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BERKELEY COUNTY  
CIRCUIT CLERK  
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VIRGINIA M. SINE, CLERK

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

v.

CASE NO.: 95-F-44  
(Division VI-Judge Groh)

STANLEY MYERS,

Defendant.

**ORDER GRANTING STATE'S MOTION TO DETERMINE  
THE DEFENDANT TO BE A SEXUALLY VIOLENT PREDATOR**

On the 25<sup>th</sup> day of February, 2010, came the Defendant, in person and by counsel, James T. Kratovil, upon the State's Motion to Determine the Defendant to be a Sexually Violent Predator, filed pursuant to **W. Va. Code § 15-12-2a**. Upon consideration of the pleadings and the argument of counsel, the Court grants the State's motion.

FINDINGS OF FACT.

1. At a June 1996 jury trial before the Honorable Andrew Frye, Circuit Judge, the Defendant was convicted of three (3) felony counts of Sexual Assault in the First Degree and one (1) felony count of Sexual Assault in the Third Degree. [Jury Verdict Order, 6/13/96, State v. Stanley Myers; Criminal Action No.: 95-F-44.]

2. The victims were four young boys, aged 6, 7, 10 and 12 at the time of the crimes.

3. These convictions were reversed by the West Virginia Supreme Court on appeal from a habeas corpus proceeding and the matter was remanded for a new trial. [State ex rel. Myers v. Painter, 213 W.Va. 32, 576 S.E.2d 277 (2002).]

4. Subsequently, the Defendant pleaded guilty to three (3) felony counts of Sexual Abuse in the First Degree and one (1) felony count of Sexual Assault in the Third Degree before the

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W. Va. Appellate  
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J. Yarbrough, MD

CRIMINAL ORDER BOOK NO. 164  
PAGE 336  
DATE 3-8-10

Honorable David Sanders, Circuit Judge.<sup>1</sup> Terms of the plea agreement included that the Defendant would be found by the Court to be a sexual predator and that he would register for life as a sex offender. The Defendant was found by the Court at the conviction and sentencing hearing to be a sexual predator “within the meaning of the West Virginia Code.” The Court’s Conviction and Sentence Order, personally prepared by Judge Sanders, made the finding that the Defendant is a sexual predator “within the meaning of that term as used in West Virginia law.” The Defendant was sentenced to one-to-five (1-5) years on each conviction, to run consecutively. [Conviction and Sentence Order, 3/25/03, Tr. 2/24/03, p. 50, Criminal Action No.: 95-F-44.]

5. The Defendant’s pre-sentence psychological evaluation includes the following conclusions: the Defendant “likely has little difficulty violating societal rules and constraints, when they run counter to his own wants and needs. His involvement in youth related programs suggests that his sexual involvement with children is very premeditated and predatory, rather than a situational reaction to stress. [...] Treatment in cases such as these, would normally consist of consequential learning, in concert with protracted sexual offender therapy and isolating this individual from any contact with potential victims. Given his pedophilic orientation, effective treatment would be extremely difficult, if not impossible. The recidivism rate for pedophiles is extremely high.” [Pre-sentence Evaluation Report, evaluation 12/16/1996.]

6. In its Motion filed on June 12, 2009, the State avers that it was the intent of the plea agreement in Case No.: 95-F-44 that the Defendant be found by the court to be a “sexually

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<sup>1</sup> In January, 2009, upon the retirement of the Honorable Thomas W. Steptoe, Jr., and by agreement of the judges of the 23<sup>rd</sup> Judicial Circuit, the Honorable David H. Sanders moved from the Circuit Court of Berkeley County to the Circuit Court of Jefferson County. The Honorable Gina M. Groh then assumed the Berkeley County Circuit Court docket of Judge Sanders.

violent predator,” pursuant to W. Va. Code § 15-12-2a, but that the State erred in using the term “sexual predator,”<sup>2</sup> instead of the statutory term “sexually violent predator.” The State asserts that the sentencing court replicated that error in its finding at the conviction and sentencing hearing and in the conviction and sentencing order.

7. The State further asserts in its Motion that the State was unaware that the West Virginia State Police were not considering the Defendant a “sexually violent predator,” for purposes of the Sex Offender Registry, until the Defendant was charged in the recent criminal matter indicted in May 2009 and currently pending in Berkeley County Circuit Court. [State v. Stanley M. Myers, Case No.: 09-F-127.]<sup>3</sup> <sup>4</sup>

8. The Defendant contends that the sentencing court never made a finding in Case No.: 95-F-44 that he was a “sexually violent predator,” that it was not a term of the plea agreement that the sentencing court make such a determination, and that this Court should not now revisit that issue.

9. In argument before this Court, the Defendant’s counsel asserted that prior to the conviction and sentencing hearing before Judge Sanders in February, 2003, he and the Defendant discussed the fact that the term “sexual predator” is not a term used in the West Virginia Code,

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<sup>2</sup> The term “sexual predator” is not found to be used in any West Virginia statute.

<sup>3</sup> The current criminal case charges the Defendant with the felony of Failure to Register as a Sex Offender (for failing to notify the State Police of all information relating to any internet accounts the Defendant has and the screen names, user names or aliases the Defendant uses on the internet), and a related misdemeanor of Contributing to the Delinquency of a Minor. [State v. Stanley M. Myers, Case No.: 09-F-127.]

<sup>4</sup> Two additional felony counts of Failure to Register as a Sexual Offender were returned against the Defendant by the February 2010 Grand Jury. [State v. Stanley M. Myers, Case No.: 10-F-22.]

and thus they believed had no effect. Yet they made no effort to correct Judge Sanders' impression that he was making a finding based on the term defined by statute.

#### CONCLUSIONS OF LAW.

1. This Court, sitting in Berkeley County, is the sentencing court and has the authority to entertain the State's motion filed pursuant to **W. Va. Code § 15-12-2a**. This Court assumed Judge Sanders Berkeley County docket when he moved to the Jefferson County Circuit Court. This is no different than had Judge Sanders retired or not sought re-election and another judge succeeded him.

2. **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.

3. 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.**

4. This Court further finds that the Defendant's reliance on State v. Whalen, 214 W. Va. 299, 588 S.E.2d 677 (2003), is misplaced. In distinction to the case *sub judice*, Whalen does not involve a determination of one being a sexually violent predator. Instead, Whalen is addressed to the issue of a sentencing court *sua sponte* making a finding that an indecent exposure charge to which that defendant was entering a guilty plea was a sexually motivated crime. The legal effect of that finding, which was not contemplated by either of the parties in their plea agreement, was that that defendant was then required to register as sexual offender, which he would not be so required absent the finding. The Defendant in the case *sub judice*, on the other hand, was required to register as a sex offender *by virtue* of the fact that he was convicted of four qualifying sex offenses with minors. 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.

5. 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.

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).

8. *W.V.R.C.P. 60*, relating to relief from final judgments in civil cases, has no applicability to this criminal case.

7. Neither does *W.V.R.Cr.P. 35* control this case. Subsection (a) of that rule is addressed to the correcting of illegal sentences; an illegal sentence was not imposed. Subsection (b) of that rule is addressed to the reduction of sentences. Neither have applicability to this case.

Accordingly, the Court holds that the State's Motion to Determine the Defendant to be a Sexually Violent Predator may proceed.

FURTHER ORDERED that, pursuant to **W. Va. Code § 15-12-2a(d)**, the Defendant shall undergo a psychiatric evaluation by John Yarbrough, M.D., Chestnut Ridge Center, 930 Chestnut Ridge Road, Morgantown, West Virginia 26505, at such time and place directed by Dr. Yarbrough. The report prepared from that evaluation shall be tendered to this Court within sixty (60) days of entry of this Order.

FURTHER ORDERED that, pursuant to **W. Va. Code § 15-12-2a(e)**, the West Virginia

Sex Offender Registration Advisory Board shall prepare and tender to the Court within thirty (30) days of receipt of this order a report on its findings and recommendations as to whether the Defendant is a sexually violent predator.

The exceptions of the Defendant to these rulings are noted.

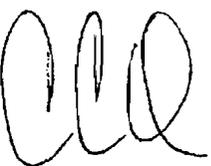
The Defendant then moved for a stay to bring the matter before the West Virginia Supreme Court of Appeals, which stay was granted for a period of thirty (30) days from the date of entry of the Order to file such pleadings with the Supreme Court, and an additional thirty (30) days thereafter.<sup>5</sup> The State's objection is noted. Any additional stay shall only be that allowed by the West Virginia Supreme Court of Appeals upon proper motion filed therewith.

It is hereby ORDERED that this matter shall come back on for a status hearing on April 29, 2010, at 1:00 p.m.

The Clerk shall enter this Order as of the date noted below and shall transmit attested copies to: counsel of record; the West Virginia Sex Offender Registration Advisory Board, Attn: Terri Swecker, West Virginia State Police Headquarters, 725 Jefferson Road, South Charleston, West Virginia 25309 ; and John Yarbrough, M.D., Chestnut Ridge Center, 930 Chestnut Ridge Road, Morgantown, West Virginia 26505.

ENTERED: March 8, 2010

  
HONORABLE GINA M. GROH  
CIRCUIT JUDGE

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<sup>5</sup> The Court notes that the Defendant previously filed a *pro se* Petition for Writ of Prohibition with the West Virginia Supreme Court of Appeals to attempt to bar this Court's consideration of the State's motion. However, to this date, no ruling has issued on that Petition. The Defendant's current counsel is appointed to represent him on this case and indicated that he intends to file a new pleading with the Supreme Court.

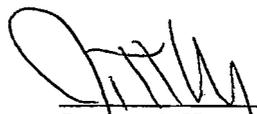
A TRUE COPY  
8 ATTEST

Virginia M. Sine  
Clerk Circuit Court  
By: Vicki S. Robinson  
Deputy Clerk

**CERTIFICATE OF SERVICE**

I, James T. Kratovil, Esq., Counsel for the Petitioner, hereby Certify that I have Served a true and complete copy of the foregoing Docketing Statement and accompanying Petition For Appeal upon Counsel for the Respondent, as listed below, by ✓ First Class U.S. Mail delivery, postage prepaid/ \_\_\_\_\_ facsimile, on this 27<sup>th</sup> day of PM, 2010.

Christopher Quasebarth, Esq.  
Chief Deputy Prosecuting Attorney  
Berkeley County Judicial Center  
380 W. South Street, Suite 1100  
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James T. Kratovil, Esq.  
Kratovil & Amore, PLLC