JEOPARDY.....40-42.

G. THE CIRCUIT COURT PROPERLY RULED THAT FINDING THE APPELLANT TO BE A SEXUALLY VIOLENT PREDATOR WAS NOT A VIOLATION OF *EX POST FACTO* PRINCIPLES.....42-43.

H. THE CIRCUIT COURT PROPERLY CONSIDERED THE APPELLANT’S PRE-SENTENCE REPORT IN FINDING THE APPELLANT TO BE A SEXUALLY VIOLENT PREDATOR.....44-52.

VI. CONCLUSION.....52-53.

ATTACHMENTS A & B.....54-59.

TABLE OF AUTHORITIES

Federal

<i>United States Const.</i> , Am. 5.....	48.
<u>Estelle v. Smith</u> , 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).....	48-49.
<u>Minnesota v. Murphy</u> , 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984).....	49, 52.
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).....	49.
<u>Baumann v. United States</u> , 692 F.2d 565, 576 (9th Cir.1982).....	50.
<u>Pens v. Bail</u> , 902 F.2d 1464 (9th Cir., 1990).....	50, 51.
<u>United States v. Cortes</u> , 922 F.2d 123 (2d Cir.1990).....	50.
<u>U.S. v. Harrington</u> , 923 F.2d 1371 (9 th Cir., 1991).....	50-51.
<u>United States v. Miller</u> , 910 F.2d 1321 (6th Cir.1990).....	50.
<u>United States v. Rogers</u> , 921 F.2d 975 (10th Cir.1990).....	50.

State

<i>W. Va. Const.</i> , Art. III, § 5.....	48.
<u>Frederick Management Co., L.L.C. v. City Nat. Bank of West Virginia</u> , — W. Va. —, — S.E.2d — (Docket No.: 35438, decided November 23, 2010).....	23, 24.
<u>Haislop v. Edgell</u> , 215 W.Va. 88, 593 S.E.2d 839 (2003).....	18, 36.
<u>Hensler v. Cross</u> , 210 W.Va. 530, 558 S.E.2d 330 (2001).....	36, 42-43.
<u>Hughes v. Gwinn</u> , 170 W.Va. 87, 290 S.E.2d 5 (1982).....	49.
<u>Myers v. West Virginia Consol. Public Retirement Bd.</u> , — W. Va. —, — S.E.2d — (Docket No.: 35470 and 35507, decided November 22, 2010).....	21, 23.
<u>State v. Godfrey</u> , 170 W. Va. 25, 289 S.E.2d 660 (1981).....	47.

<u>State v. Hayhurst</u> , 207 W.Va. 259, 531 S.E.2d 324 (2000).....	38.
<u>State v. Rodoussakis</u> , 204 W. Va. 58, 511 S.E.2d 469 (1998).....	45.
<u>State v. Salmons</u> , 203 W. Va. 561, 509 S.E.2d 842 (1998).....	45.
<u>State v. Smith</u> , 225 W.Va. 706, 696 S.E.2d 8 (2010)	13, 20, 22, 23, 24, 25, 34, 40, 42, 43, 46, 52.
<u>State v. Whalen</u> , 214 W.Va. 299, 588 S.E.2d 677 (2003).....	38.
<u>State ex rel. Bradley v. Johnson</u> , 152 W.Va. 655, 166 S.E.2d 137 (1969), <i>overruled on other grounds</i> , <u>State v. Eden</u> , 163 W.Va. 370, 256 S.E.2d 868 (1979)....	18.
<u>State ex rel. Brewer v. Starcher</u> , 195 W.Va. 185, 465 S.E.2d 185 (1995).....	36, 37.
<u>State ex rel. Forbes v. Kaufman</u> , 185 W.Va. 72, 404 S.E.2d 763 (1991).....	38.
<u>State ex rel. Games-Neely v. Silver</u> , 226 W.Va. 11, 697 S.E.2d 47 (2010).....	40.
<u>State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.</u> , 200 W.Va. 221, 488 S.E.2d 901 (1997).....	19.
<u>State ex rel. Thompson v. Watkins</u> , 200 W.Va. 214, 488 S.E.2d 894 (1997).....	38.
<u>Webster County Com'n v. Clayton</u> , 206 W.Va. 107, 522 S.E.2d 201, 206 (1999).....	25.
W. Va. Code § 15-12-1, et seq. ,.....	18, 25, 26, 37.
W. Va. Code § 15-12-1a(a)	36.
W. Va. Code § 15-12-2(e)	27-29.
W. Va. Code § 15-12-2(f)	27-29, 39, 41.
W. Va. Code § 15-12-2(i)	14-15.
W. Va. Code § 15-12-2(k)	14.
W. Va. Code § 15-12-2(l)	15.
W. Va. Code § 15-12-2(m)	15.
W. Va. Code § 15-12-2a	13, 16, 18, 20, 21, 22, 23, 24, 25, 26, 31, 33, 34, 38, 40, 42, 47, 48, 51, 52-53.

W. Va. Code § 15-12-3a.....	26, 27.
W. Va. Code § 15-12-10.....	39, 41.
W. Va. Code § 17B-2-3(b).....	39, 41.
W. Va. Code § 55-2-12.....	19.
W. Va. Code § 62-12-2(e).....	51, 52.
W. Va. Code § 61-12-2(f).....	30.
W. Va. Code § 61-12-2(g).....	30, 31.
W. Va. Code § 62-12-7.....	47.
W. Va. Code § 62-12-7a.....	47, 48, 51, 52.
W. Va. Code § 62-12-26.....	31-33, 39-40, 41, 43.
<i>W.V.R.C.P.</i> 60.....	19.
<i>W.V.R.Cr.P.</i> 32(b)(3).....	47.
<i>W.V.R.P.C.</i> 3.3.....	17.
81 CSR 14-11.....	26.
84 CSR 14-11-5.1.....	36.

Other states

<u>Dzul v. State</u> , 118 Nev. 681, 56 P.3d 875 (2002).....	50, 52.
<u>People v. Bachman</u> , 127 Ill.App.3d 179, 82 Ill.Dec. 270, 468 N.E.2d 817 (1984).....	50.
<u>People v. Corrigan</u> , 129 Ill.App.3d 787, 84 Ill.Dec. 924, 473 N.E.2d 140 (1985).....	50.
<u>People v. Hillier</u> , 392 Ill.App.3d 66, 910 N.E.2d 181 (Ill. App. 3 Dist., 2009).....	49-50, 52.
<u>People v. Wright</u> , 431 Mich. 282, 430 N.W.2d 133 (1988).....	50, 52.

I. ASSIGNMENTS OF ERROR.

A. WHETHER THE CIRCUIT COURT PROPERLY RULED THAT THERE WAS NO STATUTE OF LIMITATIONS FOR BRINGING A MOTION TO DETERMINE WHETHER ONE IS A SEXUALLY VIOLENT PREDATOR?

B. WHETHER THE CIRCUIT COURT PROPERLY RULED THAT THERE WAS NO *RES JUDICATA* BARRING THE MOTION TO DETERMINE THE APPELLANT A SEXUALLY VIOLENT PREDATOR?

C. WHETHER THE CIRCUIT COURT PROPERLY RULED THAT THE STATE WAS NOT COLLATERALLY ESTOPPED FROM PURSUING THE MOTION TO DETERMINE THE APPELLANT A SEXUALLY VIOLENT PREDATOR?

D. WHETHER THE CIRCUIT COURT PROPERLY RULED THAT **W. VA. CODE § 15-12-2a** PROVIDES NO TIME LIMITATION FOR BRINGING A MOTION TO DETERMINE WHETHER ONE IS A SEXUALLY VIOLENT PREDATOR?

E. WHETHER THE CIRCUIT COURT PROPERLY RULED THAT FINDING THE APPELLANT TO BE A SEXUALLY VIOLENT PREDATOR WAS NOT A MODIFICATION OF THE PLEA AGREEMENT?

F. WHETHER THE CIRCUIT COURT PROPERLY RULED THAT FINDING THE APPELLANT TO BE A SEXUALLY VIOLENT PREDATOR WAS NOT A VIOLATION OF DOUBLE JEOPARDY?

G. WHETHER THE CIRCUIT COURT PROPERLY RULED THAT FINDING THE APPELLANT TO BE A SEXUALLY VIOLENT PREDATOR WAS NOT A VIOLATION OF *EX POST FACTO* PRINCIPLES?

H. WHETHER THE CIRCUIT COURT PROPERLY CONSIDERED THE APPELLANT'S PRE-SENTENCE REPORT IN FINDING THE APPELLANT TO BE A SEXUALLY VIOLENT PREDATOR?

II. STATEMENT OF THE CASE.

A. State v. Myers, Case No.: 95-F-44.

1. Pursuant to a plea agreement, the Appellant pleaded guilty in 2003 before the Honorable David H. Sanders to three felony counts of Sexual Abuse in the First Degree (as lesser-included felonies of the indicted charges of Sexual Assault in the First Degree) and one count of Sexual Assault in the Third Degree. The trial court sentenced the Appellant to four consecutive statutory 1-5 year penitentiary terms. The trial court also found the Appellant to be “a SEXUAL PREDATOR within the meaning of that term as used in West Virginia law.” The Appellant is to register for life as a sexual offender. The Appellant was fined \$8000.00 and assessed costs. [Conviction and Sentence Order, 3/25/03, State v. Stanley Myers, Case No.: 95-F-44; R. 1-8.]

2. Prior to that conviction by guilty plea, the Appellant was convicted in the same case at a 1996 jury trial of three indicted felony counts of Sexual Assault in the First Degree and one indicted felony count of Sexual Assault in the Third Degree, for which he was sentenced to three consecutive 15-35 year sentences and one 1-5 year sentence. [Order, 4/23/97]

3. This Court refused the Petition for Appeal from that first conviction. [Supreme Court Order; 6/25/97.]

4. This Court heard an interlocutory writ during the course of the Appellant’s habeas corpus proceedings, and ruled that an Appellant’s assertion of the Fifth Amendment in a civil habeas proceeding may be construed against him. State ex rel. Myers v. Sanders, 206 W. Va. 544, 526 S.E.2d 320 (1999).

5. The circuit court denied the Appellant habeas relief after an evidentiary hearing. State

ex rel. Myers v. Painter, Case No.: 98-C-96.

6. This Court, however, on appeal reversed the circuit court's habeas denial and reversed the Appellant's conviction and remanded the matter back to the trial court for a new trial. State ex rel. Myers v. Painter, 213 W.Va. 32, 576 S.E.2d 277 (2002).

7. Shortly thereafter, Appellant pleaded guilty as described in Paragraph 1, above.

8. The Appellant appealed to this Court from his guilty plea, which conviction was affirmed by written opinion. State v. Myers, 216 W.Va. 120, 602 S.E.2d 796 (2004).

9. The Appellant was discharged from incarceration in 2006 and returned to Berkeley County. He there registered as a sexual offender.

B. State v. Myers, Case Nos.: 09-F-127 and 10-F-22.

1. In mid-February, 2009, a librarian at the Berkeley County Martinsburg Public Library observed the Appellant with a young boy. The boy was then observed to retrieve a note and some candy from a specific book on the shelf. On February 18, 2009, the librarian found the same book with a new note and some more candy. The note read as follows:

2/18/09 J-Bug:

Hope you enjoyed your day off from school, even if it was ugly outside. Just want you to know you are really special to me, and your smile makes my day! You now have \$10⁰⁰ more on your Amazon account.

Love ya,
S

[Martinsburg Police Report; State Police Report.]

2. The police were notified. The police located the Appellant and spoke with him. The boy identified the Appellant as the person leaving him notes and candy. Further investigation

revealed that the Appellant had been told by the boy's parents to stay away from their child when they found out he was a sex offender, and that the Appellant established an internet account to contact the boy, of which account, as a registered sex offender, he was required to notify the State Police but never had. [West Virginia State Police Report.]

3. The Appellant was indicted for one felony count of Failure to Register as a Sex Offender and one misdemeanor count of Contributing to the Delinquency of a Minor. [Indictment, 5/20/09; Berkeley County Case No.: 09-F-127; R. 11-14.] The Appellant is released on supervised bail. This case is still pending and scheduled for trial in March 2011.

4. Subsequent investigation revealed that the Appellant was utilizing two more internet accounts to communicate with and purchase gifts for the same boy, of which accounts he also did not notify the State Police. The Appellant was then indicted for two more felony counts of Failure to Register as a Sex Offender. [Indictment, 2/17/10; Berkeley County Case No.: 10-F-22.] This case was joined for trial with Case No.: 09-F-127 and is scheduled for trial in March 2011.

5. Despite being represented by counsel, the Appellant *pro se* sought a writ of prohibition from this Court on an evidentiary matter related to expert testimony regarding his sexually predatory conduct. This Court appointed the Appellant's trial counsel to the case. This Court remanded the matter to the circuit court after this Court heard argument. [Order, 6/4/10; SER Myers v. Groh, Docket No.: 35473.] This matter is still pending before the circuit court.

C. Sexually Violent Predator Finding, Case No.: 95-F-44.

1. The brief history of Case Nos. 09-F-127 and 10-F-22, above, is relevant to this proceeding because at the time of arraignment in Case No.: 09-F-127, the State was first made

aware that the State Police were not registering the Defendant as a “sexually violent predator,” pursuant to **W. Va. Code** § 15-12-2a, because the language of the sentencing order in Case No.: 95-F-44 only uses the phrase “sexual predator” and not “sexually violent predator.” The State then filed a Motion to Determine Defendant to be a Sexually Violent Predator in the original criminal case. [Motion to Determine Defendant to be a Sexually Violent Predator, 6/12/09; Case No.: 95-F-44; R. 15-29.]

2. The Appellant, unrepresented by counsel, opposed the filing of the motion on procedural grounds. [R. 30-36, 38-48.]

3. Following hearing where the Appellant was represented by counsel, the circuit court directed the parties to submit proposed orders. [Order From Status Hearing, 7/13/09.] The State filed its proposed Order. [Order Permitting Filing of State’s Motion to Determine the Defendant to be a Sexually Violent Predator, 8/21/09; R. 49-57.]

3. In an attempt to stop the circuit court from moving forward with the State’s Motion to Determine the Defendant to be a Sexually Violent Predator, and despite being represented by counsel, in January 2010, the Appellant *pro se* filed a Petition for Writ of Prohibition with this Court. The Petition was refused on April 14, 2010. [SER Myers v. Groh, Docket No.: 10013.]

4. Meanwhile, at hearing on February 25, 2010, before the Honorable Gina M. Groh, the circuit court inquired of the Appellant’s counsel, Mr. Kratovil, as to Judge Sanders’ finding in the Conviction and Sentencing Order that the Appellant is “a SEXUAL PREDATOR within the meaning of that term as used in West Virginia law”:

THE COURT: Well, there’s no such thing as a sexual predator. So it had to have been contemplated that it would be a sexually violent predator finding a designation, correct?

MR. KRATOVIL: I don't think so, Your Honor. I mean if you--

THE COURT: Then why did it slip through in the order of conviction and sentence? How did it get past defence counsel?

MR. KRATOVIL: Well, Your Honor, Mr. Quasebarth wanted to have Mr. Myers designated as a sexual predator. And he wanted the Court to make that finding, and we had no objection to it because as a practical matter, other than the slanderous sort of nature of a finding of that kind, it had no real legal effect.

[Tr. 2/25/10, p. 10, l. 1-15.]

5. The circuit court inquired further:

THE COURT: So you're telling me that defense counsel agreed to go into court and advise the judge that the Court accepting the plea could make a finding that your client or apply a label to your client that had no basis in law?

MR. KRATOVIL: Well, Your Honor, it has a basis in law. The Court can make any finding it wants as long as the parties agree to it. And if they want to characterize Mr. Myers as a sexual predator, okay. I have no objection to it. I mean Mr. Quasebarth wanted it. We had no objection to it because it didn't really mean much other than he would have to bear that label that the Court had made a finding of that in fact.

THE COURT: But it's quite a stigma. It's quite a stigma if it has no legal meaning. You know, what you're telling me is that Mr. Quasebarth will come in here to sentencing and tell me, well, you could--you know, Judge, we want you to label this client as a this, as a that, as you said, an evil person, you know, Joe so and so, on his rape and robbery, and why don't you throw in there that he is a scumbag for the parole board, Your Honor; and defense counsel would permit that?

MR. KRATOVIL: Sure. We wanted a binding plea. We were getting a reduction in the exposure that Mr. Myers had. The time he was going to spend. And I think that Mr. Myers and I, we sort of agreed that it didn't make any difference what designation Mr. Quasebarth wanted to put on him. He was going to kill his

sentence no matter what, and he did kill his sentence.

THE COURT: And you're telling me as an officer of this court that in your mind when you made that agreement with Mr. Quasebarth, it was your intent for him to just be labeled as a sexual predator understanding that it had no legal meaning?

MR. KRATOVIL: As an officer of the Court, Your Honor, I was—and after discussions with my client, we were willing to accept the offer made by the prosecutor. And the offer made by the prosecutor was accepted. We agreed to it in full. We signed the plea agreement. We didn't object when he made the representation at the sentencing hearing. We didn't object when the judge made the finding. We didn't object when the judge read Mr. Myers his reporting requirements. We didn't object when the final order was entered. We accepted in total what Mr. Quasebarth offered us.

THE COURT: That is not what I am asking you. What I'm asking you is, is that you're telling me—if I understand what you're telling me correctly—after we pare all this down is that you contemplated in presenting this plea to the Court that you would ask the Court to make a finding that Mr. Myers was a sexual predator with the understanding that it had no legal meaning?

MR. KRATOVIL: Mr. Myers and I discussed that issue. And of course, I can't tell you what we discussed.

[Id., 13-15.]

6. Reflecting on the specific finding made in the Conviction and Sentencing Order, the circuit court concluded as follows:

THE COURT: Judge Sanders found Mr. Myers to be a sexual predator within the meaning of the Code, and it only has legal meaning if he's a sexually violent predator. And I find it hard to believe that Judge Sanders would have given a defendant a label, a stigma, and then also said within the meaning of the code if he did not understand that he was making the distinction or determination that Mr. Myers was a sexually violent predator under the law.

[Id., 41-42.]

7. These facts and conclusions were reflected in Paragraph 3 of the circuit court's written

Order:

The term "sexually violent predator," is defined by **W. Va. Code § 15-12-2(k)**. The term "sexual predator" is not defined or used in the West Virginia Code. The Defendant acknowledges in his argument to this Court that he understood that by asking Judge Sanders to find him to be a "sexual predator" he was asking Judge Sanders to make finding with no legal basis. However, in both the transcript of the conviction and sentencing hearing, and in the conviction and sentencing order that Judge Sanders personally prepared, Judge Sanders referenced the term "sexual predator" as "within the meaning of the West Virginia Code" and "within the meaning of that term as used in West Virginia law." This Court finds that Judge Sanders would not have made a finding in the sentencing order that was not based in law. This Court holds that Judge Sanders believed that he was using the term properly found in the West Virginia Code--that of "sexually violent predator." The finding Judge Sanders made in the conviction and sentencing order could have no meaning at all unless that finding was to mean "sexually violent predator," which is the term used in **W. Va. Code § 15-12-2, et seq.**

[Order Granting State's Motion to Determine the Defendant to be a Sexually Violent Predator, 3/8/10, ¶ 2; R.62-69.]

8. Considering this factual background, and the relevant law, the circuit court ruled that the State could pursue its Motion. The circuit court further ordered the Appellant to submit to a psychiatric evaluation, pursuant to **W. Va. Code § 15-12-2a(d)**. The circuit court granted the Appellant a thirty day stay from this Order to file pleadings with this Court to seek redress.

[Order Granting State's Motion to Determine the Defendant to be a Sexually Violent Predator, 3/8/10; R.62-69; Tr. 2/25/10.]

9. The circuit court stay was subsequently lifted by the circuit court after expiration of the thirty day period with nothing further having been filed with this Court, and upon this Court's

refusal of the Petition for Writ of Prohibition in SER Myers v. Groh, Docket No.: 10013. [Order Lifting Stay on Proceedings, 4/20/10; Addendum R. 1.]

10. A week after the stay was lifted, on or about April 27, 2010, the Appellant, by counsel, filed a Petition for Appeal with this Court from the circuit court's March 8, 2010, interlocutory order denying the Appellant's motion to procedurally stop the Motion to Determine the Defendant to be a Sexually Violent Predator. The Appellant also moved this Court for a further stay. [State v. Myers, Docket No.: 100593.] The State filed with this Court its response thereto, opposing the stay and the premature appeal from the interlocutory order. [State's Response in Opposition to Application for Stay And In Opposition to Petition for Appeal.]

11. On May 20, 2010, the circuit court conducted a hearing on the Appellant's Notice of Assertion of Fifth Amendment Right During Psychiatric Examination. The circuit court ruled that the Appellant could not assert a blanket Fifth Amendment right to silence during the ordered psychiatric examination. However, the circuit court further ruled that the court was not going to compel the Appellant to participate in the evaluation since it would be a waste of further resources since the Appellant asserted that he was not going to meaningfully participate in the evaluation. The circuit court allowed the parties leave to further argue whether any adverse inference could be taken from the Appellant's silence. [Order on Defendant's Fifth Amendment Assertion as to the Ordered Psychiatric Evaluation, 5/26/10.]

12. Despite being represented by counsel, the Appellant *pro se* filed a Petition for Writ of Prohibition with this Court regarding the circuit court's May 26, 2010, Order which had left open the question of whether the court could, in the future proceeding, draw an adverse inference. The Petition was ultimately withdrawn by the Appellant. [SER Myers v. Groh, Docket No.: 100726.]

13. At an evidentiary hearing held on June 28, 2010, the circuit court denied the Appellant's renewed motions to dismiss. The circuit court then received evidence on the issue of whether the Appellant is a sexually violent predator. The circuit court ruled that it could, but would not, take any adverse inference from the Appellant's silence as to the previously ordered psychiatric evaluation because it had sufficient evidence to make its ruling without making any such inferences. Based on the evidence before it, *inter alia*, that the Appellant was convicted of qualifying sexual offenses, the predatory nature of his offenses, and the recommendation of the Sexually Violent Predator Advisory Board that the Appellant is a sexually violent predator [Attachment A], the circuit court found the Appellant to be a sexually violent predator as that term is used in **W. Va. Code** § 15-12-2a. [Final Order Determining the Defendant to be a Sexually Violent Predator, 7/6/10, Addendum R. 2-7; Tr. 6/28/10.]¹

14. On or about August 19, 2010, the Appellant moved this Court to accept his previously filed Petition for Appeal. [Petitioner's/Appellant's Motion Permitting Re-filing of Petition for Appeal, 8/19/10.]

15. On September 9, 2010, this Court accepted the previously filed Petition for Appeal. By letter dated November 4, 2010, the parties were informed of the Court's briefing schedule.

16. The State respectfully requests this Court to affirm the judgment of the circuit court.

¹On or about August 11, 2010, the Appellant, *pro se*, instituted a civil action in the United States District Court (N.D.W.V.) seeking monetary damages and injunctive relief against Circuit Court Judge Groh, Chief Deputy Prosecuting Attorney Quasebarth, and Deputy Circuit Clerk Melnick. Myers v. Groh, et al., Civil Action No.: 3:10-CV-77. The suit alleged that an order of the circuit court requiring the Appellant to go through counsel to file pleadings in the State courts related to Case Nos.: 95-F-44, 09-F-127 and 10-F-22 violated his civil rights. That suit has been dismissed by the federal court as to all three defendants as of November 23, 2010. Judge Groh recused herself from all three of the Appellant's state court cases as a result of the Appellant filing that suit. [Order of Recusal, 8/30/10.] Judge Sanders now presides over all three state court cases.

III. SUMMARY OF ARGUMENT.

The Appellant is a sexually violent predator, pursuant to **W. Va. Code** § 15-12-2a, as determined by the circuit court. The Appellant was previously convicted on his guilty pleas to four predatory felony sexual offenses—three of which were qualifying sexual offenses to be determined a sexually violent predator—committed against four different minors. The West Virginia Sexually Violent Predator Advisory Board recommended to the circuit court that the Appellant be determined to be a sexually violent predator.

Significant to this appeal is that the Appellant does not challenge the circuit court's July 2010 factual findings, or ultimate conclusions of law applying **W. Va. Code** § 15-12-2a, in ruling that the Appellant is a sexually violent predator.² Rather, the Appellant's challenges are to the circuit court's earlier rulings in March 2010 denying the Appellant's attacks on the *procedure* for the State bringing the motion.

The circuit court's application of the law in denying each of the Appellant's challenges to the procedure is sound. The circuit court did not merely correct a drafting "error" in the trial court's original finding in 2003 that the Appellant is "a SEXUAL PREDATOR within the meaning of that term as used in West Virginia law." The circuit court's ruling from which the Appellant brings this appeal was made pursuant to the full procedures accorded by **W. Va. Code** § 15-12-2a, and after an evidentiary hearing. A significant factual finding of the circuit court underpinning its procedural ruling—which is also a factual finding that the Appellant does not dispute—is that the Appellant and his counsel (the same counsel he has today) understood at the

²The only exception is the Appellant's challenge to the circuit court considering the pre-sentence investigation report that was prepared for this very case before the Appellant was sentenced, and which report is properly filed as part of the record.

time of the entry of his guilty plea in 2003 that the Appellant was to be found by the trial court to be a “sexually violent predator,” as that term is used in law, but allowed the trial court, without correction, to find him to be a “sexual predator.” The Appellant acknowledges that the term “sexual predator” has no meaning in the law. The Appellant apparently has no qualms over being known as a sexual predator.

The Appellant was discharged from incarceration in 2006. The State later became aware that he was not registered with the State Police as a “sexually violent predator” only after he was indicted in 2009 for his attempts to groom another child for sexual victimization and for his violation of the State Sex Offender Registration Act. As is evident through the record pertinent to this appeal, the Appellant stands on his intentional misleading of the trial court to avoid the legal conclusion that court believed it was making: the Appellant is a sexually violent predator.

For the reasons illuminated below, in its detailed orders, the circuit court properly made factual findings based on the record. The circuit court then properly applied the law in concluding that the Appellant failed to prove that the motion to determine the Appellant to be a sexually violent predator was time-barred, or barred by principles of *res judicata*, collateral estoppel, double jeopardy or *ex post facto* law. In the Appellant’s singular challenge to the circuit court’s ultimate conclusion that he is a sexually violent predator, the record demonstrates that the circuit court properly considered the contents of the pre-sentence report that was prepared in the very same criminal case in which the Appellant pleaded guilty to the qualifying sexual offenses committed against four young boys.

The State of West Virginia requests this Honorable Court to affirm the circuit court’s judgment.

IV. ARGUMENT.

Standard of Review.

The State finds no cases where this Court has considered the provisions of **W. Va. Code** § 15-12-2a. The general standard of review, applicable to each of these issues presented in this appeal, is:

“This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed de novo.’ Syllabus Point 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996).”

Syl. Pt. 1, *State v. Smith*, 225 W.Va. 706, 696 S.E.2d 8 (2010).

A. THE CIRCUIT COURT PROPERLY RULED THAT THERE IS NO STATUTE OF LIMITATIONS FOR BRINGING A MOTION TO DETERMINE WHETHER ONE IS A SEXUALLY VIOLENT PREDATOR.

W. Va. Code § 15-12-2a³ requires the court that has sentenced a person for the

³**W. Va. Code** § 15-12-2a [2004] reads in its entirety:

(a) The circuit court that has sentenced a person for the commission of a sexually violent offense or that has entered a judgment of acquittal of a charge of committing a sexually violent offense in which the defendant has been found not guilty by reason of mental illness, mental retardation or addiction shall make a determination whether:

(1) A person is a sexually violent predator; or

(2) A person is not a sexually violent predator.

(b) A hearing to make a determination as provided in subsection (a) of this section is a summary proceeding, triable before the court without a jury.

(c) A proceeding seeking to establish that a person is a sexually violent predator is initiated by the filing of a written pleading by the prosecuting attorney. The pleading shall describe the record of the judgment of the

commission of a sexually violent offense to make a determination of whether or not that person is a sexually violent predator. A “sexually violent predator,” as that term is defined by **W. Va. Code § 15-12-2(k)**, is “a person convicted [...] of a sexually violent offense who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.” Sexual Abuse in the First Degree is a “sexually violent offense,” as

court on the person's conviction or finding of not guilty by reason of mental illness, mental retardation or addiction of a sexually violent offense and shall set forth a short and plain statement of the prosecutor's claim that the person suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.

(d) Prior to making a determination pursuant to the provisions of this section, the sentencing court may order a psychiatric or other clinical examination and, after examination, may further order a period of observation in an appropriate facility within this state designated by the court after consultation with the director of the division of health.

(e) Prior to making a determination pursuant to the provisions of this section, the sentencing court shall request and receive a report by the board established pursuant to section two-b of this article. The report shall set forth the findings and recommendation of the board on the issue of whether the person is a sexually violent predator.

(f) At a hearing to determine whether a person is a sexually violent predator, the person shall be present and shall have the right to be represented by counsel, introduce evidence and cross-examine witnesses. The offender shall have access to a summary of the medical evidence to be presented by the state. The offender shall have the right to an examination by an independent expert of his or her choice and testimony from the expert as a medical witness on his or her behalf. At the termination of the hearing the court shall make a finding of fact upon a preponderance of the evidence as to whether the person is a sexually violent predator.

(g) If a person is determined by the circuit court to be a sexually violent predator, the clerk of the court shall forward a copy of the order to the state police in the manner promulgated in accordance with the provisions of article three, chapter twenty-nine-a of this code.

that term is defined by **W. Va. Code** § 15-12-2(i). “Mental abnormality” is “a congenital or acquired condition of a person, that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.” **W. Va. Code** § 15-12-2(l). A “predatory act” is “an act directed at a stranger or at a person with whom a relationship has been established or promoted for the primary purpose of victimization.” **W. Va. Code** § 15-12-2(m). The term “sexual predator” is neither defined nor used in the West Virginia Code.

Pursuant to a plea agreement, the Appellant pleaded guilty in 2003 before the Honorable David H. Sanders to three felony counts of Sexual Abuse in the First Degree and one count of Sexual Assault in the Third Degree. The plea agreement included the following language: “As a result of the convictions under this agreement, your client agrees to the court making a finding that he is a sexual predator and agrees that he is required to register for life as a sexual offender.” [Plea Letter, dated 1/29/03, ¶ 5, 2/5/03, Attachment B.] Below that line, the Appellant added in: “The Defendant also agrees to “waive” a Presentence Investigation Report, pursuant to Rule 32(b)(1)(A), WV Rules of Criminal Procedure.” [Id.]

The trial court convicted the Appellant on his pleas and sentenced him to four consecutive 1-5 year penitentiary terms. The trial court also found the Appellant to be “a SEXUAL PREDATOR within the meaning of that term as used in West Virginia law.” The Appellant is to register for life as a sexual offender. [Conviction and Sentence Order, 3/25/03; R. 1-8.]

The record further shows that the Appellant was discharged from this sentence in 2006. The State filed a Motion to Determine Defendant to be a Sexually Violent Predator in the

original criminal case upon discovery in May 2009, at the time of the Appellant's arraignment in Case No.: 09-F-127, that the State Police were not registering the Defendant as a "sexually violent predator," pursuant to **W. Va. Code** § 15-12-2a, because the language of the sentencing order in Case No.: 95-F-44 only uses the phrase "sexual predator" and not "sexually violent predator." [Motion to Determine Defendant to be a Sexually Violent Predator, 6/12/09; Case No.: 95-F-44; R. 15-29.]

After engaging in the dialogue with the Appellant's counsel recounted in the Statement of the Case, above, and reflecting on the specific finding made in the Conviction and Sentencing Order, the circuit court concluded as follows:

THE COURT: Judge Sanders found Mr. Myers to be a sexual predator within the meaning of the Code, and it only has legal meaning if he's a sexually violent predator. And I find it hard to believe that Judge Sanders would have given a defendant a label, a stigma, and then also said within the meaning of the code if he did not understand that he was making the distinction or determination that Mr. Myers was a sexually violent predator under the law.

[Tr. 2/25/10, 41-42.]

These facts and conclusions were reflected in Paragraph 3 of the circuit court's written Order:

The term "sexually violent predator," is defined by **W. Va. Code** § 15-12-2(k). The term "sexual predator" is not defined or used in the West Virginia Code. The Defendant acknowledges in his argument to this Court that he understood that by asking Judge Sanders to find him to be a "sexual predator" he was asking Judge Sanders to make finding with no legal basis. However, in both the transcript of the conviction and sentencing hearing, and in the conviction and sentencing order that Judge Sanders personally prepared, Judge Sanders referenced the term "sexual predator" as "within the meaning of the West Virginia Code" and "within the

meaning of that term as used in West Virginia law.” This Court finds that Judge Sanders would not have made a finding in the sentencing order that was not based in law. This Court holds that Judge Sanders believed that he was using the term properly found in the West Virginia Code--that of “sexually violent predator.” The finding Judge Sanders made in the conviction and sentencing order could have no meaning at all unless that finding was to mean “sexually violent predator,” which is the term used in **W. Va. Code § 15-12-2, et seq.**

[Order Granting State’s Motion to Determine the Defendant to be a Sexually Violent Predator, 3/8/10, ¶ 2; R.62-69.]

The Appellant does not contest the circuit court’s findings and conclusions that the Appellant was well aware at the time of his guilty plea in 2003 that “sexually violent predator” was the only term with legal consequence that the trial court could have found, not “sexual predator.” The Appellant does not contest the circuit court’s findings and conclusions that Judge Sanders believed that he was making the proper legal finding of “sexually violent predator.” It was only through the Appellant’s calculated and intentional refusal to be candid with the trial court that the error was allowed to persist.

The *West Virginia Rules of Professional Conduct* require counsel’s candor with the court:

(a) A lawyer shall not knowingly: [...]

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

W.V.R.P.C. 3.3. By this Rule, the Appellant’s counsel was required to have corrected the trial court’s error. Instead, counsel was intentionally not candid with the trial court, allowing the court to make an error of which the Appellant would seek to gain advantage at a later date.

The circuit court further ruled: “The Defendant’s representations to this Court make it

apparent that he understood that the State in the plea agreement was seeking a finding of sexually violent predator, and that the Defendant consciously allowed Judge Sanders to believe that he was making that finding without correction.” *See* Order Granting State’s Motion to Determine the Defendant to be a Sexually Violent Predator, 3/8/10, ¶ 4; R.62-69.

The circuit court’s findings and conclusions, based on the record, provide the important context that the Appellant could not have been surprised when the State discovered that the Appellant was not registered by the State Police as a sexually violent predator and sought to remedy that situation. The State never “bargained away” its statutory authority to have the Appellant determined to be a “sexually violent predator” under **W. Va. Code** § 15-12-2a. There is nothing in the plea agreement which binds the State to foregoing its ability to proceed against the Appellant under **W. Va. Code** § 15-12-2a. The Appellant contends, in brief, that there was no mistake because he intentionally allowed the trial court to make a finding not based in the law, which finding the trial court clearly believed was based in the law.

The circuit court concluded that the requirements of the West Virginia Sex Offender Registration Act, **W. Va. Code** § 15-12-1, *et seq.*, are civil in nature and non-punitive. *See Haislop v. Edgell*, 215 W.Va. 88, 593 S.E.2d 839 (2003). Although civil in nature, they plainly arise from criminal proceedings. **W. Va. Code** § 15-12-2a requires the court that has sentenced a person in a criminal case for the commission of a sexually violent offense to make a determination of whether or not that person is a sexually violent predator. The rules of civil procedure do not apply to criminal proceedings. *State ex rel. Bradley v. Johnson*, 152 W.Va. 655, 166 S.E.2d 137, 139 (1969), *overruled on other grounds*, *State v. Eden*, 163 W.Va. 370, 256 S.E.2d 868 (1979). Since the rules of civil procedure do not apply to criminal proceedings,

the circuit court properly ruled that *W.V.R.C.P.* 60 did not apply to the case *sub judice*.

The Appellant's suggestion that **W. Va. Code** § 55-2-12,⁴ imposing time limitations for bringing personal actions, is wholly misplaced. Criminal cases are not "personal actions." This Court defines "personal actions" as

Personal actions have been defined at common law as including "all actions whether local or transitory that do not seek the specific recovery of lands, tenements, or hereditaments." (Personal actions are those actions "brought for the recovery of personal property, for the enforcement of a contract or to recover for its breach, or for the recovery of damages for an injury to the person or property." (footnote omitted)). More succinctly, "[a]t common law, personal actions were those for the recovery of movable property, damages, or other forms of redress, as opposed to real actions which were for the recovery of lands, tenements, hereditaments, or for the protection of real property interests."

State ex rel. Smith v. Kermit Lumber & Pressure Treating Co., 200 W.Va. 221, 488 S.E.2d 901,

912 n. 14 (1997)(citations and emphasis omitted).

The circuit court properly concluded that

There is no statutory time limit in **W. Va. Code** § 15-12-2a specifically, or in the West Virginia Sex Offender Registration Act, **W. Va. Code** § 15-12-1, *et seq.*, generally, for the State to initiate a proceeding pursuant to **W. Va. Code** § 15-12-2a to determine that a defendant is a sexually violent predator. The Court finds that under the specific facts of this case, as outlined above and which resulted in a misnomer in the conviction and sentencing order, the

⁴ **W. Va. Code** § 55-2-12 reads:

Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative.

State's current motion is not time barred.

[Order Granting State's Motion to Determine the Defendant to be a Sexually Violent Predator, 3/8/10, ¶ 5; R.62-69; *see also* Final Order Determining the Defendant to be a Sexually Violent Predator, 7/6/10, Addendum R. 2-7.]

There is no principle of law applicable to civil actions that would time-bar the circuit court's determination that the Appellant is a sexually violent predator pursuant to **W. Va. Code § 15-12-2a** under the facts of this case. The circuit court did not abuse its discretion in so ruling. The circuit court's findings of fact are plainly based on the record and are not clearly wrong. The circuit court properly applied the law in reaching its conclusion. State v. Smith, *supra*.

The Appellee State of West Virginia respectfully requests this Court to affirm the judgment of the circuit court.

B. THE CIRCUIT COURT PROPERLY RULED THAT THERE WAS NO *RES JUDICATA* BARRING THE MOTION TO DETERMINE THE APPELLANT A SEXUALLY VIOLENT PREDATOR.

The Appellee incorporates herein the argument above. The standard of review is the same, from State v. Smith, *supra*.

The circuit court plainly found that the trial court did not make a finding that was based in the law when it found the Appellant to be a "sexual predator" rather than the statutorily correct term "sexually violent predator." **W. Va. Code § 15-12-2a**. The circuit court plainly found the trial court's finding was arrived at due to the Appellant's calculated lack of candor with the trial court at the time the finding was to be made.

The Appellant incorrectly asserts that *res judicata* bars the circuit court from making a finding that the Appellant is a sexually violent predator, pursuant to **W. Va. Code § 15-12-2a**.

The record conclusively demonstrates that no such finding was made before as to this Appellant.

This Court holds that “The purpose of *res judicata*, also referred to as ‘claim preclusion,’ is to ‘preclude the expense and vexation attending relitigation of causes of action which have been fully and fairly decided.’” Myers v. West Virginia Consol. Public Retirement Bd., — W. Va. —, — S.E.2d — (Docket No.: 35470 and 35507, decided November 22, 2010)(citations omitted). There was no full and fair decision before the trial court as to whether the Appellant is a sexually violent predator because the record shows that the Appellant’s calculated lack of candor with the trial court prevented a full and fair decision on that issue.

In addition, the Appellant fails to meet the elements he must satisfy for *res judicata* to apply:

“Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. 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 either 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.” Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997).

Syl. Pt. 6, Myers v. West Virginia Consol. Public Retirement Bd., *supra*.

The question of whether the Appellant is a sexually violent predator arises within the same criminal case, Case No.: 95-F-44, in which he was convicted of three qualifying offenses. The State never “bargained away” its statutory authority to have the Appellant determined to be a “sexually violent predator” under **W. Va. Code** § 15-12-2a. There was no final adjudication on the merits had on this issue because the Appellant knowingly permitted the trial court to make a

finding that was not based in the law. Since the finding of “sexual predator” was not based on the law, there was never a finding as to whether the Appellant is a “sexually violent predator” under **W. Va. Code § 15-12-2a**. In Myers v. West Virginia Consol. Public Retirement Bd., *supra*, this Court affirmed the circuit court’s ruling that *res judicata* did not apply to an administrative ruling entered several years earlier concerning credit for employment service because the prior administrative ruling never finally adjudicated the service credit. Since the issue of whether the Appellant is a sexually violent predator was never finally adjudicated on the merits, the Appellant fails to meet even the first element required for *res judicata* to apply. Myers v. West Virginia Consol. Public Retirement Bd., *supra*.

The principle of *res judicata* is inapplicable to the circuit court’s determination that the Appellant is a sexually violent predator pursuant to **W. Va. Code § 15-12-2a** under the facts of this case. The circuit court did not abuse its discretion in so ruling. *See* Order Granting State’s Motion to Determine the Defendant to be a Sexually Violent Predator, 3/8/10, ¶ 3, 4; R.62-69; *see also* Final Order Determining the Defendant to be a Sexually Violent Predator, 7/6/10, Addendum R. 2-7. The circuit court’s findings of fact are plainly based on the record and are not clearly wrong. The circuit court properly applied the law in reaching its conclusion. State v. Smith, *supra*.

The Appellee State of West Virginia respectfully requests this Court to affirm the judgment of the circuit court.

C. THE CIRCUIT COURT PROPERLY RULED THAT THE STATE WAS NOT COLLATERALLY ESTOPPED FROM PURSUING THE MOTION TO DETERMINE THE APPELLANT A SEXUALLY VIOLENT PREDATOR.

The Appellee incorporates herein the arguments above. The standard of review is the same, from State v. Smith, *supra*.

The day after this Court recently addressed the principles of *res judicata* in Myers v. West Virginia Consol. Public Retirement Bd., *supra*, it also addressed the principles of collateral estoppel:

“Collateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.’ Syllabus Point 1, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).” Syl. Pt. 3, *Holloman v. Nationwide Mut. Ins. Co.*, 217 W.Va. 269, 617 S.E.2d 816 (2005).

Syl. Pt. 4, Frederick Management Co., L.L.C. v. City Nat. Bank of West Virginia, — W. Va. —, — S.E.2d — (Docket No.: 35438, decided November 23, 2010).

For the same reasons argued above that *res judicata* does not apply, the Appellee State was not collaterally estopped from seeking a ruling from the circuit court that the Appellant is a sexually violent predator. The State never “bargained away” its statutory authority to have the Appellant determined to be a “sexually violent predator” under **W. Va. Code** § 15-12-2a. The circuit court plainly found that the trial court did not make a finding that was based in the law when it found the Appellant to be a “sexual predator” rather than the statutory correct term “sexually violent predator.” **W. Va. Code** § 15-12-2a. The circuit court plainly found the trial

•
•
court's finding was arrived at due to the Appellant's calculated lack of candor with the trial court at the time the finding was to be made.

Due to the Appellant's actions, this issue was not previously decided nor was there a final adjudication on the merits of this issue nor was there a full and fair opportunity to litigate the issue. The Appellant does not meet the elements required to invoke collateral estoppel.

Frederick Management Co., L.L.C. v. City Nat. Bank of West Virginia, *supra*.

The principle of collateral estoppel is inapplicable to the circuit court's determination that the Appellant is a sexually violent predator pursuant to **W. Va. Code** § 15-12-2a under the facts of this case. The circuit court did not abuse its discretion in so ruling. *See* Order Granting State's Motion to Determine the Defendant to be a Sexually Violent Predator, 3/8/10, ¶ 3, 4; R.62-69; *see also* Final Order Determining the Defendant to be a Sexually Violent Predator, 7/6/10, Addendum R. 2-7. The circuit court's findings of fact are plainly based on the record and are not clearly wrong. The circuit court properly applied the law in reaching its conclusion.

State v. Smith, *supra*.

The Appellee State of West Virginia respectfully requests this Court to affirm the judgment of the circuit court.

D. THE CIRCUIT COURT PROPERLY RULED THAT W. VA. CODE § 15-12-2a PROVIDES NO TIME LIMITATION FOR BRINGING A MOTION TO DETERMINE WHETHER ONE IS A SEXUALLY VIOLENT PREDATOR.

The Appellee incorporates herein the arguments above. The standard of review is the same, from State v. Smith, *supra*.

Neither **W. Va. Code § 15-12-2a** specifically, nor the West Virginia Sex Offender Registration Act, **W. Va. Code § 15-12-1, et seq.**, generally, impose any specific time frame for the State to bring a motion to determine a qualifying sexual offender to be a sexually violent predator. The plain and unambiguous language of these statutes do not impose any deadline. A statute that is plain and unambiguous is to be applied, not construed. See Webster County Com'n v. Clayton, 206 W.Va. 107, 522 S.E.2d 201, 206 (1999).

The circuit court properly concluded that

There is no statutory time limit in **W. Va. Code § 15-12-2a** specifically, or in the West Virginia Sex Offender Registration Act, **W. Va. Code § 15-12-1, et seq.**, generally, for the State to initiate a proceeding pursuant to **W. Va. Code § 15-12-2a** to determine that a defendant is a sexually violent predator. The Court finds that under the specific facts of this case, as outlined above and which resulted in a misnomer in the conviction and sentencing order, the State's current motion is not time barred.

[Order Granting State's Motion to Determine the Defendant to be a Sexually Violent Predator, 3/8/10, ¶ 5; R.62-69.]

The Appellant attempts to distract this Court from his own actions, and those of his attorney, in misleading the trial court into making a finding not based in the law. The record makes plain that the intention, and the belief, of the trial court was that it *was* making a finding based in the law that the Appellant is a "sexually violent predator" pursuant to **W. Va. Code §**

15-12-2a. Nothing in the State Police’s procedural rule, 81 CSR 14-11⁵ specifically limits the time frame to make a determination that the Appellant is a sexually violent predator. The State never “bargained away” its statutory authority to have the Appellant determined to be a “sexually violent predator” under **W. Va. Code** § 15-12-2a. When first discovered in 2009 that the State Police did not find the trial court’s finding in its written Conviction and Sentencing Order that the Appellant is “a SEXUAL PREDATOR within the meaning of that term as used in West Virginia law” adequate, the prosecuting attorney brought the matter back before the sentencing court, which is the only court with jurisdiction over the matter, pursuant to **W. Va. Code** § 15-12-2a.

The Appellant offers no legal authority for his suggestion that this Court should construe *other* sections of **W. Va. Code** § 15-12-1, *et seq.*, to impose a time bar that the legislature did not otherwise provide.

If this Court were to find it pertinent to consider **W. Va. Code** § 15-12-3a⁶, addressing

⁵81 CSR 14-11 reads in significant part:

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 by filing of a written information with the circuit court that sentenced the offender.

⁶**W. Va. Code** § 15-12-3a reads:

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 petition shall set forth that the underlying qualifying conviction has been reversed or vacated. Upon receipt of proof that no qualifying conviction exists, the court shall enter an order directing the removal of the designation.

the procedure for the *removal* of a sexually violent predator designation, that language actually supports the State's position. The language of **W. Va. Code** § 15-12-3a requires one to go back to the sentencing court in the original criminal case and seek a removal of the designation. It imposes no deadline for bringing such a petition. Identically, the State in the case *sub judice* returned to the sentencing court in the Appellant's original criminal case to make the finding that the Appellant is a sexually violent predator, where there is also no statutory deadline imposed.

The Appellant's argument regarding **W. Va. Code** § 15-12-2(e) and (f) ⁷ is simply

⁷**W. Va. Code** § 15-12-2(d)-(f) read:

(d) Persons required to register under the provisions of this article shall register in person at the West Virginia State Police detachment in the county of his or her residence, the county in which he or she owns or leases habitable real property that he or she visits regularly, the county of his or her place of employment or occupation and the county in which he or she attends school or a training facility, and in doing so, provide or cooperate in providing, at a minimum, the following when registering:

- (1) The full name of the registrant, including any aliases, nicknames or other names used by the registrant;
- (2) The address where the registrant intends to reside or resides at the time of registration, the address of any habitable real property owned or leased by the registrant that he or she regularly visits: *Provided*, That a post office box may not be provided in lieu of a physical residential address, the name and address of the registrant's employer or place of occupation at the time of registration, the names and addresses of any anticipated future employers or places of occupation, the name and address of any school or training facility the registrant is attending at the time of registration and the names and addresses of any schools or training facilities the registrant expects to attend;
- (3) The registrant's social security number;
- (4) A full-face photograph of the registrant at the time of registration;
- (5) A brief description of the crime or crimes for which the registrant

was convicted;

(6) Fingerprints;

(7) Information related to any motor vehicle, trailer or motor home owned or regularly operated by a registrant, including vehicle make, model, color and license plate number: *Provided*, That for the purposes of this article, the term “trailer” shall mean travel trailer, fold-down camping trailer and house trailer as those terms are defined in section one, article one, chapter seventeen-a of this code;

(8) Information relating to any Internet accounts the registrant has and the screen names, user names or aliases the registrant uses on the internet; and

(9) Information related to any telephone or electronic paging device numbers that the registrant has or uses, including, but not limited to, residential, work and mobile telephone numbers.

(e)(1) On the date that any person convicted or found not guilty by reason of mental illness, mental retardation or addiction of any of the crimes listed in subsection (b) of this section, hereinafter referred to as a “qualifying offense”, including those persons who are continuing under some post-conviction supervisory status, are released, granted probation or a suspended sentence, released on parole, probation, home detention, work release, conditional release or any other release from confinement, the Commissioner of Corrections, regional jail administrator, city official or sheriff operating a jail or Secretary of the Department of Health and Human Resources who releases the person and any parole or probation officer who releases the person or supervises the person following the release, shall obtain all information required by subsection (d) of this section prior to the release of the person, inform the person of his or her duty to register and send written notice of the release of the person to the State Police within three business days of receiving the information. The notice must include the information required by said subsection. Any person having a duty to register for a qualifying offense shall register upon conviction, unless that person is confined or incarcerated, in which case he or she shall register within three business days of release, transfer or other change in disposition status.

(2) Notwithstanding any provision of this article to the contrary, a court of this state shall, upon presiding over a criminal matter resulting in conviction or a finding of not guilty by reason of mental illness, mental retardation or addiction of a qualifying offense, cause, within seventy-two hours of entry of the commitment or sentencing order, the transmittal to the sex offender registry for inclusion in the registry all

illogical. Those subsections relate to the notice requirements for someone required to register a sexual offender upon his/her release from incarceration. The Appellant's status as a sexually violent predator does not affect the fact that he is required to register for the rest of his life as a sexual offender. The Appellant was always required to register for life as a sexual offender because the four felony sexual offenses he committed were all against children. That subsection (f) includes additional material to be provided for persons determined to be sexually violent predators does not preclude the determination in the Appellant's case, especially since the trial court believed that it was making that determination in 2003 but for the Appellant's lack of candor with the court.

information required for registration by a registrant as well as the following non-identifying information regarding the victim or victims:

- (A) His or her sex;
- (B) His or her age at the time of the offense; and
- (C) The relationship between the victim and the perpetrator.

The provisions of this paragraph do not relieve a person required to register pursuant to this section from complying with any provision of this article.

(f) For any person determined to be a sexually violent predator, the notice required by subsection (d) of this section must also include:

- (1) Identifying factors, including physical characteristics;
- (2) History of the offense; and
- (3) Documentation of any treatment received for the mental abnormality or personality disorder.

The Appellant replicates the same lack of logic in his citation to **W. Va. Code** § 62-12-2(f) and (g),⁸ relating to probation. Those subsections relate to the notice requirements for persons placed on probation. The Appellant was never considered for probation as part of the

⁸**W. Va. Code** § 62-12-2(f) and (g) read:

(f) Any person who has been convicted of a violation of the provisions of article eight-b, eight-c or sections five and six, article eight-d, chapter sixty-one of this code, or of section fourteen, article two, or of sections twelve and thirteen, article eight, chapter sixty-one of this code, or of a felony violation involving a minor of section six or seven, article eight, chapter sixty-one of this code, or of a similar provision in another jurisdiction shall be required to be registered upon release on probation. Any person who has been convicted of an attempt to commit any of the offenses set forth in this subsection shall also be registered upon release on probation.

(g) The probation officer shall within three days of release of the offender, send written notice to the State Police of the release of the offender. The notice shall include:

- (1) The full name of the person;
- (2) The address where the person shall reside;
- (3) The person's social security number;
- (4) A recent photograph of the person;
- (5) A brief description of the crime for which the person was convicted;
- (6) Fingerprints; and
- (7) For any person determined to be a sexually violent predator as defined in section two-a, article twelve, chapter fifteen of this code, the notice shall also include:
 - (i) Identifying factors, including physical characteristics;
 - (ii) History of the offense; and
 - (iii) Documentation of any treatment received for the mental abnormality or personality disorder.

plea agreement for the four felony sexual offenses he committed against children. That subsection (g) includes additional material to be provided for persons determined to be sexually violent predators does not preclude the determination pursuant to **W. Va. Code § 15-12-2a** in the Appellant's case, especially since the trial court believed that it was making that determination in 2003 but for the Appellant's lack of candor with the court.

The Appellant replicates this same lack of logic in his citation to **W. Va. Code § 62-12-26**,⁹ which relates to supervised release for certain sexual offenders. The supervised release

⁹ **W. Va. Code § 62-12-26** [2006] reads:

(a) Notwithstanding any other provision of this code to the contrary, any 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, however*, That a defendant designated after the effective date of this section as amended and reenacted during the first extraordinary session of the Legislature, 2006, 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: *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.

(b) Any person required to be on supervised release for a minimum term of ten years or for life pursuant to the provisions of subsection (a) of this section also shall be further prohibited from:

(1) Establishing a residence or accepting employment within one thousand feet of a school or child care facility or within one thousand feet of the residence of a victim or victims of any sexually violent offenses for which the person was convicted;

(2) Establishing a residence or any other living accommodation in a household in which a child under sixteen resides if the person has been convicted of a sexually violent offense against a child, unless the person is one of the following:

(i) The child's parent;

(ii) The child's grandparent; or

(iii) The child's stepparent and the person was the stepparent of the child prior to being convicted of a sexually violent offense, the person's parental rights to any children in the home have not been terminated, the child is not a victim of a sexually violent offense perpetrated by the person, and the court determines that the person is not likely to cause harm to the child or children with whom such person will reside: *Provided*, That nothing in this subsection shall preclude a court from imposing residency or employment restrictions as a condition of supervised release on defendants other than those subject to the provision of this subsection.

(c) 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.

(d) Any person sentenced to a period of supervised release pursuant to the provisions of this section shall be supervised by the probation office of the sentencing court or by the community corrections program established in said circuit unless jurisdiction is transferred elsewhere by order of the sentencing court.

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

Within ninety days of the effective date of this section as amended and reenacted during the first extraordinary session of the Legislature, 2006, the Secretary of the Department of Health and Human Resources shall propose rules and emergency rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code establishing qualifications for sex offender treatment programs and counselors based on accepted treatment protocols among licensed mental health professionals.

(f) The sentencing court may, based upon defendant's ability to pay, impose a supervision fee to offset the cost of supervision. Said fee shall not exceed \$50 per month. Said fee may be modified periodically based upon the defendant's ability to pay.

(g) *Modification of conditions or revocation.* -- The court may:

(1) Terminate a term of supervised release and discharge the defendant released at any time after the expiration of two years of supervised release, pursuant to the provisions of the West Virginia Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interests of justice;

(2) Extend a period of supervised release if less than the maximum authorized period was previously imposed or modify, reduce or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, consistent with the provisions of the West

statute was not yet passed by the legislature at the time the Appellant was convicted in 2003.

There is no time limit in any of these sections for determining a sex offender to be a sexually violent predator pursuant to **W. Va. Code § 15-12-2a**.

There is no time limit in **W. Va. Code § 15-12-2a** which would bar the circuit court's determination that the Appellant is a sexually violent predator pursuant to **W. Va. Code § 15-12-2a** under the facts of this case. *See Order Granting State's Motion to Determine the Defendant*

Virginia Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) 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, except that a defendant whose term is revoked under this subdivision may not be required to serve more than the period of supervised release;

(4) Order the defendant to remain at his or her place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

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

(i) *Supervised release following revocation.* -- When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of supervised release authorized under subsection (a) of this section, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such term of supervised release shall not exceed the term of supervised release authorized by this section less any term of imprisonment that was imposed upon revocation of supervised release.

(j) *Delayed revocation.* -- The power of the court to revoke a term of supervised release for violation of a condition of supervised release and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (i) of this section, a further term of supervised release extends beyond the expiration of the term of supervised release for any period necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

to be a Sexually Violent Predator, 3/8/10, ¶ 5; R.62-69; *see also* Final Order Determining the Defendant to be a Sexually Violent Predator, 7/6/10, Addendum R. 2-7. The circuit court did not abuse its discretion in so ruling. The circuit court's findings of fact are plainly based on the record and are not clearly wrong. The circuit court properly applied the law in reaching its conclusion. State v. Smith, *supra*.

The Appellee State of West Virginia respectfully requests this Court to affirm the judgment of the circuit court.

E. THE CIRCUIT COURT PROPERLY RULED THAT FINDING THE APPELLANT TO BE A SEXUALLY VIOLENT PREDATOR WAS NOT A MODIFICATION OF THE PLEA AGREEMENT.

The Appellee incorporates herein the arguments above. The standard of review is the same, from State v. Smith, *supra*.

The plea agreement contemplated that the Appellant would be found by the trial court to be a "sexually violent predator," as that is the term with legal meaning in **W. Va. Code** § 15-12-2a. The plea agreement stated that the circuit court would find the Appellant to be a "sexual predator," which is a term with no legal meaning. The trial court found the Appellant to be "a SEXUAL PREDATOR within the meaning of that term as used in West Virginia law."

The circuit court ruled that the trial court did not make the finding based in law because of the Appellant's conduct. The circuit court's written order ruled that there was no modification of the Appellant's plea agreement by the State now moving to have the Appellant determined to be a sexually violent predator:

6. The requirements of the West Virginia Sex Offender Registration Act, **W. Va. Code** § 15-12-1, *et seq.*, are civil in nature and non-punitive. *See Haislop v. Edgell*, 215 W.Va. 88,

593 S.E.2d 839 (2003). The West Virginia Supreme Court further holds “The Sex Offender Registration Act, W.Va. Code §§ 15-12-1 to 10, is a regulatory statute which does not violate the prohibition against *ex post facto* laws.” Syl. Pt. 5, Hensler v. Cross, 210 W.Va. 530, 558 S.E.2d 330 (2001). “We, therefore, conclude that the disadvantages which the Act imposes on the appellant are not sufficient to make the registration statute punitive in overall effect.” *Id.*, 558 S.E.2d 330, 336. Consequently, a current determination of whether this Defendant is a sexually violent predator will not impose any further punishment upon the Defendant and does not modify the sentence imposed upon his convictions.

7. The Defendant argues that to allow the State’s motion is an unlawful modification of the plea agreement. However, there is nothing in the plea agreement between the State and the Defendant which expressly precludes the State from pursuing a determination that the Defendant is a sexually violent predator pursuant to **W. Va. Code § 15-12-2a**. The finding that was made that the Defendant is a “sexual predator” is of no consequence since that term has no meaning in **W. Va. Code § 15-12-1, et seq.** The record is plain that there has been no determination that the Defendant is or is not a “sexually violent predator,” as that term is defined and used in **W. Va. Code § 15-12-1, et seq.** Hensler makes plain that the requirements of the West Virginia Sex Offender Registration Act are not punitive. The State and Judge Sanders apparently thought that such a determination was being made; the Defendant made no attempt to bring that mistake to their attention. The determination of a sexually violent predator is non-punitive. This Court’s permitting of the State’s motion to proceed forward at this time is not a modification of the plea agreement. State ex rel. Brewer v. Starcher, 195 W.Va. 185, 465 S.E.2d 185 (1995).

[Order Granting State’s Motion to Determine the Defendant to be a Sexually Violent Predator, 3/8/10, ¶ 6, 7; R.62-69; *see also* Final Order Determining the Defendant to be a Sexually Violent Predator, 7/6/10, Addendum R. 2-7.]

There is no modification of the plea agreement by the circuit court determining that the Appellant is a sexually violent predator because that determination did not impose any additional

punishment. The legislature made plain that the West Virginia Sex Offender Registration Act is non-punitive:

It is the intent of this article to assist law-enforcement agencies' efforts to protect the public from sex offenders by requiring sex offenders to register with the state police detachment in the county where he or she shall reside and by making certain information about sex offenders available to the public as provided in this article. *It is not the intent of the Legislature that the information be used to inflict retribution or additional punishment on any person convicted of any offense requiring registration under this article. This article is intended to be regulatory in nature and not penal.*

W. Va. Code § 15-12-1a(a) (emphasis added).¹⁰

This Court holds that the West Virginia Sex Offender Registration Act is regulatory and non-punitive. See Haislop v. Edgell, *supra*, 215 W.Va. 88, 593 S.E.2d 839 (2003); and Hensler v. Cross, 210 W.Va. 530, 558 S.E.2d 330 (2001). The circuit court followed these rulings in reaching its conclusion.

In addition, this Court, in State ex rel. Brewer v. Starcher, 195 W.Va. 185, 465 S.E.2d 185 (1995), holds:

¹⁰Nearly identical language is found in the State Police procedural rule for sex offender registration:

5.1. Legislative Intent and Findings. -- The intent of the Sex Offender Registration Act is to assist law-enforcement agencies efforts to protect the public from sex offenders by requiring sex offenders to register with a State Police detachment in the county where they reside, work, attend school or visit for more than fifteen (15) continuous days and by making certain information about sex offenders available to the public. *It is not the intent of the Legislature that the information be used to inflict either retribution or additional punishment on any person requiring registration under the West Virginia Sex Offender Registration Act.*

84 CSR 14-11-5.1 (emphasis added).

5. A circuit court has no authority to vacate or modify, *sua sponte*, a validly accepted guilty plea under Rule 11(e)(1)(C) of the West Virginia Rules of Criminal Procedure because of subsequent events that do not impugn the validity of the original plea agreement.

6. If proven, a charge of fraud or misrepresentation poses a serious threat to the integrity of judicial proceedings. Therefore, the “fraud exception” is adopted as a necessary rule to enhance the administration of justice. This exception is aimed at penalizing deceitful behavior engaged in during the negotiating of a plea agreement, in its presentation to the court, or in its execution by the defendant.

Syl. Pts. 5 and 6, State ex rel. Brewer v. Starcher, *id.*

The circuit court’s findings, which are uncontested, that the Appellant and his counsel knowingly permitted the trial court to make a finding of “sexual predator” not based in the law when the trial court believed that it was making a finding of “sexually violent predator,” which is based in the law, is “deceitful behavior engaged in during the negotiating of a plea agreement, in its presentation to the court, or in its execution by the defendant.” The Appellant should not be rewarded for his deceitful conduct before the trial court.

The only reasonable construction of the written plea agreement’s use of the term “sexual predator” is “sexually violent predator,” as that term is defined and used in the West Virginia Sex Offender Registration Act, **W. Va. Code** § 15-12-1, *et seq.* Consequently, there is no ambiguity or vagueness in the State’s plea agreement. The trial court did not find any ambiguity; the Appellant and his counsel knew exactly what was meant; the circuit court found that the trial court believed that it was making the finding based in the law. The circuit court properly found that there was no modification of the plea agreement. *See* Order Granting State’s Motion to

Determine the Defendant to be a Sexually Violent Predator, 3/8/10, ¶ 7; R.62-69.¹¹

The rule that this Court announced in State ex rel. Forbes v. Kaufman, 185 W.Va. 72, 404 S.E.2d 763 (1991), and later applied in State v. Hayhurst, 207 W.Va. 259, 531 S.E.2d 324 (2000), that any ambiguity in a plea agreement is to be construed against the State, is not absolute. In State ex rel. Thompson v. Watkins, 200 W.Va. 214, 488 S.E.2d 894 (1997), this Court distinguished Kaufman and held that Thompson's argument that the plea agreement was ambiguous was "undermined by the objective facts that appear in the record." *Id.*, 488 S.E.2d 894, 900. When considering the record of the trial court at the Appellant's conviction and sentencing in 2003, and the Appellant's admissions to the circuit court in 2010, it is plain that the Appellant well understood the finding that was proposed in the plea agreement, and which the trial court believed that it was in fact making, was that of a sexually violent predator pursuant to **W. Va. Code § 15-12-2a**.

Before considering the Appellant's plea, the trial court noted on the record a condition of lifetime sex offender registration and, at sentencing, advised the Appellant both of his lifetime sex offender registration requirement and that it is a felony to not comply with those requirements. [Tr. 2/24/03, 6, 55.] Consequently, the Appellant's reliance on the holding of State v. Whalen, 214 W.Va. 299, 588 S.E.2d 677 (2003), is misplaced. In Whalen the offense of which the defendant was convicted on his guilty plea did not automatically trigger statutory sex offender registration. The trial court there made a special finding that triggered sex offender

¹¹The Appellant's assertion that the circuit court reversed course on this issue [Appellant's Brf., 30] is without merit. Without requesting a response from the State, the circuit court denied as premature a *pro se* petition brought by the Appellant to prohibit the State from having the circuit court consider the issue of whether the Appellant is a sexually violent predator. [Order Denying Writ of Prohibition, 6/16/09; Myers v. State, et al., Berkeley County Case No.: 09-C-457, R. 11-14.]

registration, which finding, though based in fact, was not contemplated as part of the plea agreement.

In the case *sub judice*, however, each of the four felony sex offenses to which the Appellant pleaded guilty automatically triggered lifetime sex offender registration because the victims were each minors, lifetime sex offender registration was specifically referenced in the plea letter, and covered by the trial court on the record before consideration of the plea.

The additional non-punitive regulatory requirements imposed on a sexually violent predator are *de minimis* and are reasonably calculated to protect the public. In addition to the requirements imposed on every sexual offender, a sexually violent predator must also provide the police with: “(1) Identifying factors, including physical characteristics; (2) History of the offense; and (3) Documentation of any treatment received for the mental abnormality or personality disorder.” **W. Va. Code** § 15-12-2(f). They must register quarterly instead of annually. **W. Va. Code** § 15-12-10. They must obtain a coded driver’s license. **W. Va. Code** § 17B-2-3(b).¹²

Although the Appellant presents as an excellent candidate for a lifelong period of supervised release for certain sex offenders under **W. Va. Code** § 62-12-26, the State did not seek its imposition in the circuit court’s 2010 determination that he is a sexually violent predator and the circuit court did not order it.¹³

¹²The Appellant was arrested on December 20, 2010, for violating this driver’s license requirement. [*State v. Stanley Melvin Myers*, Berkeley County Magistrate Court Case No.: 10-M-6773.] Based on this criminal violation, the Appellant’s bail was revoked by the circuit court in the Appellant’s currently pending felony prosecutions, Case Nos.: 09-F-127 and 10-F-22, that same day.

¹³It appears to the State at this time that supervised release under **W. Va. Code** § 62-12-26 is a punitive sentence, akin to the imposition of a sentence that is then suspended for probation. Violation of the terms of lifelong supervised release may result in the imposition of incarceration for life. *Id.* This statute was initially enacted by the legislature in 2003 *after* the Appellant was convicted upon his guilty plea; the automatic lifelong supervision for persons determined to be a sexually violent predator was

There was no modification of the Appellant's plea agreement by the circuit court determining that the Appellant is a sexually violent predator pursuant to **W. Va. Code** § 15-12-2a under the facts of this case. The circuit court did not abuse its discretion in so ruling. The circuit court's findings of fact are plainly based on the record and are not clearly wrong. The circuit court properly applied the law in reaching its conclusion. State v. Smith, *supra*.

The Appellee State of West Virginia respectfully requests this Court to affirm the judgment of the circuit court.

F. THE CIRCUIT COURT PROPERLY RULED THAT FINDING THE APPELLANT TO BE A SEXUALLY VIOLENT PREDATOR WAS NOT A VIOLATION OF DOUBLE JEOPARDY.

The Appellee incorporates herein the arguments above. The standard of review is the same, from State v. Smith, *supra*.

This Court holds:

Through the double jeopardy clauses of our state and federal constitutions, citizens are protected against: (1) a second prosecution for the same offense after an acquittal; (2) a second prosecution for the same offense after a conviction; and (3) multiple punishments for the same offense.

State ex rel. Games-Neely v. Silver, 226 W.Va. 11, 697 S.E.2d 47, 51 (2010).

amended into the statute in 2006. If **W. Va. Code** § 62-12-26 imposes a punitive sentence, application to the Appellant would be a violation of the constitutional prohibition on *ex post facto* laws. See Hensler v. Cross, *supra*, 210 W.Va. 530, 558 S.E.2d 330 (2001), for the standards applied in reviewing *ex post facto* law analysis, noted in more detail in Argument G, *infra*.

This Court has not ruled on whether the retrospective application of supervised release under **W. Va. Code** § 62-12-26 is barred by the prohibition on *ex post facto* laws. If this Court were to hold that the State has mistakenly construed the prohibition on *ex post facto* laws as preventing a retrospective application of supervised release to the Appellant, the State requests this Court to remand the matter to the circuit court to impose lifelong supervised release on the Appellant.

As referenced in Argument E, above, although the Appellant presents as an excellent candidate for a lifelong period of supervised release for certain sex offenders under **W. Va. Code** § 62-12-26, the State did not seek its imposition in the circuit court's 2010 determination that he is a sexually violent predator and the circuit court did not order it. There has been no additional punishment imposed upon the Appellant.

The additional non-punitive regulatory requirements imposed on a sexually violent predator are *de minimis* and are reasonably calculated to protect the public. In addition to the requirements imposed on every sexual offender, a sexually violent predator must also provide the police with: "(1) Identifying factors, including physical characteristics; (2) History of the offense; and (3) Documentation of any treatment received for the mental abnormality or personality disorder." **W. Va. Code** § 15-12-2(f). They must register quarterly instead of annually. **W. Va. Code** § 15-12-10. They must obtain a coded driver's license. **W. Va. Code** § 17B-2-3(b). There is no additional punishment imposed upon the Appellant by the circuit court's determination that he is a sexually violent predator. Consequently, there is no double jeopardy concern.

The circuit court ruled that

The requirements of the West Virginia Sex Offender Registration Act, **W. Va. Code** § 15-12-1, *et seq.*, are civil in nature and non-punitive. See Haislop v. Edgell, 215 W.Va. 88, 593 S.E.2d 839 (2003). The West Virginia Supreme Court further holds "The Sex Offender Registration Act, W.Va. Code §§ 15-12-1 to 10, is a regulatory statute which does not violate the prohibition against *ex post facto* laws." Syl. Pt. 5, Hensler v. Cross, 210 W.Va. 530, 558 S.E.2d 330 (2001). "We, therefore, conclude that the disadvantages which the Act imposes on the appellant are not sufficient to make the registration statute punitive in overall effect." *Id.*, 558 S.E.2d 330, 336. Consequently, a current

determination of whether this Defendant is a sexually violent predator will not impose any further punishment upon the Defendant and does not modify the sentence imposed upon his convictions.

[Order Granting State's Motion to Determine the Defendant to be a Sexually Violent Predator, 3/8/10, ¶ 6; R.62-69; *see also* Final Order Determining the Defendant to be a Sexually Violent Predator, 7/6/10, Addendum R. 2-7.]

There is no double jeopardy concern in the circuit court's determination that the Appellant is a sexually violent predator pursuant to **W. Va. Code** § 15-12-2a under the facts of this case because the only effects of the finding are non-punitive. The circuit court did not abuse its discretion in so ruling. The circuit court's findings of fact are plainly based on the record and are not clearly wrong. The circuit court properly applied the law in reaching its conclusion.

State v. Smith, *supra*.

The Appellee State of West Virginia respectfully requests this Court to affirm the judgment of the circuit court.

G. THE CIRCUIT COURT PROPERLY RULED THAT FINDING THE APPELLANT TO BE A SEXUALLY VIOLENT PREDATOR WAS NOT A VIOLATION OF EX POST FACTO PRINCIPLES.

The Appellee incorporates herein the arguments above. The standard of review is the same, from State v. Smith, *supra*.

In addition, when considering an allegation of the imposition of an *ex post facto* law, this Court holds:

3. "Under *ex post facto* principles of the United States and West Virginia Constitutions, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to

him.” Syllabus Point 1, *Adkins v. Bordenkircher*, 164 W.Va. 292, 262 S.E.2d 885 (1980).

4. The question whether an Act is civil or punitive in nature is initially one of statutory construction. A court will reject the Legislature's manifest intent only when a party challenging the Act provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the Legislature's intention.

5. The Sex Offender Registration Act, W.Va.Code §§ 15-12-1 to 10, is a regulatory statute which does not violate the prohibition against *ex post facto* laws.

Syl. Pts. 3-5, Hensler v. Cross, *supra*, 210 W.Va. 530, 558 S.E.2d 330 (2001).

Plainly obvious in the circuit court's 2010 orders is that the court did not impose upon the Appellant any additional punishment or supervised release for certain sex offenders under **W. Va. Code** § 62-12-26. The State did not seek imposition of supervised release or any additional punishment in the circuit court's 2010 determination that the Appellant is a sexually violent predator and the circuit court did not order it.¹⁴ [Final Order Determining the Defendant to be a Sexually Violent Predator, 7/6/10, Addendum R. 2-7.] There is no additional punishment imposed upon the Appellant by the circuit court's determination that he is a sexually violent predator. Consequently, there is no *ex post facto* law concern. Hensler v. Cross, *supra*.

The circuit court did not abuse its discretion in so ruling. The circuit court's findings of fact are plainly based on the record and are not clearly wrong. The circuit court properly applied the law in reaching its conclusion. State v. Smith, *supra*.

The Appellee State of West Virginia respectfully requests this Court to affirm the judgment of the circuit court.

¹⁴See fn. 13, *supra*.

H. THE CIRCUIT COURT PROPERLY CONSIDERED THE APPELLANT'S PRE-SENTENCE REPORT IN FINDING THE APPELLANT TO BE A SEXUALLY VIOLENT PREDATOR.

The determination that the Appellant is a sexually violent predator arises from his original criminal case, State v. Myers, Case No.: 95-F-44. As part of that determination, the circuit court used the Presentence Investigation Report that was earlier prepared for the case. At hearing on June 28, 2010, the Appellant never objected to the circuit court considering this pre-sentence report, which includes his 60-day evaluation from Huttonsville, in its determination of whether or not he is a sexually violent predator. *See* Final Order Determining the Defendant to be a Sexually Violent Predator, 7/6/10, Addendum R. 2-7; Tr. 6/28/10, 9-16. The record reflects that the pre-sentence report was missing from the court file, so a new copy was filed without objection at hearing on June 28, 2010. [Id.]

The record further reflects that the court file did contain the Appellant's 60-day evaluation, which is a part of the pre-sentence report, but was missing the first page of that evaluation. A new copy, with that first page, was filed. The Appellant objected to the new copy being filed, and moved that it be sealed. *See* Final Order Determining the Defendant to be a Sexually Violent Predator, 7/6/10, Addendum R. 2-7; Tr. 6/28/10, 9-16. The circuit court specifically inquired of the Appellant's counsel about whether he was objecting to the Court's consideration of the document:

THE COURT: And you're not asking me not to consider the information then, are you?

MR. KRATOVIL: No. I'm just asking--

THE COURT: You're just asking for it to be resealed?

MR. KRATOVIL: For it to be resealed. [...]

[Tr. 6/28/10, 14-15.]

The circuit court then clearly indicated that there was no objection to the court considering the evaluation, and ordered that it be resealed at the conclusion of this proceeding:

THE COURT: Okay. I'm going to go ahead and order that it be resealed, Martha, and every copy of it whether incomplete or complete. But Mr. Quasebarth is passing up a complete one at this point. I don't hear any objection to considering that so at the conclusion of this proceeding, we'll reseat it.

[Id., 15.]

The Appellee State of West Virginia objects to this Honorable Court considering this issue raised for the first time on appeal. "To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect. Syl. Pt. 2, State ex rel. Cooper v. Caperton, 196 W. Va. 208, 470 S.E.2d 162 (1996)." Syl. Pt. 1, State v. Rodoussakis, 204 W. Va. 58, 511 S.E.2d 469 (1998).

This Court additionally holds that:

2. As a general matter, a defendant may not assign as error, for the first time on direct appeal, an issue that could have been presented initially for review by the trial court on a post-trial motion. [and]

3. When a defendant assigns an error in a criminal case for the first time on direct appeal, the state does not object to the assignment of error and actually briefs the matter, and the record is adequately developed on the issue, this Court may, in its discretion, review the merits of the assignment of error.

Syl. Pts. 2 and 3, State v. Salmons, 203 W. Va. 561, 509 S.E.2d 842 (1998).

If this Court, over the State's objection, does consider the matter of the circuit court's use

of its pre-sentence report in determining the Appellant to be a sexually violent predator, the State respectfully requests the Court to affirm the judgment of the circuit court for the following reasons.

The Appellee incorporates herein the arguments above. The standard of review is the same, from State v. Smith, *supra*.

In ruling on the Appellant's preliminary motions to dismiss the State's Motion to Determine the Defendant to be a Sexually Violent Predator, the circuit court considered the conclusions of the Appellant's 60-day evaluation and ruled:

W. Va. Code § 15-12-2a requires the court that has sentenced a person for the commission of a sexually violent offense to make a determination of whether or not that person is a sexually violent predator. A "sexually violent predator," as that term is defined by **W. Va. Code** § 15-12-2(k), is "a person convicted [...] of a sexually violent offense who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." Sexual Abuse in the First Degree, of which the Defendant was convicted of three offenses, is a "sexually violent offense," as that term is defined by **W. Va. Code** § 15-12-2(i). The conclusions of the Defendant's pre-sentence psychological evaluation make clear that the Defendant "suffers from a mental abnormality or personality disorder that makes [him] likely to engage in predatory sexually violent offenses." This Court concludes that the Defendant is subject to the statutory process for determining whether or not he is a sexually violent predator.

[Order Granting State's Motion to Determine the Defendant to be a Sexually Violent Predator, 3/8/10, ¶ 2; R.62-69.]

In its final ruling that the Appellant is a sexually violent predator, the circuit court concluded:

Based on the testimony of Mr. Glance, as well as the

Defendant's self-reporting as found in the 60-day Huttonsville evaluation in this Case No. 95-F-44, this Court finds that the Defendant suffers from a "mental abnormality," defined by **W. Va. Code** § 15-12-2(1) as meaning "a congenital or acquired condition of a person, that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons."

[Final Order Determining the Defendant to be a Sexually Violent Predator, 7/6/10, Addendum R. 2-7.]

The Appellant's pre-sentence evaluation report prepared in this case was a diagnostic and classification evaluation pursuant to **W. Va. Code** § 62-12-7a. That statute begins:

Notwithstanding any other provision of law, when any person has been found guilty of, or pleads guilty to, a felony, or any offense described in article eight-d or eight-b, chapter sixty-one of this code, against a minor child, the court may, prior to pronouncing of sentence, direct that the person be delivered into the custody of the commissioner of corrections, for the purpose of diagnosis and classification for a period not to exceed sixty days[.]

W. Va. Code § 62-12-7a (in part).

A Pre-sentence Evaluation Report prepared pursuant to **W. Va. Code** § 62-12-7a is to be treated in the same manner as a presentence investigation report prepared by a probation officer pursuant to **W. Va. Code** § 62-12-7. State v. Godfrey, 170 W. Va. 25, 289 S.E.2d 660 (1981). Although this report was not "disclosed" by its use in the same criminal case for which it was prepared, *W.V.R.Cr.P.* 32(b)(3) authorizes disclosure of pre-sentence reports when a criminal defendant "has pleaded guilty or nolo contendere, or has been found guilty." The Appellant pleaded guilty and was convicted on his pleas.

W. Va. Code § 15-12-2a requires the prosecuting attorney, in its initial pleading, to

provide a statement that a person suffers from a mental abnormality or personality disorder that makes him likely to engage in predatory sexually violent offenses. In its Motion, the State referenced the Pre-sentence Evaluation Report that was prepared, pursuant to **W. Va. Code** § 62-12-7a, as evidencing that the Appellant suffers from a mental abnormality or personality disorder that makes him likely to engage in predatory sexually violent offenses. [Motion to Determine the Defendant to be a Sexually Violent Predator, 6/12/09, R. 15-29.]

W. Va. Code § 15-12-2a requires the court that has sentenced a person for the commission of a sexually violent offense to make a determination of whether or not that person is a sexually violent predator. It should be plain, then, that the sentencing court will be aware of the contents of the pre-sentence report, and its accompanying diagnostic evaluation, if any, when it makes such a determination. The Appellant's argument that the evaluation cannot be used by the sentencing court when determining whether or not one is a sexually violent predator is contrary to the procedure of **W. Va. Code** § 15-12-2a and common sense understanding of a court's use of its own presentence reports.

The Appellant launches a Fifth Amendment attack on his pre-sentence diagnostic evaluation. Yet, there is nothing in the record that shows, and the Appellant does not assert, that he invoked his Fifth Amendment rights¹⁵ during the court ordered pre-sentence diagnostic evaluation. Moreover, the Appellant misconstrues the holding and effect of the United States Supreme Court case he cites in support of his proposition that use of the information in that pre-sentence evaluation is barred by the Fifth Amendment. Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), does not involve a court ordered pre-sentence evaluation. Estelle

¹⁵ *United States Const.*, Am. 5; *see also*: *W. Va. Const.*, Art. III, § 5.

held that the right against self-incrimination barred the government's use of statements made by a murder defendant in a *pre-trial competency evaluation* to elevate punishment in the defendant's post-conviction sentencing hearing. *See also Minnesota v. Murphy*, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984), holding that incriminating statements a person on probation for a sex offense made to his probation officer about a murder were not barred by the right against self-incrimination when those statements were used against him in trial for that murder.¹⁶

In this sexually violent predator determination, the State is not prosecuting the Appellant for any crime that he admitted to during the pre-sentence evaluation. Those matters are resolved by the guilty plea.

As to court ordered pre-sentence psychological evaluations, several jurisdictions hold that *Miranda*¹⁷ warnings do not apply to court ordered pre-sentence psychological evaluations and that a prisoner waives his Fifth Amendment right if he does not invoke it. The Appellant in the case *sub judice* never invoked his Fifth Amendment rights during the course of his court ordered pre-sentence psychological evaluation.

In the recently decided case of *People v. Hillier*, 392 Ill.App.3d 66, 910 N.E.2d 181 (Ill. App. 3 Dist., 2009), the appellate court affirmed the sentence in a child sex assault case, refuting the defendant's Fifth Amendment claim as to his court-ordered pre-sentence sex offender psychological evaluation by holding that he waived it by not exercising it. The *Hillier* court

¹⁶*Murphy* favorably cited this Court's opinion in *Hughes v. Gwinn*, 170 W.Va. 87, 290 S.E.2d 5 (1982), that a probationer is not entitled to *Miranda* warnings when speaking with her probation officer. *Murphy*, 465 U.S. 420, 424 n.3.

¹⁷ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

distinguished Estelle as addressing the use of a pre-trial competency evaluation, not a post-conviction pre-sentencing evaluation, noting that several courts have held that pre-sentence interviews do not implicate *Miranda* warnings, citing Baumann v. United States, 692 F.2d 565, 576 (9th Cir.1982); United States v. Rogers, 921 F.2d 975 (10th Cir.1990); United States v. Miller, 910 F.2d 1321 (6th Cir.1990); United States v. Cortes, 922 F.2d 123 (2d Cir.1990); People v. Corrigan, 129 Ill.App.3d 787, 84 Ill.Dec. 924, 473 N.E.2d 140 (1985); and People v. Bachman, 127 Ill.App.3d 179, 82 Ill.Dec. 270, 468 N.E.2d 817 (1984). Hillier, *supra*, 910 N.E.2d 181, 186-188. Based on this analysis, the Hillier court found that *Miranda* does not apply to court ordered pre-sentence psychological evaluations. *Id.*, 910 N.E.2d 181, 187-188. The Hillier court then cited Murphy, 465 U.S. 420, 427, for the proposition that when *Miranda* does not apply, a person waives his Fifth Amendment right by not invoking it. *Id.*, at 188.

Similarly, in Dzul v. State, 118 Nev. 681, 56 P.3d 875 (2002), the Supreme Court of Nevada affirmed the sentence for attempted lewdness with a child under fourteen, distinguishing Estelle and holding that *Miranda* did not apply to the defendant's court ordered pre-sentence psychosexual evaluation.

In People v. Wright, 431 Mich. 282, 430 N.W.2d 133 (1988), the Supreme Court of Michigan likewise distinguished Estelle in affirming a murder sentence, holding that a court ordered pre-sentence custodial psychological evaluation does not implicate *Miranda*.

Distinguished are the cases the Appellant relies on of U.S. v. Harrington, 923 F.2d 1371 (9th Cir., 1991), and Pens v. Bail, 902 F.2d 1464 (9th Cir., 1990). Harrington disallowed a *federal sentencing court* from considering the defendant's statements given in a psychiatric report that had been ordered previously in an *unrelated state court criminal proceeding* where there

existed a *state statute prohibiting the use* of such statements in other proceedings. Pens concerned the sentencing court imposing an elevated sentence based on information provided in reports from the *state mental hospital* where the court ordered the defendant for pre-sentence *psychiatric treatment*. The defendant was there for three years. During that three years the therapist at the state hospital assured the defendant that any statements made would not be provided to the court. They were provided to the court after all.

Nothing in **W. Va. Code** §§ 62-12-7a or 15-12-2a prevents the sentencing court from considering the diagnostic and classification report when also determining the issue of whether a defendant is a sexually violent predator. The Appellant confuses the different purposes of a court-ordered diagnostic and classification report under **W. Va. Code** § 62-12-7a and that of a “physical, mental and psychiatric study” of **W. Va. Code** § 62-12-2(e)¹⁸ that a defendant convicted of certain offenses must provide the court with before he may be eligible for probation.

¹⁸**W. Va. Code** § 62-12-2(e) reads in significant part:

In the case of any person who has been found guilty of, or pleaded guilty to, a violation of the provisions of section twelve, article eight, chapter sixty-one of this code, the provisions of article eight-c or eight-b of said chapter, or under the provisions of section five, article eight-d of said chapter, such person shall only be eligible for probation after undergoing a physical, mental and psychiatric study and diagnosis which shall include an on-going treatment plan requiring active participation in sexual abuse counseling at a mental health facility or through some other approved program: *Provided*, That nothing disclosed by the person during such study or diagnosis shall be made available to any law-enforcement agency, or other party without that person's consent, or admissible in any court of this state, unless such information disclosed shall indicate the intention or plans of the probationer to do harm to any person, animal, institution or property, in which case such information may be released only to such persons as might be necessary for protection of the said person, animal, institution or property.

W. Va. Code § 62-12-2(e).

A convict with a diagnostic and classification report under **W. Va. Code** § 62-12-7a is still not eligible for probation unless he/she has also undertaken the “physical, mental and psychiatric study” of **W. Va. Code** § 62-12-2(e).

Neither **W. Va. Code** § 62-12-7a nor **W. Va. Code** § 62-12-2(e) reference each other. There is nothing in the record to support the Appellant’s assertion that his trial counsel assured him that **W. Va. Code** § 62-12-2(e) provided protection of his diagnostic and classification report under **W. Va. Code** § 62-12-7a such that it could not be used by the sentencing court, in the same case for which it was prepared, to determine whether the Appellant is a sexually violent predator.

W. Va. Code § 62-12-2(e) does not bar the disclosure of the Appellant’s pre-sentence evaluation had under **W. Va. Code** § 62-12-7a. *Miranda* does not apply to the court ordered pre-sentence psychological evaluation. *Hillier, supra*; *Dzul, supra*; *Wright, supra*. The Appellant waived any Fifth Amendment protections by not invoking them at the time he provided the information to his interviewers. *Murphy, supra*; *Hillier, supra*; *Dzul, supra*; *Wright, supra*.

The circuit court did not abuse its discretion in considering the pre-sentence and diagnostic reports in reaching its conclusion that the Appellant is a sexually violent predator. The circuit court’s findings of fact are plainly based on the record and are not clearly wrong. The circuit court properly applied the law in reaching its conclusion. *State v. Smith, supra*.

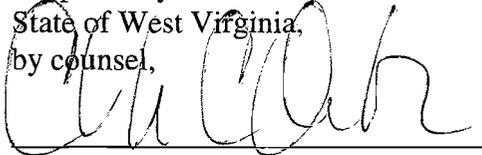
The Appellee State of West Virginia respectfully requests this Court to affirm the judgment of the circuit court.

VI. CONCLUSION.

For each of the foregoing reasons, the Appellant fails to demonstrate that there was any error in the circuit court’s determination that he is a sexually violent predator pursuant to **W. Va.**

Code § 15-12-2a. The State respectfully requests this Court to affirm the judgment of the circuit court.

Respectfully submitted,
State of West Virginia,
by counsel,

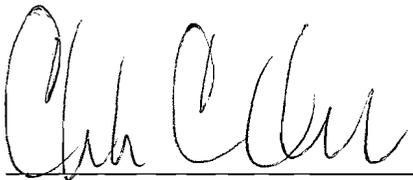
A handwritten signature in black ink, appearing to read "C. Quasebarth", written over a horizontal line.

Christopher C. Quasebarth
Chief Deputy Prosecuting Attorney
State Bar No.: 4676
380 W. South St., Suite 1100
Martinsburg, West Virginia 25401
304-264-1971

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true copy of the foregoing **APPELLEE STATE OF WEST VIRGINIA'S BRIEF and MOTION TO EXCEED PAGE LIMITATION** on this the 21st day of December, 2010, by ___ hand-delivery, x first-class mail, postage prepaid, ___ facsimile to:

James T. Kratovil, Esq.
P.O. Box 337
Charles Town, West Virginia 25414



Christopher C. Quasebarth

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE