



APPEAL NO. 12-0658

IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff below- Appellee,

vs.

Case No. 08-F-38  
Circuit Court of Randolph County

JOSHUA R. CARVER,

Defendant below- Appellant.

FROM THE CIRCUIT COURT OF RANDOLPH COUNTY  
WEST VIRGINIA

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APPELLANT'S BRIEF

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**(1) Whether WV Code 62-12-26 is unconstitutional as it provides for additional felony level incarceration against a Defendant who has served the maximum amount of time for underlying misdemeanor conviction without giving the Defendant the constitutional protection of a new charge and a trial by jury, and is disproportionate to offenses for which he was convicted.**

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FROM THE CIRCUIT COURT OF RANDOLPH COUNTY, WEST VIRGINIA

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

**APPELLANT'S BRIEF IN SUPPORT OF  
PETITION FOR APPEAL ON BEHALF OF  
JOSHUA R. CARVER**

**TABLE OF AUTHORITIES**

**STANDARD OF REVIEW**

"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*." *State v. Keesecker*, 222 W. Va. 139; 663 S.E.2d 593

(2008), citing Syl. Pt. 4 *Burgess v. Porterfield*, 196 W. Va. 178; 469 S.E.2d 114. Further, this Court has ruled, "The constitutionality of a statute is a question of law which this Court reviews *de novo*." Syl. Pt. 1, *State v. Rutherford*, 223 W. Va. 1; 672 S.E.2d 137 (2008).

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**ASSIGNMENTS OF ERROR**

**AND THE MANNER IN WHICH THEY WERE DECIDED**

(1) Whether WV Code 62-12-26 is unconstitutional as it provides for additional felony level incarceration against a Defendant who has served the maximum amount of time for underlying misdemeanor conviction without giving the Defendant the constitutional protection of a new charge and a trial by jury, and is disproportionate to offenses for which he was convicted.

The Circuit Court denied Defendant’s Motion to Dismiss and found that he violated his sex offender probation and sentenced him to six (6) months in the penitentiary.

**STATEMENT OF THE CASE**

The Defendant pled guilty to four (4) misdemeanor counts of sexual abuse in the third degree in violation of WV Code 61-8B-9 (*Appendix pg. 24*). The Court, pursuant to the plea, sentenced the Defendant to ninety (90) days of incarceration on each count consecutively for a grand total of three hundred sixty days (360) of incarceration in the Tygart Valley Regional Jail (*Appendix pg 34*). The Defendant served the entirety of this sentence at the Tygart Valley

Regional Jail and then was placed by the Court to a period of extended sex offender supervision pursuant to WV Code 62-12-26 for a term of fifty (50) years (*Appendix pg 57*). The Defendant was then brought before the Court on a probation violation in February 2012 for violation of the sex offender probationary terms (*Appendix pg 16*). The Defendant objected to the proceedings as he had served the maximum amount of incarceration in this matter and accordingly it was unconstitutional for the Court to impose additional incarceration upon him pursuant to WV Code 62-12-26 (*Appendix pgs 4, 13*). The Circuit Court denied this Motion, ultimately adjudicated the Defendant for violating his probation, and sentenced the Defendant to six (6) months in the penitentiary (*Appendix pgs 4, 7*). The Defendant seeks a ruling by this Court that the extended supervision imposed by the Court pursuant to WV Code 62-12-26 is unconstitutional as it imposes additional felony level incarceration for the Defendant without providing him constitutional protections of a new charge and new trial, and further is disproportionate to the offenses for which he was convicted.

### **SUMMARY OF ARGUMENT**

The Defendant contends that he was unconstitutionally placed upon a period sex offender supervised probation for a period of fifty (50) years in violation of the United States and West Virginia Constitution. The Defendant asserts that pursuant to his plea to four (4) counts of misdemeanor sexual offense he was given ninety (90) days of incarceration in the Regional Jail for each count consecutive for a period of 360 years. The Defendant served the

entirety of his sentence and was released from incarceration. Subsequent to his release the Defendant was placed upon supervised probation for sex offenders for a period of fifty (50) years and ultimately underwent that supervision. A probation violation was filed with the Court on February 16, 2012 asserting that the Defendant had breached his supervised probation term and asking that his probation be revoked. The Defendant was brought before the Court and moved to dismiss this matter because he had already served the maximum amount of incarceration and accordingly it was unconstitutional to require the Defendant to serve additional incarceration without affording him the right to a jury trial and all other constitutional protections. The Circuit Court denied the Motion to Dismiss and found that the Defendant had violated his probation and sentenced the Defendant to six (6) months in the penitentiary. The Defendant's sentence would further be illegal and unconstitutional as he was placed in the penitentiary without the aforesaid constitutional rights and further upon an offense initially was only a misdemeanor conviction. Defendant also contends the fifty (50) years added supervision and penalties is disproportionate to the misdemeanor, for which he was convicted.

**STATEMENT REGARDING ORAL ARGUMENT AND DECISION.**

The Defendant asserts that this matter would be ripe for a Rule 20 decision and the Defendant would request that he be permitted to present oral argument in this matter.

## ARGUMENT AND DISCUSSION OF LAW

### I.

**Whether WV Code 62-12-26 is unconstitutional as it provides for additional felony level incarceration against a Defendant who has served the maximum amount of time for underlying misdemeanor conviction without giving the Defendant the constitutional protection of a new charge and a trial by jury, and is disproportionate to offenses for which he was convicted.**

"The constitutionality of a statute is a question of law which this Court reviews *de novo*." Syl. Pt. 1, *State v. Rutherford*, 223 W. Va. 1; 672 S.E.2d 137 (2008). Further, this Court has found,

"In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt." *Id.* at Syl. Pt. 2, citing Syl. Pt. 4, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740; 143 S.E.2d 351 (1965).

Even in light of the substantial deference given when determining the constitutionality of a legislative enactment, it is clear from reviewing the controlling authority and the facts of the case *sub judice* that *W. Va. Code* §62-12-26 is unconstitutional pursuant to both the United States Constitution and the West Virginia Constitution because it denies Petitioner his constitutional rights to due process, notice, and trial by jury. *W. Va. Code* § 62-12-26(a) provides in pertinent part,

"[A]ny defendant convicted after the effective date of this section of a violation of section twelve, article eight, chapter sixty-one of this code or a felony violation of the provisions of article eight-b, eight-c or eight-d of said chapter shall, as part of the sentence imposed at final disposition, be required to serve, in addition to any other penalty or condition imposed by the court, a period of supervised release of up to fifty years: Provided, That the period of supervised release imposed by the court pursuant to this section for a defendant convicted after the effective date of this section as amended and reenacted during the first extraordinary session of the Legislature, 2006, of a violation of section three or seven, article eight-b, chapter sixty-one of this code and sentenced pursuant to section nine-a of said article, shall be no less than ten years: .. Provided further, That, pursuant to the provisions of subsection (g) of this section, a court may modify, terminate or revoke any term of supervised release imposed pursuant to subsection (a) of this section." *Id.*

Further, *W Va. Code* § 62-12-26(c) provides, "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," *Id.*

With regard to the revocation of said supervised release, *W Va. Code* § 62-12-26( d)

authorizes the supervising court to:

" . . . (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 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." (Emphasis added.)  
*Id.*

This Court has recently reviewed West Virginia Code § 62-12-26 and its constitutional challenges in *State v James* 227 WV 407, 710 S.E. 2d 98 (2011). Further, the Court has upheld constitutionality of said statute on its face in various subsequent memorandum decisions that have been decided. The Petitioner in this case asserts that the rulings contained in the *James* case and memorandum decisions do not specifically address the issues that are present in this

case. Specifically, in *James* the Court held that on its face the statute was constitutional and permitted the Legislature to add the additional penalties for sex offenses in this matter. However, the ruling that the statute is constitutional on its face does not address whether a defendant may be placed in prison pursuant to this statute when his underlying convictions were misdemeanors. The Defendant in this case served a 360 day sentence at the Tygart Valley Regional Jail and fully discharged the same. He was released and then placed on fifty (50) years of supervised sex offender probation. Pursuant to the hearings held in this matter the Court found there was a violation. The Defendant was given a six (6) month sentence by the Circuit Court for the Defendant to serve in the penitentiary. The Defendant asserts that it is improper and unconstitutional for him to be subject to the increased penalty that would be consistent with the level of a felony sentence when he was never convicted of a felony. Thus, the Defendant asserts that before the statute could be applied to him and he be placed in prison for a felony term he get the added protection of a felony charge and jury trial in this matter. (It is also important to note that the underlying violation was for having contact with an under aged teenage girl who was seventeen (17) at the time of the contact. The Defendant was not charged with any new criminal law violation for this contact by any law enforcement agency). Thus, the Defendant asserts that his underlying six (6) month sentence was improper.

The United States Supreme Court, has determined that a criminal defendant is entitled to a trial by jury at which the allegations are proven beyond a reasonable doubt for any fact that increases the penalty for a crime beyond the prescribed statutory maximum, which *W Va. Code § 62-12-26* clearly does. Specifically, the Court found,

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: 'It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'" *Apprendi v. New Jersey*, 530 U.S. 466, 490; 120 S. Ct. 2348, 2362-2363 (2000).

Further, the Legislature determined that a violation of a similar supervision provision for sexual offenders should be proven beyond a reasonable doubt following an indictment and trial by jury, with all of the constitutional rights that every criminal defendant is afforded pursuant to the principles of our criminal justice system. As codified in *W Va. Code* § 15-12-1 et seq., the "Sex Offender Registration Act" places a number of requirements upon individuals convicted of sexual offenses, stating, "the intent of this article [is] to assist law-enforcement agencies' efforts to protect the public from sex offenders ... " *W Va. Code* § 15-12-1 a. Pursuant to *W Va. Code* § 15-12-8, individuals alleged to have violated the provisions of the registration requirement can be charged with a felony offense for said violation. Consistent with any other criminal offense, the accused is afforded all constitutional safeguards of any other criminal defendant. Specifically, the accused is permitted a trial by jury at which the State is required to prove his non-compliance with the requirements of the statute beyond a reasonable doubt.

To the extent that the Petitioner can face close to a fifty (50) year term of incarceration in this matter, the defendant asserts that the same would be unconstitutional as it is disproportionate

and cruel and unusual violation of our constitution. The same violates his constitutional right against cruel and inhuman punishment to the Eighth Amendment to the United States Constitution and Article 3, § 5 of the West Virginia Constitution, as said sentence is disproportionate. "Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article 3, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense. "Syl Pt. 5, *State v. Cooper*, 172 W.Va. 266, 304 S.E. 2d 851 (1983).

This Court has further determined that two different tests should be utilized when determining whether a sentence is disproportionate, stating:

In making such a determination as to whether the punishment for the offenses upon which Petitioner was convicted "shocks the conscience and offends fundamental notions of human dignity".

"The first is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further. When it cannot be said that a sentence shocks the conscience, a disproportionality challenge is guided by the objective test we spelled out in Syllabus Point 5 of *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981): In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the

legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction." *State v. Cooper*, 172 W. Va. at 272; 304 S.E.2d at 857 (1983).

From reviewing the facts of this case, it is evident that the potential for Petitioner to serve a fifty (50) year term of incarceration should the terms of his supervised release be violated would shock the conscience of the court and society insomuch as Petitioner's criminal convictions resulted in a sentences of ninety (90) days in the Regional Jail. Thus, the penalty of the supervised release is disproportionate in relation to the offenses upon which Petitioner was convicted and, as such, is violative of his constitutional right against cruel and inhuman punishment pursuant to the Eighth Amendment to the United States Constitution and Article 3, § 5 of the West Virginia Constitution.

Even if this Court were to find that Petitioner's sentence was not disproportionate pursuant to the subjective test set forth in *Cooper*, it is evident that said sentence is disproportionate pursuant to the objective test provided in *Wanstreet*. Sexual abuse in the third degree is a misdemeanor offense punishable by a term of incarceration in the Regional Jail for more than ninety (90) days. Said sentence constitutes one of the lesser statutory penalties in the West Virginia State Code for a sexual offense. Thus requiring Petitioner to serve a fifty (50) year term of supervised release upon completion of his sentence is disproportionate in and of itself, regardless of whether said supervised release actually results in violation and incarceration for said period.

In the *State v James* 227 WV 407, 710 S.E. 2d 98 (2011) case, this Court focused on the nature of the underlying convictions for the Appellants. In each case, there were felony convictions and more egregious facts than in this matter. Further, allowing penitentiary sentences for misdemeanor convictions would void the misdemeanor intent of the Legislature in characterizing the statute and determining the penalty for sexual abuse in the third degree.

## CONCLUSION

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

Respectfully Submitted,

Joshua A. Carver,  
Appellant,

By Counsel



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**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has this date served a true copy of the foregoing upon all other parties to this action by depositing a copy hereof in the United States Mail, first class postage prepaid, properly addressed to the parties listed below.

Dated this the 16<sup>th</sup> day of August, 2012.

Andy Mendelson  
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