IN THE SUPREME COURT OF APPEALS OF WEST VRIGINIA

CHARLESTON

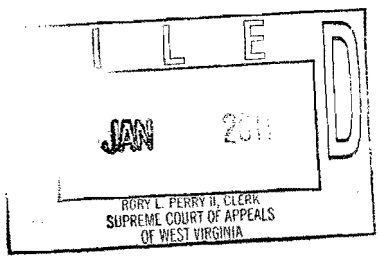
STATE OF WEST VIRGINIA,

Appellee,

v. **SUPREME COURT NO. 35672**

STANLEY MELVIN MYERS,

Appellant.



APPELLANT'S REPLY BRIEF

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

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Additional/Corrected Statements Of Fact
[II. Statement Of The Case—Appellee's Brief, pp. 2-10]

In the Appellee's Brief, pp. 2-5, II Statement Of The Case, the Appellee states that: "The trial court also found the Appellant to be 'a SEXUAL PREDATOR within the meaning of that term as used in West Virginia law.'" However, that reference comes from the Order of Conviction And Sentence, which was entered by Judge Sanders on March 25, 2003, nearly **one month after** the trial court's acceptance of the Appellant's binding plea agreement. The binding plea agreement itself, (Attachment B, Appellee's Brief, p. 2, #5), simply states: "...your client agrees to the court making a finding that he is a sexual predator..." No reference is made to the "West Virginia Code" or to "the West Virginia law", in the plea agreement itself, which was signed by the Appellant on February 5, 2003. In fact, when the trial court discussed the terms of the plea agreement with the Appellant, the State's Counsel at that time, Mr. Quasebarth, indicated that "...there is to be a Court finding that Mr. Myers is a sexual predator" [TR. 2/24/03, p. 49], and, once again, no reference was made to the West Virginia Code or to West Virginia law by the State or the trial Court. It was not until **after the Appellant had formally and finally accepted the State's proferred binding plea agreement** [TR. 2/24/03, p. 50], that the trial Court stated: "The Court specifically does find also that you are a **sexual predator** within the meaning of the West Virginia Code with regard to these convictions." [TR. 2/24/03, p. 50] The terms West Virginia Code and West Virginia law were not mentioned at all **prior to the acceptance of the Appellant's binding plea agreement.** In addition, no mention was made by the trial Court of the sexual predator

designation in the trial Court's pronouncement of sentence, [TR. 2/24/03, pp. 53-57], and the term **sexually violent predator** was not used at all by the State or the trial Court throughout the proceedings.

Assignments Of Error

Assignment Of Error Number One

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

Assignment Of Error Number Two

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

Assignment Of Error Number Three

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

Assignment of Error Number Four

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

Assignment of Error Number Five

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

Assignment of Error Number Six

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

Assignment of Error Number Seven

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

Assignment of Error Number Eight

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

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Appellant.

Comes now the Appellant, Stanley M. Myers, by and through his Counsel, James T. Kratovil, Esq., pursuant to Rule 10(c), W.Va. Rules of Appellate Procedure, and hereby submits his Reply Brief with respect to the above style matter.

Discussion Of Law

III. Summary Of Argument [Appellee's Brief, pp. 11-12]

The Appellee asserts that: "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 time of 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." (Appellee's Brief, pp. 11-12.)

For the record, the Appellant herein does dispute such a factual finding by the Circuit Court, and has taken exception to the Circuit Courts findings in this matter in the past. (TR. 6/28/10, p. 113; Final Order Determining The Defendant To Be A Sexually Violent

Predator, p. 6) If the Circuit Court could rely upon such a factual finding unopposed, then conducting an entirely new summary proceeding for the determination of sexually violent predator status was unnecessary and duplicitous, and many of the errors assigned in this Petition For Appeal would have become moot. It is difficult to imagine how the Circuit Court could have arrived at any such factual conclusion about what the Appellant "understood" at the time of his 2003 plea agreement (short of speculation), since the Appellant did not testify at the summary proceeding at all, much less with regard to his understanding of the plea agreement. Appellant's Counsel actually declined to offer an explanation regarding his client's understanding of the terms of the plea agreement, out of respect for client privilege. [TR. 2/25/10, pp. 13-15.] (Appellee's Brief, p. 7.) The issue is really a simple one. The State offered a plea, the terms of which were clear and were set forth in writing, and the Appellant accepted that plea as written. It was not, then, the Appellant's place to change the plea agreement or to correct the trial court with respect to anything found therein, unless, of course, the trial court misstated the terms of that agreement, which it did not, prior to accepting the plea.

The Appellee continues, by stating that: "The Appellant acknowledges that the term 'sexual predator' has no meaning in the law." (Appellee's Brief, p. 12) Up to and throughout the process of the acceptance of the Appellant's guilty plea by the trial Court, no reference was made to **the law** or to the **West Virginia Code**, with respect to the term 'sexual predator". It was only **after** the acceptance of the Appellant's plea that any such reference was made by the trial Court. [Order of Conviction And Sentence, 3/25/03, p. 2; TR. 2/24/03, p. 50.] In addition, Appellant's Counsel, at the Final Disposition Hearing in

this matter held on June 28, 2010, went to great length in questioning the State's expert witness, Theodore Glance, regarding the meaning of the term "sexual, predator", [TR. 6/28/10, pp. 63-64, 73-75], and Mr. Glance agreed that "sex offender", "sexual predator" and "sexually violent predator" are all professionally recognized terms, having distinct and separate meanings.

The Appellee states that, "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." (Appellee's Brief, p. 12) The Appellant has not been indicted for the "attempt" of anything,, much less any form of sexual exploitation. Insofar as any alleged intentions which the Appellant supposedly had for "grooming for sexual victimization", such an allegation is baseless speculation and has not been determined by any trier of fact. If it was true that the State did not find our until **after indictment** for a violation of the Sex Offender Registration Act that the Appellant had not registered as a "sexually violent predator", why, then, was the Appellant not charged with failure to register as a "sexually violent predator", pursuant to W.Va. Code § 15-12-8(e), rather than being Indicted simply for failure to register as a sex offender, pursuant to W.Va. Code § 15-12-8(c), in the February, 2009, Indictment?

The Appellee further stated that, "...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." (Appellee's Brief, p. 12.) First and foremost, we do not know what the trial court believed about the determination it was

making, since the record is devoid of any such explanation and Judge Sanders was not called to testify at the summary proceeding in this matter. Furthermore, there is nothing in the record of the plea agreement proceedings held on February 24, 2003, that indicates that the Appellant intentionally misled anyone. In fact, if anyone was misled, it was the Appellant, who was asked to agree to the term "sexual predator", only to be later told by the State that that was incorrect and what they really meant was "sexually violent predator". Certainly, the Appellee, having offered many plea agreements, is familiar with the old adage "Say what you mean, and mean what you say." Mr. Quasebarth, however, as Counsel for the State, apparently had a history shortly before the time of acceptance of the Appellant's plea agreement, of making proffers which contained ambiguous terms. State v. Hayhurst, 207 W.Va. 259, 531 S.E. 2d 324 (2000). Now, however, he expects us to believe that the Appellant should some how have been able to divine or speculate about what he really meant, based upon something which he did not say.

Assignment Of Error Number One

IT WAS ERROR FOR THE CIRCUIT COURT OF BERKELEY COUNTY, WV, TO GRANT THE STATE'S MOTION, WHEN THE STATE OF WEST VIRGINIA WAS BARRED FROM BRINGING SAID ACTION BY THE STATUTE OF LIMITATIONS GOVERNING CIVIL ACTIONS IN THE STATE OF WEST VIRGINIA. [Appelle's Brief, Assignment A., pp. 13-20]

The Appellee, once again, refers to the Circuit Court's finding regarding what Judge Sanders allegedly believed with respect to the finding he was making (Appellee's Brief, p. 17), when we do not know what Judge Sanders actually believed. [See: Discussion Of Law, pp. 6-7, Appellant's Reply Brief.]

The Appellee also again refers to the "Appellant's calculated and intentional refusal to

be candid with the trial court", (Appellee's Brief, p. 17), when we do not know what the Appellant's understanding of the terms of the plea agreement were at the time of the acceptance of the plea agreement. [See: Discussion Of Law, p. 5, Appellant's Reply Brief.]

The Appellee goes so far as to blame Appellant's Counsel for violating the W.Va. Rules of Professional Conduct, [Rule 3.3(a)(3)], (Appellee's Brief, p. 17), rather than to accept responsibility for his own shortcomings. Since it was the State's proffered plea agreement, it should have been incumbent upon the State, rather than Defense Counsel, to have fully explained the terms and associated meanings to the trial Court. Appellant's Counsel could not possible have known that the trial Court was making any error which required correction at that point in time, without the State first coming forward and clarifying its intentions contained in the language of the plea agreement. Perhaps the "lack of candor" referred to in the Appellee's Brief (p. 17) should actually be attributed to the State, if it stood silent while allowing the Appellant and the trial Court to accept its proffered term "sexual predator" in the plea agreement, while it made no effort to indicate otherwise by citing the term "sexually violent predator" or the applicable section of the W.Va. Code from which it was derived.

The Appellee further states that: "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..."(Appellee's Brief, pp.17-18). [1] The record in this matter is

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[1] This assertion by the Appellee simply lends credibility to the Appellant's argument in Assignment Of Error Three related to the doctrine of *collateral estoppel.*

devoid of any such representation by the Appellant.

The Appellee argues that, "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., (Appellee's Brief, p. 18). However, by permitting the statute of limitations to expire, that is exactly what the State did.

While the Appellee further contends that, "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 law," (Appellee's Brief, p. 18), no citation reference is made to any particular Brief or page therein submitted by the Appellant, which made such an allegation, and the Appellant is not aware of any such allegation made by him. In fact, the Appellant's Brief on this issue reveals that there was a **mistake**, and that mistake was the "drafting error" supposedly made by the State in its proffered plea agreement. (Appellant's Brief, p. 13).

The Appellee seems to vacillate between calling the summary proceeding for determination of sexually violent predator status a "civil" one, but yet a "criminal" one. "Although civil in nature, they plainly arise from criminal proceedings." (Appellee's Brief, p. 18). The language of W.Va. Code 15-12-2a(f), "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" (**emphasis added**) gives a clear indication that such a summary proceeding is **civil**. For that reason, the statute of limitations for civil proceedings apply and that limitations period had expired before the State initiated its summary proceeding against the Appellant.

Assignment Of Error Number Two

IT WAS ERROR FOR THE CIRCUIT COURT OF BERKELEY COUNTY, WV, TO GRANT THE STATE'S MOTION, WHEN THE STATE WAS BARRED FROM BRINGING SAID ACTION BY THE DOCTRINE OF *RES JUDICATA*. [Appellee's Brief, pp. 20-22, Assignment Of Error B.]

The Appellee relies upon this Court's decision in Myers v. West Virginia Consol. Public Retirement Bd., ___W.Va.___, ___S.E.2d___, (Docket No. 35470 and 35507, decided November 22, 2010), to stand for the proposition that re-opening the Appellant's old criminal matter, Case No. 95-F-44, is not barred by the doctrine of *res judicata*. (Appellee's Brief, pp. 21-22). However, that case was decided so recently, that it cannot be retroactively applied to the matter *sub judice*, which was finally adjudicated in January, 2005, and was then re-opened by the State in June, 2009 and decided by the Circuit Court in June, 2010.

The Appellant has correctly argued that the three elements which must be satisfied for *res judicata* to act as a bar, have been met in his underlying matter (Appellant's Brief, pp. 15-18). The Appellee recites the same three elements in the Appellee's Brief (p. 21), even citing the same case law. Blake v. Charleston Area Medical Center, 201 W.Va. 469, 498 S.E. 2d 41 (1997).

The *res judicata* bar does not demand a "full and fair decision before the trial court as to whether the Appellant is a sexually violent predator...", as the Appellee has put forward in the Appellee's Brief. (p. 21) Once a matter has been finally adjudicated, as has underlying Case No. 95-F-44, with the parties being the same parties, as they are here, the only remaining requirement which the Appellant must meet for *res judicata* to

be applicable is that the cause of action (i.e. the Appellant's sexually violent predator determination), must be such that it could have been resolved, had it been properly presented in the prior action. Blake, *Id.* While the sexually violent predator determination **could have been resolved as a part of the prior action**, before the matter was finally adjudicated and the Appellant had discharged his sentence, **had it been adequately presented by the State**, it obviously was not. That is the reason why the State has now attempted to re-open the Appellant's old criminal case and resurrect the sexually violent predator determination issue.

The Appellant maintains that the doctrine of *res judicata* bars the State and the Circuit Court from now re-visiting the sexually violent predator determination issue in his underlying criminal case.

Assignment Of Error Number Three

IT WAS ERROR FOR THE CIRCUIT COURT OF BERKELEY COUNTY, WV, TO GRANT THE STATE'S MOTION, WHEN THE STATE WAS BARRED FROM BRINGING SAID ACTION BY THE DOCTRINE OF *COLLATERAL ESTOPPEL.* [Appelle's Brief, pp. 23-24, Assignment Of Error C.]

The Appellee relies upon this Court's decisions in two pieces of case law, Myers v. West Virginia Consol. Public Retirement Bd., (Docket No. 35470 and 35507, decided November 22, 2010) and Frederick Management Co., LLC. v. City Nat. Bank of West Virginia, (Docket No. 35438, decided November 23, 2010), (Appelle's Brief, p. 23), to stand for the proposition that the doctrine of *collateral estoppel* does not bar the State and the Circuit Court from now re-opening the Appellant's old criminal case, in order to make a sexually violent predator determination. The Appellant believes that the decisions in these two recent cases cannot be retroactively applied to what has transpired

in his underlying case.

Once again, the Appellee asserts that "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." (Appellee's Brief, p. 23) However, that is exactly what the State has done, by being precluded from doing so under the doctrine of *collateral estoppel.*

In an effort to avoid the first prong of the standards for a *collateral estoppel* bar,as set forth in Syllabus Point 1 of State v. Miller, 194 W.Va. 3, 459 S.E. 2d 114 (1995), the Appellee now argues that, "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'". (Appellee's Brief, p. 23) However, this conclusion appears to conflict with the Appellee's previous position, wherein it was stated: "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'", (Appellee's Brief, p. 17), and "The Appellant...intentionally allowed the trial court to make a finding...which finding the trial court clearly believed was based in the law." (Appellee's Brief, p. 18) These assertions by the Appellee seem to indicate that the first prong of the standards for a *collateral estoppel* bar, as enunciated in Miller, *Id.,* have been met in the instant matter, i.e., "The issue previously decided is identical to the one presented in the action in question."

For the foregoing reasons, the Appellant maintains the position that the doctrine of

collateral estoppel bars the State and the Circuit Court from now re-visiting the sexually violent predator determination issue in the underlying matter.

Assignment of Error Number Four

IT WAS ERROR FOR THE CIRCUIT COURT OF BERKELEY COUNTY, WV, TO GRANT THE STATE'S MOTION, BECAUSE THE STATUTE IN QUESTION, W.Va. CODE § 15-12-2a, DOES NOT AFFORD THE CIRCUIT COURT AN UNLIMITED TIMEFRAME FOR SUCH ACTIONS, NOR DOES SAID STATUTE CONFER MULTIPLE OPPORTUNITIES UPON THE STATE OF WEST VIRIGNIA TO BRING SUCH AN ACTION. [Appellee's Brief, pp. 25-34, Assignment Of Error D.]

The Appellee asserts that, "The plain and unambiguous language of these statutes do not impose any deadline," (Appellee's Brief, p. 25), and, "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 not (sic) otherwise provide." (Appellee's Brief, p. 26).

The Appellant, however, has merely suggested to this Court that W.Va. Code § 15-12-2a must be read *in para materia* with other sections of the W.Va. Code, in order to ascertain the legislature's intent for the timeframe for making a sexually violent predator determination. For example:

(1) W.Va. Code § 15-12-3a gives a clear indication that such a determination was to have been made by the **original sentencing court.**

(2) 81 CSR 14-11.1 indicates that the State should have initiated sexually violent predator proceedings **before the Appellant was released from incarceration.**

(3) W.Va. Code § 62-12-26(a)&(c), indicates that a sexually violent predator

determination should have been made **before the expiration of any period of probation, parole or incarceration.**

(4) W.Va. Code §§ 15-12-2(e)(1) and 15-12-2(f)(1)(2)&(3) give a clear indication that a sexually violent predator must be given notice of his/her duty to register as a sexually violent predator by authorities, **prior to their release from confinement** by discharge of sentence or release on probation or parole.

There is also ample case law from various other jurisdictions to support the conclusion that a sexually violent predator determination must be made **before the release of the person so designated**, particularly before their release from incarceration or confinement. [See: Allen v. Illinois, 92 L.Ed.2d 296, 302 (1986); Kansas v. Hendricks, 138 L.Ed.2d 501 (1997); Seling v. Young, 148 L.Ed.2d 734, 741 (2001).]

Finally, the statutes governing sexually violent predator determinations for all of the surrounding jurisdictions require that such a determination be made prior to the person's discharge of their sentence for the underlying crimes. [Appellant's Brief, p. 25, note 3.]

The Appellant maintains his position that the State and the Circuit Court were time-barred from making his sexually violent predator determination, once he had discharged his sentence form his underlying convictions.

Assignment of Error Number Five

IT WAS ERROR FOR THE CIRCUIT COURT OF BERKELEY COUNTY, WV, TO GRANT THE STATE'S MOTION, WHEN THE FORCE AND EFFECT OF DOING SO HAS RESULTED IN THE CIRCUIT COURT UNILATERALLY MODIFYING THE APPELLANT'S BINDING PLEA AGREEMENT, WHICH HAD BEEN AGREED UPON BY THE STATE AND THE APPELLANT AND HAD BEEN PREVIOUSLY ACCEPTED BY THE COURT. [Appellee's Brief, pp. 34-40, Assignment Of Error E.]

The Appellee states that: "The trial court found the Appellant to be 'a SEXUAL PREDATOR within the meaning of that term as used in West Virginia law.'" (Appellee's Brief, p. 34) However, no reference was made in the plea agreement which the Appellant had signed to either "West Virginia law" or "the West Virginia Code". (Appellee's Brief, Attachment B.) Those terms were added by the Court **after** the Court's acceptance of the Appellant's binding plea agreement on February 24, 2003. [TR. 2/24/03, p. 50; Order of Conviction And Sentence, entered on 3/25/03, p. 2.] In fact, during the pronouncement of sentence by the trial court, no mention was made of the "sexual predator" determination whatsoever, or the laws or codes of this State. [TR. 2/24/03, pp. 54-56]

The Appellee, apparently citing the Circuit Court's findings in its "Order Granting State's Motion To Determine The Defendant To Be A Sexually Violent Predator", entered on 3/8/10, states that, "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..." (Appellee's Brief, p. 35) The Appellee continued by stating that, "Consequently, the Appellant's reliance on the holding of State v. Whalen, 214 W.Va. 299, 588 S.E.2d 677 (2003), is misplaced." (Appellee's Brief, p. 38) The Appellant contends that this Court's holding in Whalen, *Id.*, at note 5, is precisely "on-point" with his case. In Whalen, this Court indicated that a criminal defendant who enters a plea agreement in which he/she would be required to register as a sex offender, must be advised, as a part of the plea, regarding the **particular provisions** found in the West Virginia Sex Offender Registration Act which would be applied to the defendant. In the instant matter, the Appellant was not apprised that he

must register as a sexually violent predator, or that the provisions of W.Va. Code § 15-12-2(f)(1)(2)&(3) would apply to him. Since such advice is required to be included as a part of the plea agreement proceedings, to impose those requirements upon the Appellant now, does, indeed, modify the terms and conditions of his plea agreement which contained no such requirements.

The Appellee, furthermore, states that, "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." (Appellee's Brief, p. 37) The Appellant has previously refuted this contention (Appellant's Reply Brief, pp. 5-6), wherein he has shown that the State's own expert witness, Theodore Glance, conceded that the term "sexual predator" is a professionally recognized term having its own distinct meaning. [TR. 6/28/10, pp. 63-64, 73-75]

The Appellee, in reliance upon State ex rel. Brewer v. Starcher, 195 W.Va. 185, 465 S.E.2d 185 (1995), seems to have implied that the Appellant and his Counsel had engaged in a deceitful pattern of fraud and misrepresentation before the trial court, during the plea agreement proceedings. (Appellee's Brief, p. 36-37) "[T]he Appellant and his counsel knowingly permitted the trial court to make a finding of 'sexual predator' not based in the law...which 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." (p. 37) There is not one scintilla of evidence in the record of the plea proceedings which indicates that the Appellant or his Counsel engaged in any type of fraud,

misrepresentation or deceitful behavior toward the trial court. In fact, it is just as likely that the State may be implicated in such behavior. Perhaps the term 'sexual predator", which the State placed in the written plea agreement as opposed to "sexually violent predator", was intentionally designed to mislead the Appellant, his Counsel and the Court into believing that the Appellant was bargaining for one thing, while he was actually receiving something entirely different. That is the reality of what the State is now saying. In determining whether or not it was the State who engaged in deceptive behavior, as opposed to the Appellant and his Counsel, perhaps this Court should consider the following:

(1) Why was a sexually violent predator determination even included in a plea agreement, when it is designed to be a separate and distinct summary proceeding to be conducted **after sentence is imposed** on the underlying convictions?

(2) Why was the term "sexually violent predator" not ever used by the State or the trial court in the written plea agreement, throughout the plea hearing proceedings or in the Conviction And Sentence Order? (Appellee's Brief, Attachment B.)

(3) Why was registration as a "sexually violent predator", as opposed to a "sexual offender", not mentioned in the State's written plea agreement, during the plea proceedings or in the Conviction And Sentence Order?

(4) Why did the State not first initiate in writing a summary proceeding for sexually violent predator determination, as required by W.Va. Code § 15-12-2a(c), before including any such determination in a plea agreement?

(5) Why does the written plea agreement contain no waiver by the Appellant of the due

process rights conferred upon him by W.Va. Code § 15-12-2a(f), for a full summary proceeding regarding sexually violent predator determination, if he was being considered as a candidate for such a determination as a part of the plea agreement?

(6) Why does the State's written plea agreement contain numerous references to rules of law [Rule 11(e)(1)(C), W.Va.R.Crim.Proc.], and statutes [W.Va. Code §§ 61-8B-3, 61-8B-5, and 61-8B-7], but yet makes no reference whatsoever to the statute governing sexually violent predator determinations, W.Va. Code § 15-12-2a? [The transcript of the plea proceedings also reveals no such reference. TR. 2/24/03.]

In spite of all of these omissions on the part of the State, (whether intentional or accidental), the Appellant and his Counsel were left to second-guess what the State now says it meant and what the trial court supposedly believed. Instead, the Appellant and his Counsel simply accepted the written plea offer at face value, and now stand wrongfully accused of fraudulent and deceitful practices.

In response to footnote 12, p. 39, Appellee's Brief, the Circuit Court, the Honorable Judge Sanders, Stayed the revocation of the Appellant's bail for those underlying matters, by Order entered 12/21/10. The Appellant had been charged with a violation of W.Va. Code § 17B-2-3(b) for failure to surrender his driver's license and to obtain a specially coded one. However, the portion of W.Va. Code § 17B-2-3(b) which applies to the Appellant, did not require him to surrender his driver's license to anyone except the Circuit Court, when Ordered to do so. The Circuit Court's Final Order Determining The Defendant To Be A Sexually Violent Predator, entered on 7/6/10, did not include any mention of the possible surrender of the Appellant's driver's license to that Court. At a

hearing held before Judge Sanders on January 3, 2011, the State withdrew its Motion To Revoke Bail.

For the reasons set forth herein above, the Appellant believes that the Circuit Court's determination that he is a sexually violent predator constitutes an unlawful unilateral modification of his binding plea agreement, since he did not agree to such a determination.

Assignment of Error Number Six

IT WAS ERROR FOR THE CIRCUIT COURT OF BERKELEY COUNTY, WV, TO GRANT THE STATE'S MOTION, WHEN BY DOING SO THE CIRCUIT COURT HAS VIOLATED THE CONSTITUTIONAL PROTECTIONS AFFORDED TO THE APPELLANT AGAINST DOUBLE JEOPARDY. [Appellee's Brief, pp. 40-42, Assignment Of Error F.]

The Appellee has properly noted that double jeopardy protects against "multiple punishments for the same offense." (Appellee's Brief, p. 40, cite omitted) The Appellee also concedes that, "It appears to the State at this time that supervised release under W.Va. Code § 62-12-26 is a punitive sentence.." (Appellee's Brief, p. 39, n. 13) Thus, by definition, the imposition of a term of supervised release pursuant to W.Va. Code § 62-12-26, upon the Appellant at this time, would clearly violate the Constitutional prohibition against double jeopardy. While the Appellee has properly indicated that the Circuit Court's Final Order Determining The Defendant To Be A Sexually Violent Predator, entered 7/6/10, did not actually impose a term of supervised release upon the Appellant, (Appellee's Brief, p. 41), the Appellee appears to indicate that if this Court would grant leave to do so, the State would certainly pursue that option. (Appellee's Brief, p. 40, n. 13, paragraph #2.)

The Appellant submits to this Court the following case which supports his position that the imposition of supervised release upon him now, pursuant to W.Va. Code § 62-12-26, would violate the prohibition against double jeopardy, by imposing upon him a second punishment which would be attached to his original underlying convictions. U.S. v. Woodrup, 86 F.3d 359, 361 (4th Cir. 1996). The Appellant has already fulfilled one such punishment by discharging the sentence for his original underlying convictions.

The Appellant respectfully requests this Court to find that the imposition of a period of supervised release upon him now, pursuant to W.Va. Code § 62-12-26, would violate the prohibition against double jeopardy.

Assignment of Error Number Seven

IT WAS ERROR FOR THE CIRCUIT COURT OF BERKELEY COUNTY, WV, TO GRANT THE STATE'S MOTION, WHEN BY DOING SO THE CIRCUIT COURT HAS VIOLATED THE CONSTITUTIONAL PROTECTIONS AFFORDED TO THE APPELLANT AGAINST EX POST FACTO APPLICATIONS OF THE LAW. [Appellee's Brief, pp. 42-43, Assignment Of Error G.]

The Appellee appears to concede that the imposition of a period of supervised release now upon the Appellant, pursuant to W.Va. Code § 62-12-26, would violate *ex post facto* prohibitions. (Appellee's Brief, pp. 39-40, n. 13) While the Appellee points out that the Circuit Court's Final Order Determining The Defendant To Be A Sexually Violent Predator, entered 7/6/10, did not impose a term of supervised release upon the Appellant, the Appellee also indicates that the State would seek leave of this Court to do just that, should this Court find that the application of W.Va. Code § 62-12-26 to the Appellant would not violate *ex post facto* principles. (Appellee's Brief, p. 40, n. 13, paragraph #2.)

The Appellant would direct this Court's attention to United States v. Parriett, 974 F.2d 523, 525-527 (4th Cir. 1992), a case which stands for the proposition that application of a supervised release statute to a defendant, which was passed or amended after the date of the commission of that defendant's underlying offenses, violates *ex post facto* prohibitions.

The Appellant respectfully requests that this Court find that the imposition of a period of supervised release upon him now, pursuant to W.Va. Code § 62-12-26, would violate *ex post facto* prohibitions.

Assignment of Error Number Eight

IT WAS ERROR FOR THE CIRCUIT COURT OF BERKELEY COUNTY, WV, TO GRANT THE STATE'S MOTION, WHEN THE STATE'S MOTION, AS WELL AS THE CIRCUIT COURT'S ORDER GRANTING IT, RELIED IN PART UPON THE CONTENTS OF THE APPELLANT'S 60-DAY PRE-SENTENCE EVALUATION REPORT, WHICH HAD BEEN PREPARED SOLELY FOR THE PURPOSE OF SENTENCING IN THE UNDERLYING MATTER, THE SENTENCE FOR WHICH HAD BEEN DISCHARGED SOME FOUR YEARS EARLIER. THE IMPROPER USE OF THE APPELLANT'S PRE-SENTENCE REPORT VIOLATED HIS CONSTITUTIONAL 5TH AMENDMENT RIGHT TO REMAIN SILENT. [Appellee's Brief, pp. 44-52, Assignment of Error H.]

The Appellant's 60-Day Pre-sentence Evaluation Report apparently had been sent by the State to the Sex Offender Registration Advisory Board for their review, in preparing their recommendation to the Circuit Court. (Appellee's Attachment A., p. 2). This was done without the prior knowledge or consent of the Appellant or his Counsel. So, it was, perhaps, the Advisory Board's Recommendation Report , per se, which the Circuit Court considered in making its determination, rather than the Appellant's actual pre-sentence

report, as the Appellee implies. (Appellee's Brief, p. 44) Although the State contends that the Appellant did not ever object to such a use of his 60-Day Pre-sentence Evaluation Report for this purpose, both the State and the Circuit Court were fully aware of the Appellant's objections to its use for anything other than sentencing. [See: SER Myers v. Hon. Gina Groh, Supreme Court No. 35473, Remanded by Memorandum Order June 4, 2010.] Furthermore, this Court is empowered to consider this Assignment Of Error under the "plain error doctrine", even without an apparent, on-the-record objection, since the Appellant has alleged a violation of his 5th Amendment Constitutional right to remain silent. While the Appellee's Brief (p.46) appears to take a quote from the Appellant's 60-Day Pre-sentence Report, ("suffers from a mental abnormality or personality disorder that makes [him] likely to engage in predatory sexually violent offenses"], no such language appears in the Pre-sentence Evaluation Report. Instead, this language is merely the Circuit Court's direct recital of a portion of W.Va. Code § 15-12-2(k).

While a number of statements contained in the 60-Day Pre-sentence Report have been attributed to the Appellant by the Circuit Court, (Appellee's Brief, pp. 46-47), the Appellant has denied having made many of them. He made his denials to his defense counsel prior to his original sentencing in February, 1997. However, his trial counsel at that time, B. Craig Manford, who was later found by this Court to have provided ineffective assistance in the underlying matter, refused to raise an objection to any such alleged inaccuracies at sentencing.

The State goes to great lengths to argue that the Appellant must necessarily have invoked his 5th Amendment rights to preclude the unfettered use of his 60-Day Pre-

sentence Report (Appellee's Brief, pp. 48-50). On the other hand, the Appellant has repeatedly asserted that his Pre-sentence Report was initially prepared for one purpose and that purpose alone—to be used at his sentencing. [2] When his Pre-sentence Report was initially prepared, the Appellant did not invoke his 5th Amendment privilege, because it was not possible for him, at that time, to have anticipated the myriad of possible uses the State would later employ for his Pre-sentence Report. Therefore, a "knowing and intelligent" waiver of his right to remain silent could not have been made at that time. Similar to the situation in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed. 2d 359 (1981), the Appellant believed his report was being used for one, limited purpose, only to find out later that it was to be used for several others.

Finally, the State incorrectly asserts that 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). However, that is not correct. [See: Sizemore v. Rubenstein, 2006, WL709220 (S.D. W.Va.)] It is the Appellant's position that the two statutory provisions are alternative methods for seeking probation, since neither of the two provisions contain the words, "In addition to the provisions of this statute, a criminal defendant must also obtain a pre-sentence evaluation report pursuant to W.Va. Code § _____, in order to be eligible for probation."

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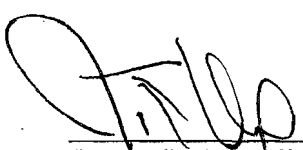
[2] Since W.Va. Code § 15-12-2a begins with the words, "The Circuit Court that **has sentenced** a person...", it is obvious that the summary proceeding for court determination of sexually violent predator status is not a part of sentencing, but instead occurs **after sentencing.**

Conclusion And Relief Requested

The State seems to have focused its attention and the attention of this Court, in nearly every argument for each of the assignments of error, upon what the original sentencing Court **did or did not do,** with respect to the Appellant's binding plea agreement. However, the State has now initiated, and the Circuit Court has entertained and granted, an entirely new summary proceeding for a sexually violent predator determination. With the exception of the assignment of error regarding the Circuit Court's unilateral modification of the Appellant's binding plea agreement, (Assignment Of Error Five/or/E.), the other seven assignments deal primarily with what the Circuit Court **can or cannot now do**, relative to such a determination, after the Appellant has discharged his underlying sentence. Many of the Circuit Court's finding of facts in this matter are based upon mere speculation and are, therefore, clearly erroneous. The Appellant, furthermore, continues to believe that the Circuit Court erred by now making its sexually violent predator determination, violating numerous principles and doctrines of law and Constitutional rights belonging to the Appellant in the process. For that reason, this Court should reverse the Circuit Court's Final Order Determining The Defendant To Be A Sexually Violent Predator, and remand the matter to the Circuit Court with directions to vacate its Final Order Determining The Defendant To Be A Sexually Violent Predator.

Respectfully Submitted,



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Certificate Of Service

I, James T. Kratovil, hereby Certify that I have Served a true and complete copy of the foregoing Appellant's Reply Brief upon the Appellee, the State of West Virginia, at the address listed below, by First Class U.S. Mail delivery, on this 6th day of January, 2011.

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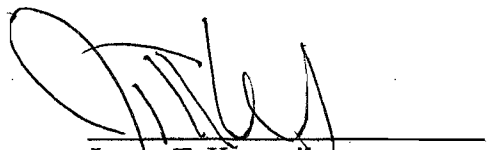

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