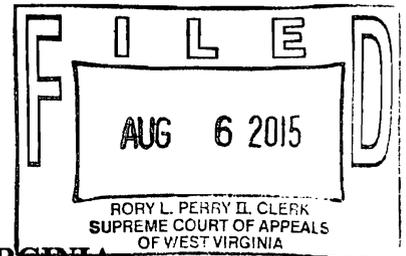


**NO. 15-0409**



**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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**CHARLESTON, WEST VIRGINIA**

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**IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA**

**STATE OF WEST VIRGINIA,**

**v.**

**Case No. 14-F-72 & 14-B-149**

**DAVID D. GRIFFY, SR.,**

**Defendant.**

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**BRIEF OF PETITIONER / SURETY BELOW, ERVIN PAGE, JR.**

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**STATUTES:**

West Virginia Code §62-1C-8..... 4, 6, 8.

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West Virginia Rules of Criminal Procedure, Rule 46. .... 6.

**PETITION**

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

**III. ASSIGNMENT OF ERRORS**

A. The record did not support a finding by the Circuit Court not to set aside the bond forfeiture.

B. The Circuit Court failed to properly apply West Virginia Rules of Criminal Procedure, Rule 46.

C. The Circuit Court erred in finding West Virginia Code Sections §62-1C-8, §62-1C-9, and §62-1C-12 requirements were satisfied.

**IV. STATEMENT OF THE CASE**

**A. PROCEEDINGS BELOW**

A property bond was executed in the amount of \$120,000.00 by the Petitioner for David Griffy, Sr., a named individual and criminal Defendant in a matter in Boone County, West Virginia in the case of State of West Virginia v. David Griffy, Sr. (Case No. 14-F-72) on August 20, 2014. The bond created a lien against petitioner's real property.

Sometime thereafter, David Griffy, Sr. absconded from the custody of Boone County, West Virginia, and failed to appear at the home confinement office as ordered, various court hearings and proceedings. The State of West Virginia then sought to revoke his bond and moved the Circuit Court to have judgment and execution of bond forfeiture against the Petitioner. (*Vol. I, App. pgs. 1 – 4*).

The Circuit Court entered the "Order on State's Motion for Judgment and Execution of Bond Forfeiture" on September 22, 2014. (*Vol. I, App. pgs. 5 – 10*). The Circuit Court found that the bond in the amount of \$120,000.00 justification of surety was posted on behalf of the

Defendant by Edna Griffy and Page Ervin, Jr. and that the Defendant Griffy had failed to appear at the home confinement office and hearings and as a result the Court ordered a judgment of default against the bond posted by the Petitioner and Edna Griffy. (*Vol. I, App. pgs. 5 -7*).

Petitioner filed his “Motion of Ervin Page, Jr. (Misspelled In Pleadings As Page Earvin, Jr.) To Set Aside Bond Forfeitures” on December 2, 2014 requesting the Court to set aside the bond forfeiture due to the Petitioner not receiving notice and in violation of his Due Process rights. (*Vol. I, App. pgs. 11 – 14*). However, unbeknownst to Petitioner, the Circuit Court entered the “Judgement Of Default And Order Of Execution Of Bond Forfeiture” on December 4, 2014. (*Vol. I, App. pgs. 15 – 28*). The Court did not receive the Petitioner’s Motion until after the time it had entered the Order on December 4, 2014.

A hearing was held on the Petitioner’s Motion To Set Aside on February 10, 2015, at which time the Petitioner presented argument as to why the Motion should be granted and the forfeiture set aside. The Circuit Court took the matter under advisement and issued a final decision titled “Findings of Fact And Conclusions Of Law Following Hearing On, Ervin Page, Jr’s Motion To Set Aside Bond Forfeiture” on April 8, 2015. (*Vol. I, App. pgs. 29 – 32*). The Circuit Court held that the bond in question was lawfully and justly declared forfeited, that notice was appropriately served upon the Petitioner and that all requirements of *West Virginia Code §62-1C-9* were satisfied. (*Vol. I, App. pgs. 29 – 32*).

## **B. STATEMENT OF FACTS**

Petitioner executed a Bond and Notice of Bond Encumbrance on the case of *State of West Virginia v. David Griffy, Sr.* (Boone County Case Nos. 14-F-72 and 14-B-149, which created a lien against certain property described as “Lt. 90X60 Kan 2 Mile Ck Union W S Rt. 21/7 1 MH” and further, against property described as “26-74 / 100A M/L Surf Goff Run Union” all ensuring

the conditions of bond entered by the Circuit Court for the Defendant, David D. Griffy, Sr., (hereinafter "Defendant Griffy") in an amount of surety of \$120,000.00.

After Petitioner posted the bond for Defendant Griffy, the Defendant then absconded from the custody of Boone County, West Virginia, and failed to make certain appearances in contradiction to his bond. The State of West Virginia sought to revoke the Defendant Griffy's bond. The State of West Virginia additionally moved the Circuit Court to have judgment and execution of bond forfeiture as against the Petitioner.

On December 4, 2014, the Circuit Court entered an Order finding that its previous judgment of default against the bond of the Petitioner be executed in the manner provided by law pursuant to *West Virginia Code §62-1C-9*. At or about the time of the entry of the Court's Order, Petitioner filed a Motion to Set Aside Bond Forfeiture. The Circuit Court did not receive this Motion to Set Aside Bond Forfeiture until after the time it had entered the December 4, 2014 Order. It should be noted the Petitioner was never served with any of the previous proceedings to forfeit the bond in this matter. Further, it appears from the record that Defendant Griffy is now in the custody of Boone County, West Virginia as he was extradited back to West Virginia once the South Carolina charges are resolved. Due to Defendant Griffy's now in custody, there was no purpose in requiring the forfeiture of the bond. Pursuant to West Virginia Rules of Criminal Procedure Rule 46 (e) and (f) and *West Virginia Code §62-1C-8*, a surrender of the bond and the assets may be exonerated and released after the surrender of the defendant into custody. Therefore, the Circuit Court should have set aside execution of the judgment and forfeiture of bond due to Defendant Griffy's being in the custody having been extradited to West Virginia.

On April 8, 2015, the Circuit Court entered “Findings of Fact and Conclusions of Law Following Hearing On, Ervin Page, Jr.’s Motion to Set Aside Bond Forfeiture” in which the Circuit Court found Defendant Griffy’s bond was lawfully and justly declared forfeited, that notice was appropriately served upon Petitioner and that all requirements of *West Virginia Code §62-1C-9* were satisfied, resulting in the denial of the Motion to Set Aside Bond Forfeiture. The Petitioner now appeals this Order of the Circuit Court of Boone County, West Virginia.

**V. SUMMARY OF THE ARGUMENT AND ISSUES**

The Circuit Court of Boone County, West Virginia, erred in its interpretation and application of relevant case law, code sections, and rules in granting a motion for setting aside forfeitures. The Circuit Court’s finding that all the requirements regarding grounds for forfeiture of a bond were properly and justly made was in error. The Circuit Court’s record did not support this finding and was clearly an abuse of discretion.

**VI. STATEMENT REGARDING ORAL ARGUMENT**

The Petitioner is requesting oral argument in this matter. The Petitioner represents that the facts and legal arguments presented in this brief, record on appeal, and the decisional process would be significantly aided by oral argument. The case should be set aside for a Rule 20. The case is not appropriate for a memorandum decision only. The case involves assignments of error in the application of settled law, constitutional questions regarding a court’s ruling, and the Petitioners claim the Circuit Court used an unsustainable exercise of discretion in the matter.

**VII. ARGUMENT AND DISCUSSION**

**A. THE CIRCUIT COURT COMMITTED AN ABUSE OF DISCRETION IN ITS FAILURE TO SET ASIDE THE FORFEITURE AND WAS IN ERROR IN THE ITS INTERPRETATION OF SETTLED LAW PERTAINING TO SETTING ASIDE FORFEITURES.**

In the April, 8, 2015 Order, the Circuit Court’s application of West Virginia’s forfeiture sections was in error.<sup>1</sup> Rule 46(e) of the West Virginia Rules of Criminal Procedure states [in pertinent part] that in considering the setting aside of a forfeiture, “the court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.” This is further reiterated by *West Virginia Code §62-1C-8*, which states that the forfeiture may be set aside if it appears that justice does not require the enforcement of the forfeiture. The West Virginia Supreme Court has indicated that “forfeiture should bear some reasonable relation to the cost and inconvenience to the government and the courts.” *State v. Hedrick*, 204 W.Va. 547, 557; 514 S.E.2d 397, 407 (1999); citing *Accredited Sur. & Cas. Co. v. United States*, 723 F.2d 368, 370 (quoting *Jeffers v. United States*, 588 F.2d 425, 427).

In a similar case, this honorable Supreme Court held that the Circuit Court’s denial to remit the penalty of the recognizance was an abuse of discretion. *State v. Arrington*, 147 W.Va. 753, 131 S.E.2d 382 (1963). In *Arrington*, the defendant was arrested for a felony of breaking and entering and a recognizance was entered with the condition that he appear in the criminal court on various dates. The defendant failed to appear due to his detainment in another state. The defendant has been taken into custody by federal authorities and was tried in the detaining state on charges for an alleged offense that was committed prior to the issuance of the recognizance. The Supreme Court held as a general rule, “upon default of the principal in a recognizance conditioned upon his appearance before a court, the surety will be excused from liability on such recognizance only where the default of the principal is caused by the public

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<sup>1</sup> The Order denying the Petitioner’s Motion to Set Aside references West Virginia Code §61-1C-9; however, Petitioner believes this is a typographical error. Petitioner notes the Court always referred to each section with chapter “61”.

enemy, the obligee, the law or an act of God.” However, in *Hedrick* the Supreme Court overruled this general rule to the extent that it may be interpreted inconsistently with the holding in *State v. Hedrick*, it is expressly overruled. *State v. Hedrick*, 204 W. Va. 547, 557, 514 S.E.2d 397, 407 (1999).

In the matter of *State v. Hedrick*, a bailbondsman posted bail for a defendant in the amount of \$455,000. Following the posting the defendant left the country and failed to appear at a hearing. The Circuit Court of Pendleton County granted the State of West Virginia’s motion to declare the bonds forfeited. Upon the defendant’s voluntary return to custody, the Circuit Court remitted and exonerated the forfeited bail bonds, except for \$100,000. The bailbondsman appealed the decision and argued it was an abuse of discretion to hold a portion of the bond. *State v. Hedrick*, 204 W.Va. 547, 514 S.E.2d 397 (1999).

This honorable Supreme Court held in *Hedrick* that justice did not require remitting the entire amount of the forfeited bond. A non-exhaustive factor test was used to assist in the determination of whether remittance of all or part of previously forfeited bail bond pursuant to West Virginia Rules of Criminal Procedure, Rule 46. When a trial court is asked to remit a previously forfeited bail bond, the Court should consider the following criteria<sup>2</sup>:

- (1) the willfulness of the defendant’s breach of the bond’s conditions;
- (2) the cost, inconvenience and prejudice suffered by the government as a result of the breach;
- (3) the amount of delay caused by the defendant’s default and the stage of the proceedings at the time of his or her disappearance;
- (4) the appropriateness of the amount of the bond;

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<sup>2</sup> This list is to be viewed to the extent that they are relevant to the particular case under consideration and is non-exhaustive. *Id.* at 406. The factors are intended to be a guide but do not represent an exhaustive list of all factors that may be relevant to a particular case. All factors need not be resolved in the State’s favor. *State v. Ratliff*, 2012 W.Va. LEXIS 686.

- (5) the participation of the bondsman in rearresting the defendant;
- (6) whether the surety is a professional or a friend or member of the defendant's family;
- (7) the public interest and necessity of effectuating the appearance of the defendant; and
- (8) any explanation or mitigating factors presented by the defendant.

*Id.*

It should be noted that the Circuit Court in this matter applied none of this analysis in the Final Order. Defendant Griffy during the majority of the time period pertaining to the forfeiture proceedings was in custody with the State of South Carolina. The willfulness of Defendant Griffy's breach of the bond's conditions to attend all court hearings is quite questionable. The State of West Virginia failed to demonstrate this factor. One cannot choose to appear for a court hearing in the State of West Virginia on one's own volition if one is incarcerated in the State of South Carolina. "In general, an abuse of discretion occurs when a material fact deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the Circuit Court makes a serious mistake in weighting them." *State ex rel. Thrasher Eng'g, Inc. v. Fox*, 218 W.Va. 134 (2005); citing *State v. Hedrick*, 204 W.Va. 547, 553, 514 S.E.2d 397, 403 (1999) (quoting *Gentry v. Mangum*, 195 W.Va. 512, 520 n. 6, 466 S.E.2d 171, 179 n. 6 (1995)).

The State of West Virginia was aware of not only his whereabouts but that said Defendant was subject to being extradited back to West Virginia once his criminal charges were resolved in the State of South Carolina. Due to Defendant Griffy's placement in custody, there simply was no purpose in continuing to require the forfeiture of bond and the Petitioner's property. In essence, the bond default caused by Defendant Griffy's absence was cured upon his location being known, his person placed in custody with the State of South Carolina, and the

extradition to West Virginia. The Circuit Court made a serious mistake in not weighing this fact in its consideration.

**B. THE PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY FAILING TO BE NOTICED REGARDING THE FORFEITURE PROCEEDINGS.**

The Due Process Clause, W.Va. Const. art. III, 10, requires "procedural safeguards against state action which affects a liberty or property interest." *Barazi v. West Virginia State College*, 201 W.Va. 527, 498 S.E.2d 720 (1997). The Circuit Court in the matter currently before the Supreme Court found that because the Petitioner had an opportunity to file a bail piece, withdrawing his bail posting, prior to the State's filing its motion to revoke, he was the one in error. The Circuit seemed to focus on the notices sent to the Petitioner. Three notices were sent to the Petitioner but were returned for either insufficient address, notification that the address did not exist, and unclaimed at least ten (10) days prior to the hearing. It should be noted that the addresses for the Petitioner differed and varied. (*Vol. I, App. pgs. 23 -28*). This is evidence that the Petitioner did not in fact receive proper notice. Simply because the notices were mailed out does not meet proper due process safe guards that are so appropriately guarded.

**VIII. CONCLUSION**

The Circuit Court of Boone County, West Virginia abused its discretion when determining whether the bond forfeiture should be set aside in this matter. The Circuit Court should have used in its analysis the fact that the Defendant Griffy was being held in another state and his actions were not willful in nature. Additionally, the Circuit Court failed to recognize or question the various addresses used by the Circuit Clerk in its attempt to notice the Petitioner of the forfeiture proceedings. For these reasons, the judgment of the Circuit Court of Boone County must be reversed.

**IX. PRAYER FOR RELIEF**

Wherefore, the Petitioner, Ervin Page, Jr., respectfully prays this Supreme Court of Appeals rules the errors committed by the Circuit Court of Boone County in this matter are reversible errors and remand this case to the Circuit Court of Boone County for further proceedings in accordance with the laws of the State of West Virginia; and grant unto the Petitioner such other, further, and general relief as may seem proper to this honorable Supreme Court.

Respectfully submitted,

**ERVIN PAGE, JR.,**

By counsel.

**CICCARELLO, DEL GIUDICE & LAFON**



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**CERTIFICATE OF SERVICE**

I, Tim LaFon, attorney for Petitioner, do hereby certify that the foregoing "Brief" and "Appendix of Petitioner" was duly served upon the Respondent by mailing a true copy thereof, United States Mail, postage prepaid, First Class, this the 6th day of August, 2015, addressed to the following:

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