

---

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**  
No. 13-0733

**STATE OF WEST VIRGINIA ex rel.  
STATE OF WEST VIRGINIA,**

*Petitioner,*

v.

**THE HONORABLE ROBERT A. BURNSIDE, JR.,  
Judge of the Circuit Court of Raleigh County,  
West Virginia, and RICHARD E. HARDISON, JR.,  
Criminal Defendant below and Real Party in Interest here,**

*Respondents.*

---

**PETITION FOR A WRIT OF PROHIBITION**

---

**SCOTT E. JOHNSON  
SENIOR ASSISTANT ATTORNEY GENERAL  
State Bar No. 6335  
812 Quarrier Street, 6th Floor  
Charleston, WV 25301  
Telephone: 304-558-5830  
Fax: 304-558-5833  
E-mail: [sej@wvago.gov](mailto:sej@wvago.gov)  
*Counsel for Petitioner***

---

---

**TABLE OF CONTENTS**

	<b>Page</b>
I. QUESTIONS PRESENTED .....	1
II. STATEMENT OF THE CASE .....	2
III. SUMMARY OF ARGUMENT .....	3
IV. STATEMENT REGARDING ORAL ARGUMENT .....	4
V. ARGUMENT .....	5
A. The State satisfies the special criteria governing a prosecutorial request for a Writ of Prohibition as set forth in Syllabus Point 5 of <i>State v. Lewis</i> , 188 W. Va. 85, 422 S.E.2d 807 (1992) .....	5
B. A balancing of the factors set forth in Syllabus Point 4 of <i>State ex rel. Hoover v. Berger</i> , 199 W. Va. 12, 483 S.E.2d 12 (1996) demonstrates that this Court should issue the Writ of Prohibition .....	7
1. The State has no adequate means such as a direct appeal to obtain the desired relief .....	7
2. The State will be damaged or prejudiced in a way that is not correctable on appeal .....	8
3. The circuit court's ruling does not demonstrate an oft repeated error or manifest persistent disregard for either procedural or substantive law .....	8
4. The lower tribunal's order raises new and important problems or issues of law of first impression .....	8
5. The circuit court's ruling was clearly erroneous as a matter of law .....	10
a. The plain language of West Virginia Code W. Va. Code § 62-1D-9(d) does not reach the use of a body wire when used to record the criminal acts of the lawyer by a confidential informant .....	12

b.	The circuit court's interpretation of West Virginia Code § 62-1D-9(d) is absurd and unjust and requires an alternate reasonable interpretation, that is, while the statute prohibits the bugging of a lawyer's place of employment, it does not prohibit the use of a body wired informant to tape the informant's and lawyer's conversations .....	17
c.	West Virginia Code § 62-1D-2(d) and 62-1D-6 constitute an impermissible infringement on this Court's constitutional authority to promulgate procedural rules and regulate the conduct of lawyers in this State .....	22
VI.	CONCLUSION .....	27

**TABLE OF AUTHORITIES**

<b>CASES</b>	<b>PAGE</b>
<i>Admiral Insurance Co. v. U.S. District Court</i> , 881 F.2d 1486 (9th Cir. 1989) .....	8
<i>Barr v. NCB Mgt. Services</i> , 227 W. Va. 507, 711 S.E.2d 577 (2011) .....	17-18
<i>Bartnicki v. Vopper</i> , 532 U.S. 514 (2011) .....	11
<i>Bowens v. Ary, Inc.</i> , No. 282711, 2009 WL 3049580 (Mich. Ct. App. Sept. 24, 2009), <i>rev'd on other grounds</i> , 794 N.W.2d 842 (Mich. 2011) .....	14
<i>Coal &amp; Coke Railway Co. v. Conley</i> , 67 S.E. 613 (W. Va. 1910) .....	17-18
<i>Committee on Legal Ethics v. Roark</i> , 181 W. Va. 260, 382 S.E.2d 313 (1989) .....	26
<i>Committee on Legal Ethics v. White</i> , 189 W. Va. 135, 428 S.E.2d 556 (1993) .....	26
<i>Doe v. Boland</i> , 698 F.3d 877 (6th Cir. 2012) .....	13, 14
<i>Dolan v. U.S. Postal Service</i> , 546 U.S. 481 (2006) .....	15, 16
<i>F.D.I.C. v. Meyer</i> , 510 U.S. 471 (1994) .....	13
<i>First United Methodist Church v. U.S. Gypsum Co.</i> , 882 F.2d 862 (4th Cir. 1989) .....	18
<i>Harmelin v. Michigan</i> , 501 U.S. 957 (1991) .....	8-9
<i>Hicks v. Ballard</i> , No. 2:08-CV-01365, WL 1043459 (S.D. W. Va. Mar. 18, 2011) .....	9
<i>Hinchman v. Gillette</i> , 217 W. Va. 378, 618 S.E.2d 387 (2005) .....	24
<i>In re B.B.</i> , 224 W. Va. 647, 687 S.E.2d 746 (2009) ( <i>per curiam</i> ) .....	9
<i>In re M.D.</i> , No. 11-1182, 2012 WL 2988768 (W. Va. Mar. 23, 2012) (Mem. Dec.) .....	9
<i>Kaahumanu v. Hawaii</i> , 682 F.3d 789 (9th Cir. 2012) .....	15
<i>Lawyer Disciplinary Board v. Askin</i> , 203 W. Va. 320, 507 S.E.2d 683 (1998) .....	26

<i>Lawyer Disciplinary Board v. McGraw</i> , 194 W. Va. 788, 461 S.E.2d 850 (1995) .....	20-21
<i>Lopez v. United States</i> , 373 U.S. 427 (1963) .....	6
<i>Louk v. Cormier</i> , 218 W. Va. 81, 622 S.E.2d 788 (2005) .....	22, 24
<i>Malloy v. Hogan</i> , 378 U.S. 1 (1964) .....	5
<i>Marker v. United States</i> , No.2:04-01161, WL 1767976 (S.D. W. Va. June 26, 2006) .....	9
<i>Massy v. United States</i> , 214 F.2d 935 (8th Cir. 1954) .....	14
<i>Mayhorn v. Logan Medical Foundation</i> , 193 W. Va. 42, 454 S.E.2d 87 (1994) .....	25
<i>Meadows v. Wal-Mart Stores, Inc.</i> , 207 W. Va. 203, 530 S.E.2d 676 (1999) .....	13
<i>Moore v. Starcher</i> , 167 W. Va. 848, 280 S.E.2d 693 (1981) .....	5
<i>Office of Disciplinary Counsel v. Alderman</i> , 229 W. Va. 656, 734 S.E.2d 737 (2012) ( <i>per curiam</i> ) .....	26
<i>On Lee v. United States</i> , 343 U.S. 747 (1952) .....	6
<i>Page v. Columbia National Res., Inc.</i> , 198 W. Va. 378, 480 S.E.2d 817 (1996) .....	22
<i>People v. Silvola</i> , 547 P.2d 1283 (Colo. 1976) .....	21
<i>People v. Gardner</i> , 359 N.Y.S.2d 196 (Sup. Ct. 1974) .....	9
<i>People v. Macrander</i> , 828 P.2d 234 (Colo. 1992) .....	21
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989) .....	17
<i>Raines Imports, Inc. v. American Honda Motor Co.</i> , 223 W. Va. 303, 674 S.E.2d 9 (2009) .....	12
<i>Roberts v. Sea-Land Service</i> , 132 S.Ct. 1350 (2012) .....	15
<i>Robinson v. Mills</i> , 592 F.3d 730 (6th Cir. 2010) .....	6
<i>Sergent v. Charleston</i> , 209 W. Va. 437, 549 S.E.2d 311 (2001) ( <i>per curiam</i> ) .....	9

<i>Shell Oil Co. v. Iowa Department of Rev.</i> , 488 U.S. 19 (1988) .....	13
<i>Shepherdstown Observer v. Maghan</i> , 226 W. Va. 353, 700 S.E.2d 805 (2010) .....	15
<i>Smith v. State Work Comp. Commissioner</i> , 159 W. Va. 108, 219 S.E.2d 361 (1975) .....	12
<i>Snyder v. Massachusetts</i> , 291 U.S. 97 (1934) .....	5
<i>Spry v. United States</i> , 2:03-2317 (S.D. W. Va. July 21, 2006) .....	9
<i>State ex rel. Clifford v. Stucky</i> , 212 W. Va. 599, 575 S.E.2d 209 (2002) .....	5
<i>State ex rel. Cohen v. Manchin</i> , 175 W. Va. 525, 336 S.E.2d 171 (1984) .....	13
<i>State ex rel. Hoover v. Berger</i> , 199 W. Va. 12, 483 S.E.2d 12 (1996) .....	7
<i>State ex rel. Marshall County Commission v. Carter</i> , 225 W. Va. 68,(2010 S.E.2d 68,(2010) (Workman, J., concurring) .....	11, 25
<i>State ex rel. Morgan v. Trent</i> , 195 W. Va. 257, 465 S.E.2d 257 (1995) .....	18
<i>State ex rel. Plants v. Webster</i> , ____ S.E.2d ____ (W. Va. 2012) ( <i>per curiam</i> ) .....	6
<i>State ex rel. Prosecuting Attorney v. Bayer Corp.</i> , 223 W. Va. 146, 672 S.E.2d 282 (2008) .....	13-14
<i>State ex rel. Quelch v. Daugherty</i> , 172 W. Va. 422, 306 S.E.2d 233 (1983) .....	26
<i>State ex rel. Ruseñ v. Hill</i> , 193 W. Va. 133, 454 S.E.2d 427 (1994) .....	7-8
<i>State ex rel. Sims v. Perry</i> , 204 W. Va. 625, 515 S.E.2d 582 (1999) .....	6
<i>State ex rel. Tucker County Solid Waste Authority v. West Virginia Division of Labor</i> , 222 W. Va. 588, 668 S.E.2d 217 (2008) .....	18
<i>State v. Angell</i> , 216 W.V a. 626, 609 S.E.2d 887 (2004) .....	5
<i>State v. Burton</i> , 163 W. Va. 40, 254 S.E.2d 129 (1979) .....	20
<i>State v. De Marco</i> , 79 A. 418 (N.J. 1911) .....	14

<i>State v. Dillon</i> , 191 W. Va. 648, 447 S.E.2d 583 (1994) .....	2
<i>State v. Evans</i> , 172 W. Va. 810, 310 S.E.2d 877 (1983) .....	9
<i>State v. Hilling</i> , No. 12-0131 (W. Va. June 24, 2013) (Mem. Dec.) .....	9
<i>State v. Holmes</i> , No. 11-0436, [2011 WL 8197528] (W. Va. Nov. 10, 2011) (Mem. Dec.) .....	9
<i>State v. Jenkins</i> , 195 W. Va. 620, 466 S.E.2d 471 (1995) .....	25
<i>State v. Johnson</i> , 179 W. Va. 619, 371 S.E.2d 340 (1988) .....	9
<i>State v. Kemah</i> , 957 A.2d 852 (Conn. 2008) .....	20
<i>State v. Lee</i> , 686 P.2d 816 (Hawaii 1984) .....	15, 22
<i>State v. Lewis</i> , 188 W. Va. 85, 422 S.E.2d 807 (1992) .....	5
<i>State v. Martin</i> , 224 W. Va. 577, 687 S.E.2d 360 (2009) ( <i>per curiam</i> ) .....	9
<i>State v. Quinn</i> , 200 W. Va. 432, 490 S.E.2d 34 (1997) .....	6
<i>State v. Wade</i> , 200 W. Va. 637, 490 S.E.2d 724 (1997) .....	9
<i>State v. Walters</i> , 186 W. Va. 169, S.E.2d 169 (1991) .....	7
<i>State v. Williams</i> , 215 W. Va. 201, 599 S.E.2d 624 (2004) ( <i>per curiam</i> ) .....	23
<i>State Farm Fire &amp; Casualty Co. v. Prinz</i> , 743 S.E.2d 907 (W. Va. 1994) .....	24-25
<i>Teter v. Old Colony Co.</i> , 190 W. Va. 711, 441 S.E.2d 728 (1994) .....	25
<i>United States v. Noriega</i> , 917 F.2d 1543 (11th Cir. 1990) .....	21
<i>United States v. Juarez</i> , 573 F.2d 267 (5th Cir. 1978) .....	17, 26
<i>United States v. Harper</i> , 729 F.2d 1216 (9th Cir. 1984) .....	8
<i>United States v. Novak</i> , 531 F.3d 99 (1st Cir. 2008) .....	26
<i>United States v. Portillo-Parra</i> , 892 F.2d 1047 (9th Cir. 1989) .....	8

<i>West Virginia Department of Health and Human Resources ex rel. Wright v. David L.</i> , 192 W. Va. 663, 453 S.E.2d 646 (1994) .....	19, 23, 25
<i>West Virginia Health Care Cost Rev. Authority v. Boone Mem. Hospital</i> , 196 W. Va. 326, 472 S.E.2d 411 (1996) .....	13
<i>West Virginia Division of Highways v. Butler</i> , 205 W. Va. 146, 516 S.E.2d 769 (1999) .....	25
<i>Youngblood v. South Carolina</i> , 741 S.E.2d 515 (S.C. 2013) .....	14

**STATUTES**

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. No. 90-351, 82 Stat. 197 .....	11
W. Va. Code § 62-1D-3(c)(2) .....	26
W. Va. Code § 62-1D-6 .....	12, 26
W. Va. Code § 62-1D-9(b) .....	11-12
W. Va. Code § 62-1D-9(d) .....	<i>passim</i>
18 U.S.C. § 2515 .....	12
18 U.S.C. § 2517 .....	23

**OTHER**

Burdine, Angela M., <i>Criminal Procedure; Electronic Surveillance</i> , 27 Pac. L.J. 614, 620-21 (1996) .....	11
Cole, Martin, <i>Lawyer Criminals</i> , 66 Bench & B. Minn. 14 (2009) .....	2
Collins, Kevin D., <i>The Use of Plain-language Principles in Texas Litigation Formbooks</i> , 24 Rev. Litig. 429 (2005) .....	14
Fishman and McKenna, <i>Wiretapping and Eavesdropping</i> § 15:25 .....	18
Goldsmith, Michael and Balmforth, Kathryn Ogden, <i>The Electronic Surveillance of Privileged Communications</i> , 64 S.Cal.L.Rev. 903 (1991) .....	10, 18

Herr, David F., Haydock, Roger S. and Stempel, Jeffrey W. <i>Fundamentals of Litigation Practice</i> (2012 ed.) .....	21
Kossegi, Terrence T. and Phair, Barbara Stegun, <i>The Clergy-Communicant Privilege in the Age of Electronic Surveillance</i> , 12 St. John's J. Legal Comment, 241, 256 (1996) .....	16
Senn, Mark A., <i>English Life and Law in the Time of the Black Death</i> , 38 Real Prop.Prob. & Tr.J. 507, 515 (2003) .....	14

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-\_\_\_\_\_

STATE OF WEST VIRGINIA *ex rel.*  
STATE OF WEST VIRGINIA,

*Petitioner,*

v.

THE HONORABLE ROBERT A. BURNSIDE, JR.,  
Judge of the Circuit Court of Raleigh County,  
West Virginia, and RICHARD E. HARDISON, JR.,  
Criminal Defendant below and Real Party in Interest here,

*Respondents.*

**PETITION FOR A WRIT OF PROHIBITION**

I.

**QUESTION PRESENTED**

Should this Court issue a writ to prohibit the circuit court from suppressing recorded statements made by a criminal defendant who is a lawyer when the taped statements relate to the criminal defendant using his law office to sell cocaine to an undercover informant when: (1) the statutory subsection the circuit court relied on to suppress the statements does not by its own terms extend to the facts of what occurred here; (2) when the circuit court's reading of the statute results in an absurd, unjust, and unfair reading of the statute; and (3) the statutory subsection here violates this Court's constitutional authority to promulgate rules of evidence and usurps its right to regulate the conduct of lawyers?

## II.

### STATEMENT OF THE CASE

It is an unfortunate truth that “some lawyers [will] commit crimes.” Martin Cole, *Lawyer Criminals*, 66 Bench & B. Minn. 14, 17 (2009). This is the background of this Petition, the prosecution of a lawyer charged with a crime. At issue in this case is the ability of the State to bring to trial a lawyer charged with a most serious crime—the delivery of a controlled substance.

The facts, for purposes of this Petition for a Writ of Prohibition, are simple and straightforward. On the evening of April 6, 2012, the Raleigh County Sheriff’s Department employed a Confidential Informant (“CI”) to meet with Richard Hardison, Jr. (Criminal Defendant below and Real Party in Interest here), a licensed lawyer in the State of West Virginia, in an effort to obtain from Attorney Hardison “two 8-balls approximately five hundred dollars of . . . cocaine[.]” Pet’r App. at 18. While wearing a body wire and recording the purchase<sup>1</sup> the CI bought drugs from Attorney Hardison that evening. *Id.* at 28, 37, 49. It is undisputed the sale (as well as the taping of the sale) occurred in Attorney Hardison’s office.

Attorney Hardison was indicted on one count of delivery of a Schedule I controlled substance, to-wit cocaine, and conspiracy to commit the felony offense of delivering a Schedule I controlled substance, to-wit cocaine. Pet’r App. at 17.

Attorney Hardison filed a motion to suppress “statements, recordings, and/or physical evidence” asserting that the State violated West Virginia Code § 62-1D-9(d), which provides:

An otherwise privileged wire, oral or electronic communication intercepted in accordance with, or in violation of, the provisions of this article does not lose its privileged character: Provided, That when an investigative or law-enforcement officer, while engaged in intercepting wire, oral or electronic communications in the manner authorized by this article, intercepts a wire, oral or electronic communication

---

<sup>1</sup>A body wire is a hidden recording device worn by a confidential informant. *State v. Dillon*, 191 W. Va. 648, 652, 447 S.E.2d 583, 587 (1994).

and it becomes apparent that the conversation is attorney-client in nature, the investigative or law-enforcement officer shall immediately terminate the monitoring of that conversation: Provided, however, That notwithstanding any provision of this article to the contrary, no device designed to intercept wire, oral or electronic communications shall be placed or installed in such a manner as to intercept wire, oral or electronic communications emanating from the place of employment of any attorney at law licensed to practice law in this state.

Pet'r App. at 1-14.

The Respondent Judge heard the arguments of counsel, Pet'r App. at 54-81, where counsel for Attorney Hardison argued that the plain language of the statute barred the taped conversation and, by extension, even the testimony from the CI, and the State argued that the conversation was not an "oral communication," Pet'r App. at 68, that attaching a body wire to a CI who enters a law office is not placing or installing a device, *id.* at 68-69, that the purpose of the statute would not be advanced here, *id.* at 72, and that Attorney Hardison's reading of the statute would lead to absurd results. *Id.* at 70. The Respondent Judge, admitting he "did struggle for a while with the concept of the wording 'placed or installed in such a manner as to intercept wire[,]'" Pet'r App. at 75-76, concluded that a device could be placed various ways, either by "hook[ing] it up to a person and send the person [in]" or by "t[ying] it to a cat and it goes in there." *Id.* at 76. Therefore, pursuant to West Virginia Code § 62-1D-9(d) and West Virginia Code § 62-1D-6, the Respondent Judge suppressed the tape, but did not suppress the CI's testimony, permitting the CI (barring anything unforeseen from arising) to testify at trial. Pet'r App. at 1-2, 77. Upon information and belief, the case is to be tried in Raleigh County Circuit Court in its September term, but no specific date has yet been set.

### III.

#### SUMMARY OF ARGUMENT

The Petitioner meets the criteria for awarding a writ of prohibition. The purely legal question in this case where the pertinent facts are essentially undisputed is whether a lawyer should be

allowed to use his place of employment as a sanctuary for criminal misconduct where the police will not be allowed to use all the legitimate resources at their disposal to obtain the most accurate evidence for a criminal trial.

The statute upon which the Respondent Judge relied only prohibits the placing or installing of monitoring devices, both words connoting a physical place in a specific location and not a device worn on the body of a CI that the CI never relinquishes. Further, a reading of the statute that prohibits a CI's taping in a lawyers place of employment leads to absurd results because it insulates a lawyer from being confronted with the most accurate evidence against him, but does nothing to protect legitimate clients. Such a reading denigrates and demeans the attorney-client privilege.

Finally, this Court has long observed and zealously enforced its constitutional rulemaking authority. Here, the West Virginia wiretapping statute's exclusionary rule provision constitutes a statute in conflict with the rules of evidence and, for this reason, is invalid. The only binding statutory exclusionary remedy is found in the federal Title III law, and under that statute the evidence is admissible. Since there is no rules-based objection to the tape, the circuit court erred in excluding it.

#### IV.

#### STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State asks this case be set for Rule 20 oral argument as it is a matter of first impression and it is a matter of fundamental public importance both to the administration of justice in West Virginia and to defend this Court's Constitutional rulemaking from Legislative encroachment. This case is unsuitable for memorandum treatment.

## V.

### ARGUMENT

- A. **The State satisfies the special criteria governing a prosecutorial request for a Writ of Prohibition as set forth in Syllabus Point 5 of *State v. Lewis*, 188 W. Va. 85, 422 S.E.2d 807 (1992).**

This Court has said, “[c]itizens who are the victims of crime are entitled to have the State, through its prosecuting attorneys, vindicate their constitutional level claims to protection from criminal invaders.” *Moore v. Starcher*, 167 W. Va. 848, 853, 280 S.E.2d 693, 696 (1981). Thus, consistent with this recognition that “justice, though due to the accused, is due to the accuser also[,]” *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964), (that is, “[j]ust as a defendant has a right to a fair trial, so does the State.” *State v. Baker*, 738 S.E.2d 909, 921 (W. Va. 2013) (Loughry, J., dissenting)), this Court has recognized that the State is sometimes entitled to review of an adverse interlocutory order. “A very narrow avenue by which the State may seek review by this Court of a circuit court’s ruling with respect to criminal matters is the writ of prohibition.” *State ex rel. Clifford v. Stucky*, 212 W. Va. 599, 601-02, 575 S.E.2d 209, 211-12 (2002).

The State may seek a writ of prohibition in this Court in a criminal case where the trial court has exceeded or acted outside of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court’s action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction. In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the defendant’s right to a speedy trial. Furthermore, the application for a writ of prohibition must be promptly presented.

Syl. Pt. 5, *State v. Lewis*, 188 W. Va. 85, 422 S.E.2d 807 (1992).

The State, however, need not be entirely deprived of the right to prosecute for a writ of prohibition to be justified. *State v. Angell*, 216 W. Va. 626, 630, 609 S.E.2d 887, 891 (2004).

Where, for example, the circuit court suppresses a defendant's confession, a writ of prohibition is properly available to test the correctness of the suppression. *State ex rel. Sims v. Perry*, 204 W. Va. 625, 515 S.E.2d 582 (1999). *Accord State ex rel. Plants v. Webster*, \_\_\_\_ S.E.2d. \_\_\_\_, 2012 WL 2225099 (W. Va. 2012) (*per curiam*). *Cf. State v. Quinn*, 200 W. Va. 432, 446, 490 S.E.2d 34, 48 (1997) (writ of prohibition available to state where wrongful introduction of extremely prejudicial evidence is unfair to the State).

Here, the State's need for the taped evidence is apparent from the nature of the case. While the circuit court found that the CI was not prohibited from testifying, "[t]he use of informers . . . may raise serious questions of credibility." *On Lee v. United States*, 343 U.S. 747, 757 (1952). "Indeed, jurors often have a negative predisposition toward informants." *Robinson v. Mills*, 592 F.3d 730, 737 (6th Cir. 2010). The trial jury would, therefore, likely be suspicious of the CI's testimony in this case confirming his purchase of cocaine from Mr. Hardison, *id.*, even though such suspicions here are truly not justified. The State requires the use of the tape in order not to allow the jury's conclusions to be unjustifiably skewed. *See Lopez v. United States*, 373 U.S. 427, 439 (1963) (footnote omitted) (recording device employed by undercover agent upheld against Fourth Amendment challenge—"Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory. We think the risk that petitioner took in offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording.").

**B. A balancing of the factors set forth in Syllabus Point 4 of *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996) demonstrates that this Court should issue the Writ of Prohibition.**

Since the State has shown that it is entitled to have this Court consider its request for a prohibition under the *Lewis* rule, the Court must then look to the general factors governing the discretion to issue a writ as set forth in Syllabus Point 4 of *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996):

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

1. *The State has no adequate means such as a direct appeal to obtain the desired relief.*

“The right of the State in a criminal case to appeal to this Court is limited to those instances authorized by the Constitution of West Virginia or by statute. . . . In this jurisdiction the State may appeal to this Court in a criminal case if (1) the case relates to the public revenue, W. Va. Const. art. VIII, § 3 and W. Va. Code, 51-1-3 [1931], or if (2) an indictment is held to be “bad or insufficient” by the order of a circuit court.” *State v. Walters*, 186 W. Va. 169, 171, 411 S.E.2d 688, 690 (1991). Neither of these circumstances obtain here. Thus, the State lacks any adequate means of review other than by extraordinary remedy and “its only available avenue for appellate review of the circuit

court's ruling is by a writ of prohibition." *State ex rel. Rusen v. Hill*, 193 W. Va. 133, 138, 454 S.E.2d 427, 432 (1994).

2. *The State will be damaged or prejudiced in a way that is not correctable on appeal.*

In the absence of a right to appeal, the State performance will be damaged in a way that is not correctable on appeal.

3. *The circuit court's ruling does not demonstrate an oft repeated error or manifest persistent disregard for either procedural or substantive law.*

The circuit court's order does not demonstrate an oft repeated error or manifest persistent disregard for either procedural or substantive law. However, as *Hoover* observed, not all five factors must be met in every case, and indeed, "[t]he fourth and fifth [*Hoover*] factors are rarely, if ever, present at the same time." *Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1491 (9th Cir.1989). Thus, "[w]here one of the two is present, the absence of the other is of little or no significance." *United States v. Harper*, 729 F.2d 1216, 1222 (9th Cir. 1984).

4. *The lower tribunal's order raises new and important problems or issues of law of first impression.*

The circuit court interpreted West Virginia Code § 62-1D-9(d), a statute which this Court has never interpreted and which is, therefore, a matter of first impression before this Court. The matter is also important for two reasons.

First, the offenses at issue here are drug crimes. "Drug crimes threaten the very fabric of our society." *United States v. Portillo-Parra*, 892 F.2d 1047 (9th Cir. 1989) (Table) (text available at 1989 WL 158220 at \*3). "Possession, use, and distribution of illegal drugs represent 'one of the greatest problems affecting the health and welfare of our population.'" *Harmelin v. Michigan*, 501

U.S. 957, 1002 (1991) (Kennedy, J., concurring) (quoting *Treasury Employees v. Von Raab*, 489 U.S. 656, 668 (1989)).

We are not, . . . dealing with ‘nonviolent’ offenses here. Realistically, we deal with but one phase of a large scale, well entrenched criminal activity that springs from human greed and preys on man’s weakness—one that turns buyers into sellers, makes addicts out of newborn infants and sets addicts to mugging, thievery, prostitution, robbery and murder to support an insatiable appetite.

*People v. Gardner*, 359 N.Y.S.2d 196, 202-03 (Sup. Ct. 1974).<sup>2</sup>

---

<sup>2</sup>*Gardner* is neither archaic nor limited to large metropolises, this Court—as have the federal courts sitting in West Virginia—has confronted the results of drug crimes on participants, law enforcement, and innocent victims. See, e.g., *In re M.D.*, No. 11-1182, 2012 WL 2988768, at \*1 (W. Va. Mar. 23, 2012) (Mem. Dec.) (“The instant petition was based on the children’s mother using drugs while pregnant with A.D., who was born addicted to drugs and had withdrawal symptoms”); *In re B.B.*, 224 W. Va. 647, 653, 687 S.E.2d 746, 752 (2009) (*per curiam*) (parental rights terminated in part because “the children were exposed to illegal drug abuse by adults in the home”), *State v. Holmes*, No. 11-0436, 2011 WL 8197528, at \*1 (W. Va. Nov. 10, 2011) (Mem. Dec.) (“Petitioner, who is from Detroit, sold illegal drugs from her house in Huntington. The murder victim, Wendy Morgan, used a room in petitioner’s house for purposes of drug use and prostitution. Witnesses testified that Morgan stole drugs and money from Petitioner’s house and, in retaliation, Petitioner ordered that Morgan be killed.”); *State v. Martin*, 224 W. Va. 577, 579, 687 S.E.2d 360, 362 (2009) (*per curiam*) (“ . . . Corporal Charles E. “Chuck” Smith, III, of the Beckley Police Department was shot and killed during an undercover drug deal.”); *State v. Wade*, 200 W. Va. 637, 651, 490 S.E.2d 724, 738 (1997) (“ . . . the violent conflict arose from a disputed drug transaction, and where Wade fired at the command of Stradwick, the drug dealer”); *Sergeant v. Charleston*, 209 W. Va. 437, 445, 549 S.E.2d 311, 319 (2001) (*per curiam*) (“the suspects were suspected drug dealers who were known to be armed because they had just shot at undercover police officers”); *State v. Johnson*, 179 W. Va. 619, 627, 371 S.E.2d 340, 348 (1988) (defendant’s motive to commit robbery was to obtain means of buying illegal drugs); *State v. Evans*, 172 W. Va. 810, 813 & n.3, 310 S.E.2d 877, 880 & n.3 (1983) (“we find that there was sufficient evidence to convince impartial minds beyond a reasonable doubt that the appellant acted with malice. The jury in this case may have believed that the shooting was intentional. They may also have believed the testimony of the Rocchi brothers that the appellant declared on two separate occasions prior to the death of Ernie Hall that Ernie had “messed over” the appellant. Andy Rocchi interpreted the appellant’s statement to be indicative of some difficulty in a drug deal.”); *State v. Hilling*, No. 06-F-146 (Cir. Ct. Monongalia County, W. Va., July 17, 2007) (final order affirming jury verdict of first degree murder without mercy of defendant who killed victim, in part, because the defendant believed the victim would inform police of defendant’s drug dealing), *pet’n appeal refused*, No. 080281 (W. Va. May, 22, 2008), *denial of habeas corpus aff’d*, No. 12-0131 (W. Va. June 24, 2013) (Mem. Dec.); *Hicks v. Ballard*, No. 2:08-CV-01365, 2011 WL 1043459, at \*1 (S.D. W. Va. Mar. 18, 2011) (“The jury found that Hicks had shot and killed Terrence Spencer . . . following an altercation arising from a proposed drug transaction.”), *appeal dis.*, 461 Fed. Appx. 316 (4th Cir. Jan. 9, 2012); *Spry v. United States*, 2:03-2317, 2006 WL 2061134, at \*5 (S.D. W. Va. July 21, 2006) (“ . . . Vanover and Cletus Robbins visited Defendant at his home to collect a drug debt. Defendant refused to pay the debt and shot Robbins in the shoulder.”); *Marker v. United States*, No. 2:04-01161, 2006 WL 1767976, at \*10 (S.D. W. Va. June 26, 2006) (“The firearm had been used in a drug-related murder”).

More generally, this case deals with issues relating to the administration and integrity of justice system; it deals with the insidious effect upon that system (and society in general) by the lawyer who ignores the duty devolving upon him as an officer of the court, a representative of clients, and a member of a learned and honorable profession dedicated to the service of society. ‘Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws . . . argues recreancy to his position and office and sets a pernicious example to the insubordinate and dangerous elements of the body politic.’” *Committee On Legal Ethics v. Roark*, 181 W. Va. 260, 266, 382 S.E.2d 313, 319 (1989) (Brotherton, C.J., concurring) (quoting *Ex parte Wall*, 107 U.S. (17 Otto) 265, 274 (1883)). “[W]hen the corrupt privileged professional is an attorney—an officer of the court—investigation and prosecution should be especially vigorous to protect the integrity of the criminal justice system.” Michael Goldsmith & Kathryn Ogden Balmforth, *The Electronic Surveillance of Privileged Communications: A Conflict in Doctrines*, 64 S. Cal. L. Rev. 903, 911 (1991).

Second, this case deals with the protection of this Court’s Constitutional rulemaking authority from Legislative encroachment.

5. *The circuit court’s ruling was clearly erroneous as a matter of law.*

Finally, and most importantly, the circuit court’s ruling was clearly erroneous as a matter of law since its ruling contravened the plain language of the statute at issue and well-established rules of statutory construction.

Moreover, the ruling was also clearly erroneous since it contradicted “[t]he Separation of Powers Doctrine and a lengthy body of case law mak[ing] it absolutely clear that judicially-created

rules relating to the function of the judicial branch of government, such as the West Virginia Rules of Evidence, will always trump any legislatively-created statutes.” *State ex rel. Marshall County Comm’n v. Carter*, 225 W. Va. 68, 78, 689 S.E.2d 796, 806 (2010) (Workman, J., concurring). The circuit court’s ruling vitiated “a very consistent and lengthy line of case law supporting the judicial branch’s authority as the final arbiters of the admissibility of evidence in a legal proceeding[.]” *Id.* at 80, 689 S.E.2d at 808 (Workman, J., concurring).

A short statutory background is in order before the full merits of the case are discussed. In 1968, “Congress undertook to draft comprehensive legislation both authorizing the use of evidence obtained by electronic surveillance on specified conditions, and prohibiting its use otherwise.” *Bartnicki v. Vopper* 532 U.S. 514, 523 (2001) (quoting *Gelbard v. United States*, 408 U.S. 41, 78 (1972) (Rehnquist, J., dissenting) (quoting S. Rep. No. 1097, 90th Cong., 2d Sess., 66 (1968), U.S.C.C.A.N. 2112, 2153 (1968)). Under this legislation (contained in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 [codified as amended in scattered sections of Titles 18 and 42] and colloquially referred to as “Title III”), “Congress did not intend to preempt the field of wiretap legislation, but rather, it intended to allow states to enact legislation in this area as long as state laws are not more permissive than the federal scheme.” Angela M. Burdine, *Criminal Procedure; Electronic Surveillance*, 27 Pac. L.J. 614, 620-21 (1996). This case deals with portions of the West Virginia Wiretapping and Electronic Surveillance Act, W. Va. Code §§ 62-1D-1 to -16 (hereinafter “the Wiretapping Act”), specifically West Virginia Code § 62-1D-9(b) (which does not have a Title III analog) which provides:

An otherwise privileged wire, oral or electronic communication intercepted in accordance with, or in violation of, the provisions of this article does not lose its privileged character: Provided, That when an investigative or law-enforcement

officer, while engaged in intercepting wire, oral or electronic communications in the manner authorized by this article, intercepts a wire, oral or electronic communication and it becomes apparent that the conversation is attorney-client in nature, the investigative or law-enforcement officer shall immediately terminate the monitoring of that conversation: Provided, however, That notwithstanding any provision of this article to the contrary, no device designed to intercept wire, oral or electronic communications shall be placed or installed in such a manner as to intercept wire, oral or electronic communications emanating from the place of employment of any attorney at law licensed to practice law in this state.

It also deals with West Virginia Code § 62-1D-6 (the West Virginia counterpart to 18 U.S.C. § 2515<sup>3</sup>) which provides, “[e]vidence obtained, directly or indirectly, by the interception of any wire, oral or electronic communication shall be received in evidence only in grand jury proceedings and criminal proceedings in magistrate court and circuit court: Provided, That evidence obtained in violation of the provisions of this article shall not be admissible in any proceeding.”

- a. The plain language of West Virginia Code W. Va. Code § 62-1D-9(d) does not reach the use of a body wire when used to record the criminal acts of the lawyer by a confidential informant.

“The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.” Syl. Pt. 1, *Smith v. State Work. Comp. Comm’r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). “When interpreting a statute, we look first to the intent of the Legislature in enacting the provision under scrutiny[.]” *Raines Imports, Inc. v. American Honda Motor Co.*, 223 W. Va. 303, 309, 674 S.E.2d 9, 15 (2009), turning then to the specific statutory language. *Id.*, 674 S.E.2d at 15.

---

<sup>3</sup>Title 18, § 2515 provides, “Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.”

“When this Court finds the terms of a statute unambiguous, judicial inquiry is complete. In such a case, the statutory language must be regarded as conclusive.” *West Virginia Health Care Cost Rev. Auth. v. Boone Mem. Hosp.*, 196 W. Va. 326, 337, 472 S.E.2d 411, 422 (1996). “Undefined words and terms used in a legislative enactment will be given their common, ordinary . . . accepted [and]” Syl. Pt. 6, in part, *State ex rel. Cohen v. Manchin*, 175 W. Va. 525, 336 S.E.2d 171 (1984), “natural meaning[.]” *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994), “Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used[.]” *Shell Oil Co. v. Iowa Dep’t of Rev.*, 488 U.S. 19, 25 n.16 (1988) (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (Hand, L., J.)).

West Virginia Code § 62-1D-9(d) uses the terms “placed” or “installed.” While normally all words in a statute should be given “significance and effect[.]” this rule only applies “if [it is] possible [to do so.]” Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999). Here, the rule does not apply because placed and installed are doublets, “two ways of saying the same thing that reinforce its meaning[.]” *Doe v. Boland*, 698 F.3d 877, 881 (6th Cir. 2012) (Sutton, J.) and “the presumption against surplusage does not apply to doublets.” *Id.* “Sometimes drafters do repeat themselves and do include words that add nothing of substance[.]” *Id.* (quoting Antonin Scalia & Bryan A. Garner, *Reading Law* 176–77 (2012)). And the West Virginia Legislature is not immune from this “ill-conceived but lamentably common belt-and-suspenders

approach.” *Id.* (quoting Scalia & Garner, *Reading Law*, at 177).<sup>4</sup> See, e.g., *State ex rel. Prosecuting Attorney v. Bayer Corp.*, 223 W. Va. 146, 158 n.22, 672 S.E.2d 282, 294 n.22 (2008) (citation omitted) (“For the purpose of W. Va. Code § 11–3–27(a) we will treat the words unintentional and inadvertent as interchangeable terms. ‘[C]ourts will not give independent meaning to a word where it is apparent from the context of the act that the word is surplusage[.]’”).<sup>5</sup>

To install and to place are virtually synonymous terms. Install “has been defined by *Webster’s New International Dictionary*, Second Edition, as follows: ‘setting up or placing in position for service or use.’ This definition finds support in adjudicated cases.” *Massy v. United States*, 214 F.2d 935, 939 (8th Cir. 1954). “The common meaning of the term ‘install’ contemplates a settled location[.]” *Bowens v. Ary, Inc.*, No. 282711, 2009 WL 3049580, at \*7 (Mich. Ct. App. Sept. 24, 2009), *rev’d on other grounds*, 794 N.W.2d 842 (Mich. 2011), and the common meaning of “to place” means, *inter alia*, “to put or set[.]” *State v. De Marco*, 79 A. 418 (N.J. 1911), and connotes a “change in physical location.” *Youngblood v. South Carolina*, 741 S.E.2d 515, 516 n.2 (S.C. 2013).

---

<sup>4</sup>There was at least some justification historically for doublets or even triplets: after the Norman conquest, the English legal system contained a mixture of Old and Middle English, French, Latin, and other languages so the use of doublets increased comprehension among a heterogenous bench and bar, Mark A. Senn, *English Life and Law in the Time of the Black Death*, 38 *Real Prop. Prob. & Tr. J.* 507, 515 (2003), the strong English oral tradition to a surfeit of words to permit allow time for the listener to take in the speaker’s point; and, lawyers distrusted language and overcompensated by using more words than necessary. Kevin D. Collins, Note, *The Use of Plain-language Principles in Texas Litigation Formbooks*, 24 *Rev. Litig.* 429, 433-34 (2005).

<sup>5</sup>*Compare Doe*, 698 F.3d at 881 (“The U.S. Code is replete with meaning-reinforcing redundancies: an invalid contract is ‘null and void’; agency action must not be ‘arbitrary and capricious’; bureaucrats send ‘cease and desist’ letters; a bankruptcy trustee can sell a debtor’s property ‘free and clear’ of other interests; and so on. See, e.g., 16 U.S.C. § 2613; 7 U.S.C. § 13b; 11 U.S.C. § 363(f).”) *with* W. Va. Code § 5B-2E-11 (“null and void”); *id.* § 21-11-13(a) (1) (“cease and desist order”); *id.* § 38-14-5 (g) (“free and clear”).

To place or install requires the device be *set or put* in and of itself in a specific physical location, not simply held or carried. *Cf. Kaahumanu v. Hawaii*, 682 F.3d 789, 808 (9th Cir. 2012) (“The use of the verb ‘placed,’ combined with the illustrative list of prohibited accessories, strongly suggest that the limitation applies only to things that are placed on the beach without being held or carried by anyone.”). Here, because the body wire remained on the person of the CI and the CI never relinquished possession of the wire to a specific location, the wire was not placed or installed. *See State v. Lee*, 686 P.2d 816, 820 (Hawaii 1984) (“Since the wearing of the recording device by the undercover agent in the case at bar did not constitute an installation in a private place by surreptitious entry, there was no violation of HRS § 803–42(b)(3).”); *Bowens*, 2009 WL 3049580, at \*7 (“Applying the common meaning of the term ‘install,’ we detect no evidence supporting that defendants ‘installed’ a device for observing or eavesdropping on plaintiffs. The parties agree that if someone employed a secret or hidden camera to record the conversation in the referees’ room, it was handheld, and not placed in position or used in a specific location.”).

Indeed, the circuit court’s error can be seen because “[s]tatutory language, . . . ‘cannot be construed in a vacuum.’” *Roberts v. Sea-Land Serv.*, 132 S. Ct. 1350, 1357 (2012) (quoting *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 809(1989)). “A word in a statute may or may not extend to the outer limits of its definitional possibilities.” *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006). Thus, “[i]t is a fundamental principle of statutory construction that the meaning of a word cannot be determined in isolation, but it must be drawn from the context in which it is used.” *Shepherdstown Observer v. Maghan*, 226 W. Va. 353, 357, 700 S.E.2d 805, 809 (2010) (quoting *West Virginia Health Care Cost Rev. Auth. v. Boone Mem. Hosp.*, 196 W. Va. 326, 338, 472 S.E.2d 411, 423 (1996) (citations omitted)). Consequently, “[i]nterpretation of a word or phrase

depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.” *Dolan*, 546 U.S. at 486.

West Virginia Code § 62-1D-9(d) provides:

An otherwise privileged wire, oral or electronic communication intercepted in accordance with, or in violation of, the provisions of this article does not lose its privileged character: Provided, That when an investigative or law-enforcement officer, while engaged in intercepting wire, oral or electronic communications in the manner authorized by this article, intercepts a wire, oral or electronic communication and it becomes apparent that the conversation is attorney-client in nature, the investigative or law-enforcement officer shall immediately terminate the monitoring of that conversation: Provided, however, That notwithstanding any provision of this article to the contrary, no device designed to intercept wire, oral or electronic communications shall be placed or installed in such a manner as to intercept wire, oral or electronic communications emanating from the place of employment of any attorney at law licensed to practice law in this state.

The language preceding West Virginia Code § 62-1D-9(d)’s second provided clause demonstrates the statute is concerned with protecting the attorney-client privilege, i.e., “does not lose its privileged character,” and “the conversation is attorney-client in nature[.]” See Terrence T. Kossegi & Barbara Stegun Phair, Note, *The Clergy-Communicant Privilege in the Age of Electronic Surveillance*, 12 St. John’s J. Legal Comment, 241, 256 (1996) (“The West Virginia and Wisconsin statutes explicitly limit the interception of attorney-client conversations, but are silent about interception of the other privileges.”).

Where a confidential informant wears a body wire when dealing with a lawyer, the confidential informant has no expectation that what occurs between him and the lawyer will remain confidential—therefore either eviscerating the existence of the privilege *vel non* since no attorney-client relationship ever existed or working a waiver of the privilege if it ever did arise. Therefore, a contextual reading of the statute evidences that the statute does not extend to the circumstances

where a CI wears a wire. *See United States v. Juarez*, 573 F.2d 267, 276 (5th Cir. 1978) (“the admission of the taped recordings did not violate the attorney-client privilege because . . . the alleged client, waived the privilege by not raising it at trial, an omission that is not surprising considering he was a government informant”).<sup>6</sup>

- b. The circuit court’s interpretation of West Virginia Code § 62-1D-9(d) is absurd and unjust and requires an alternate reasonable interpretation, that is, while the statute prohibits the bugging of a lawyer’s place of employment, it does not prohibit the use of a body wired informant to tape the informant’s and lawyer’s conversations.

Here, if the meaning of the language is not plainly in favor of the State, it is also not plainly in favor of Attorney Hardison. The circuit court itself observed that upon first reading the subsection at issue here, he “struggled for a while with the concept of the wording ‘placed or installed . . . .’” Pet’r App at 75-76. Application of accepted canons to ambiguous statutes counsels that the circuit court clearly erred.

Because “[w]e need not leave our common sense at the doorstep when we interpret a statute[.]” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) (plurality opinion), this Court long ago recognized that “[a]ll laws should receive a sensible construction.” *Coal & Coke Ry. Co. v. Conley*, 67 S.E. 613, 627 (W. Va. 1910) (quoting *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 487 (1868)). Hence, this Court has long recognized its “duty to avoid whenever possible [an

---

<sup>6</sup>The State below argued that West Virginia Code § 62-1D-9(d) does not reach oral communications (“any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication.” *Id.* § 62-1D-2(h)) and that Attorney Hardison could not have believed he was subject to interception based on the second provided clause of West Virginia Code § 62-1D-9(d). This case, therefore rises or falls on West Virginia Code § 62-1D-2(d) prevents the use of a wired informant because if it does not there was no circumstance justifying any belief Attorney Hardison may have held.

application] of a statute which leads to absurd, inconsistent, unjust or unreasonable results.” *Barr v. NCB Mgt. Servs.* 227 W. Va. 507, 513, 711 S.E.2d 577, 583 (2011) (quoting *Peters v. Rivers Edge Min.*, 224 W. Va. 160, 176, 680 S.E.2d 791, 807 (2009) (internal quotations and citation omitted)). See generally *State ex rel. Tucker County Solid Waste Auth. v. West-Virginia Div. of Labor*, 222 W. Va. 588, 600, 668 S.E.2d 217, 229 (2008) (citing cases). The circuit court’s reading of West Virginia Code § 62-1D-9(d) leads to such absurd, unjust, and unreasonable results and affronts “the most fundamental guide to statutory construction—common sense.” *First United Methodist Church v. U.S. Gypsum Co.*, 882 F.2d 862, 869 (4th Cir. 1989).<sup>7</sup>

Apparently, even Attorney Hardison recognizes that the underlying purpose of West Virginia Code § 62-1D-9(d) is to protect the attorney-client privilege. Pet’r App. at 61. Undoubtedly, Attorney Hardison is correct on this point and the State takes no exception to it, in fact, it agrees completely—the attorney-client relationship must be respected and protected. The danger always exists that when law enforcement investigates a lawyer the investigation may accidentally uncover legitimate attorney-client privileged communications. Goldsmith & Kathryn Ogden Balmforth, *The Electronic Surveillance of Privileged Communications*, 64 S. Cal. L. Rev. at 910. See also Fishman and McKenna, *Wiretapping and Eavesdropping* § 15:25 (“When an attorney’s office or phone is the target of the court order, the likelihood that innocent and privileged communications between the target and unwitting clients is particularly high.”). On the other hand, though, the circuit court’s absolutist reading of the statute “unreasonably extends immunity through investigation to privileged professionals who can and do commit crimes. Such laws also transform the corrupt privileged

---

<sup>7</sup>The rule of lenity cannot be invoked here because the rule of lenity applies only to penal statutes, Syl. Pt. 5, *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 465 S.E.2d 257 (1995), a “penal statute” being a statute that “defines and prescribes the punishment for a criminal offense.” *Ballentine’s Law Dictionary* (ed. 1969).

professional's office into a sanctuary for criminal activity." *Id.* A common sense reading of West Virginia Code § 62-1D-9(d) demonstrates that the statute actually balances this dilemma.

West Virginia Code § 62-1D-9(d) creates a categorical ban on *placing or installing* listening devices in such a manner as to intercept wire, oral or electronic communications emanating from the place of employment of any attorney at law licensed to practice law in this state. This prevents surveillance that might otherwise capture attorney-client privileged communications. For example, if a legitimate client is aware that a lawyer might be being bugged, the client might be chilled in communicating with the lawyer—thus undercutting the reason for the privilege. Placing or installing connotes some conduct not consented to by a client.

Attorney Hardison attempted to bring himself within the rule's purposes arguing to the Respondent Judge that the principle behind West Virginia Code § 61-1D-9(d) and "probably why the statute was drafted in the way it was [was] under *State v. Mullens*, [221 W. Va. 70, 650 S.E.2d 169 (2007)]" where this Court found inadmissible a tape made by a CI while in the defendant's residence "because of the expectation of privacy in a home, and certainly there's an expectation of privacy in a law office, given the confidential nature of it." Pet'r App. at 61. Attorney Hardison is wrong on all fronts.

First "West Virginia's Wiretapping and Electronic Surveillance Act was adopted in 1987[.]" *West Virginia Dep't of Health and Human Resources ex rel. Wright v. David L.*, 192 W. Va. 663, 666-67, 453 S.E.2d 646, 649-50 (1994), and *Mullens* was not decided until 2007. *Mullens* could have had no impact on the Legislature.

Second, *Mullens* actually found that the Wiretapping Act permitted one-party consent tapping in a resident's home when the consentor was the CI and the party in ignorance was the home's resident. 221 W. Va. at 88, 650 S.E.2d at 187.

Third, this Court concluded that it was the West Virginia Constitution's search and seizure provision that prohibited in-home taping absent a search warrant. But this Court went to great lengths to explain that the rationale for its conclusion was the fact that the taping occurred in a home. *Id.* at 90-91, 650 S.E.2d at 189-90. This Court specifically noted in *Mullens* that it wanted "to be clear that our concern here is only with the use of an electronic surveillance device by an informant while in the home of a suspect. Our decision has no impact on the authority of the police to place a body wire on an informant to record communications with a suspect outside the suspect's home." *Id.* at 88 n.45, 650 S.E.2d at 187 n.45.

Finally, while there is an "expectation of privacy in a law office, given the confidential nature of it[.]" Pet'r App. at 61, that expectation is not focused on the lawyer, but the client. "The guiding principle in determining whether or not there exists a privileged attorney-client relationship is the intent of the client." *Kevlik v. Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984). Here there was no client since the CI was not seeking to retain Attorney Mr. Hardison or, at the very least, he was not seeking legal advice from Attorney Hardison on the night at issue, Pet'r Br at 63-64, nor was there an expectation of privacy on the CI's behalf—he certainly expected his conversation with Attorney Hardison to be heard by third-parties, like the police. *See* Syl. Pt. 2, *State v. Burton*, 163 W. Va. 40, 254 S.E.2d 129 (1979) ("In order to assert an attorney-client privilege, three main elements must be present: (1) both parties must contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from the attorney in his capacity as a legal advisor; (3) the communication between the attorney and client must be intended to be confidential.").

Indeed, the circuit court's ruling actually turns the purpose of privilege and, consequently, "the statute on its head." *State v. Kemah*, 957 A.2d 852, 866 n.16 (Conn. 2008). The attorney-client privilege "belongs to the client and not the lawyer[.]" *Lawyer Disciplinary Bd. v. McGraw*, 194 W.

Va. 788, 798, 461 S.E.2d 850, 860 (1995); it is “for the benefit of the client, not the attorney.” David F. Herr, Roger S. Haydock & Jeffrey W. Stempel, *Fundamentals of Litigation Practice* § 11:5.5 (2012 ed.). “It is a ‘bedrock principle that the attorney-client privilege is the client’s and his alone. If the client wishes to waive it, the attorney may not assert it, either for the client’s or his own benefit.’” *United States v. Noriega*, 917 F.2d 1543, 1551 (11<sup>th</sup> Cir. 1990) (quoting *United States v. Juarez*, 573 F.2d 267, 276 (5<sup>th</sup> Cir. 1978)). Any lawyer who communicates with a legitimate client risks that the client will disclose the communications to third-parties. That is not a consequence of the client being a snitch, that is a consequence of the client being a client and doing what the law entitles clients to do—waive the attorney-client privilege. It would be unjust and absurd— that is, completely contrary to the dictates and purposes of the privilege and the statute— to allow the lawyer to benefit from it. Indeed, Attorney Hardison “can suggest no public policy, other than the advancement of his self-interest, that supports his interpretation.” *People v. Silvola*, 547 P.2d 1283, 1288 (Colo. 1976), *overruled in part on other grounds by People v. Macrander*, 828 P.2d 234 (Colo.1992).

Finally, the absurdity<sup>8</sup> of the circuit court’s ruling is evidenced from the fact that under the circuit court’s ruling the CI can testify, Pet’r App. at 60-61, but the best evidence of the conversation between the CI and Attorney Hardison where Attorney Hardison sold drugs to the CI—the tape—is inadmissible. The Hawaii Supreme Court was confronted with this exact situation noting that the defendant’s argument in that case “would bring about the absurd result of allowing a consenting participant to a conversation to testify to what was said, but prohibiting the admission of the tape.

---

<sup>8</sup>The use of the term absurdity is not meant to be disrespectful or pejorative, it is used in its technical legal sense.

...” *State v. Lee*, 686 P.2d 816, 820 (Haw.1984). The court went on to explain, “[t]he adversary system of justice is a fact-finding mission to seek the truth. The most accurate and reliable evidence of what was said in the conversation is the tape. Since the undercover agent is not prohibited from testifying to what was said, it would be absurd to exclude the recordings. We do not believe the legislature intended such an absurd result.” *Id.* The Hawaii Supreme Court’s ruling comports with the recognition of this Court that “[b]asic to the administration of justice is the search for the truth.” *Page v. Columbia Nat. Res., Inc.*, 198 W. Va. 378, 387, 480 S.E.2d 817, 826 (1996).

- c. West Virginia Code § 62-1D-2(d) and 62-1D-6 constitute an impermissible infringement on this Court’s constitutional authority to promulgate procedural rules and regulate the conduct of lawyers in this State.

The circuit court’s interpretation of West Virginia Code § 62-1D-9(d) coupled with West Virginia Code § 62-1D-6 constitutes an invasion of this Court’s constitutional rulemaking authority. The only statutory exclusionary rule that applies here is the exclusionary rule contained in Title III. Although this ground was not raised by the State below, this Court has held “A constitutional issue that was not properly preserved at the trial court level may, in the discretion of this Court, be addressed on appeal when the constitutional issue is the controlling issue in the resolution of the case.” Syl. Pt. 2, *Louk v. Cormier*, 218 W. Va. 81, 622 S.E.2d 788 (2005). Indeed in *Louk*, the Court addressed the same kind of argument presented here, that a procedural statute was unconstitutional as violating this Court’s constitutional rulemaking authority even though, like here, the issue was not raised in the trial court.

Unlike West Virginia Code § 62-1D-9(d), Title III does not bar recording or the introduction into evidence of nonprivileged communications (if all other requirements are met). “Title III

contains no explicit directive against intercepting privileged communications. In fact, the only provision in Title III that deals with privileged communications is contained 18 U.S.C.A. § 2517, which regulates disclosure and use of lawfully intercepted communications.” Fishman and McKenna, *Wiretapping and Eavesdropping* § 8:109. And all § 2517(4) does is maintain the privilege if a privileged communication is intercepted. *Id.*

In *West Virginia Department of Health and Human Resources ex rel. Wright v. David L.*, 192 W. Va. 663, 453 S.E.2d 646 (1994), this Court held in Syllabus Point 3 that “[a]ny recordings of conversations made in violation of W. Va. Code, 62–1D–3(a)(1) (1987), and 18 U.S.C. § 2511(1)(a) (1988) are inadmissible under W. Va. Code, 62–1D–6 (1987), and 18 U.S.C. § 2515 (1968).” In his concurring opinion, then Justice Neely recognized an issue not addressed by the majority—that there existed a conflict between the West Virginia Rules of Evidence and West Virginia Code § 62-1D-3(a)(1)—and went on to observe that precedent from this Court implied that the Wiretapping Statute must yield to the Rules of Evidence. *David L.*, 192 W. Va. 663 at 672, 453 S.E.2d at 655 (Neely, J., dissenting).

Justice Neely’s concurring opinion is even more stark here. *David L.*, dealt with West Virginia Code § 62–1D–3(a)(1)<sup>9</sup> and 18 U.S.C. 2511(1)(1)<sup>10</sup> both of which are practically identical. *State v. Williams*, 215 W. Va. 201, 206, 599 S.E.2d 624, 629 (2004) (*per curiam*). Here, though, West Virginia Code § 61-1D-9(d) has no Title III counterpart. By virtue of West Virginia Code §

---

<sup>9</sup>West Virginia Code § 62–1D–3(a)(1) provides, “Except as otherwise specifically provided in this article it is unlawful for any person to: Intentionally intercept, attempt to intercept or procure any other person to intercept or attempt to intercept, any wire, oral or electronic communication[.]”

<sup>10</sup>Title 18, § 2511(1)(a) provides, “Except as otherwise specifically provided in this chapter any person who— intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication[.]”

62-1D-9(d), the Legislature has made the West Virginia Wiretapping Act's exclusionary section, *id.* § 62-1D-9(d), broader than that required by Title III's exclusionary section, 18 U.S.C. § 2515. In so doing, the Legislature has run afoul of the West Virginia Constitution that authorizes only this Court to make provision governing the admissibility of evidence into the Court's of this State. To the extent that the Legislature has created a broader exclusionary rule than that mandated under Title III, the statute is unconstitutional as a violation of this Court's constitutional rulemaking authority.

“The Rule-Making Clause of our constitution is quite clear in providing that the Supreme ‘[C]ourt shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process practice and procedure, which shall have the force and effect of law.’” *Hinchman v. Gillette*, 217 W. Va. 378, 388, 618 S.E.2d 387, 397 (2005) (quoting W. Va. Const. art. 8, § 3). It is “this Court’s longstanding position that ‘the legislative branch of government cannot abridge the rule-making power of this Court.’” *Louk v. Cormier*, 218 W. Va. 81, 91, 622 S.E.2d 788, 798 (2005) (quoting *In re Mann*, 151 W. Va. 644, 651, 154 S.E.2d 860, 864 (1967), *overruled on other grounds by Committee on Legal Ethics of West Virginia State Bar v. Boettner*, 183 W. Va. 136, 394 S.E.2d 735 (1990)). In other words “[a]s a result of the authority granted to this Court by the Rule-Making Clause, ‘a statute governing procedural matters in [civil or] criminal cases which conflicts with a rule promulgated by the Supreme Court would be a legislative invasion of the court’s rule-making powers.’” *Id.*, 618 S.E.2d at 398 (quoting *State v. Arbaugh*, 215 W. Va. 132, 138, 595 S.E.2d 289, 295 (2004) (Davis, J., dissenting) (quoting *People v. Hollis*, 670 P.2d 441, 442 (Colo. Ct. App.1983))).

This Court has only recently reiterated, “[t]he West Virginia Rules of Evidence remain the paramount authority in determining the admissibility of evidence in circuit courts.” Syl. Pt. 3, *State*

*Farm Fire & Cas. Co. v. Prinz*, 743 S.E.2d 907 (W. Va. 2013) (quoting *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994)). “This Court has not hesitated to invalidate a statute that conflicts with our inherent rule-making authority.” *Id.* at 916. See also *State ex rel. Marshall County Comm’n v. Carter*, 225 W. Va. 68, 78, 689 S.E.2d 796, 806 (2010) (Workman, J., concurring) (“This Court has made it abundantly clear through numerous prior decisions that statutes that conflict with rules and principles promulgated by this Court as to the admissibility of evidence will be invalidated.”). And where a statute excludes evidence that the Rules of Evidence would admit, the statute is in conflict with the rules and the statute is invalid. See, e.g., *State Farm Fire & Cas. Co. v. Prinz*, 743 S.E.2d 907 (W. Va. 2013) (invalidating Deadman’s Statute because it conflicted with the Rules of Evidence); *West Virginia Div. of Highways v. Butler*, 205 W. Va. 146, 516 S.E.2d 769 (1999) (invalidating a statute that was in conflict with W. Va. R. Evid. 702); *State v. Jenkins*, 195 W. Va. 620, 466 S.E.2d 471 (1995) (admissibility of handwriting samples controlled by Rule of Evidence 901 and not West Virginia Code § 57-2-1); *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 454 S.E.2d 87 (1994) (invalidating a statute that was in conflict with W. Va. R. Evid. 702); *Teter v. Old Colony Co.*, 190 W. Va. 711, 441 S.E.2d 728 (1994) (same). Such is the case here.

While the Legislature may legitimately pass a statute prohibiting certain conduct, it may not pass a statute precluding introduction of evidence in a West Virginia judicial proceeding obtained by the statute’s violation for this would usurp this Court’s well-established Constitutional rulemaking authority to determine the admissibility of evidence. The only statutory limitation binding on this Court is—by virtue of the Supremacy Clauses of the United States and West Virginia Constitutions, U.S. Const. art. 6, cl.2; W. Va. Const. art. I, § 1 and Rule of Evidence 402; *David L.*, 192 W. Va. at 672 n.1, 453 S.E.2d at 655 n.1 (1994) (Neely, J., concurring) (“I recognize that this

case can also be decided exclusively under 18 U.S.C. § 2511 and the U.S. Constitution Supremacy Clause.”)—the exclusionary rule contained in Title III, 18 U.S.C. § 2515. And the Title III exclusionary rule was not violated here because the CI’s consent triggers the one party consent provision of the Wiretapping Act. W. Va. Code § 62–1D–3(c)(2). *United States v. Juarez*, 573 F.2d 267, 276-77 (5th Cir. 1978). *See also United States v. Novak*, 531 F.3d 99, 102 (1st Cir. 2008) (O’Connor, Assoc. Just., sitting by designation) (citing *Griggs–Ryan v. Smith*, 904 F.2d 112, 116 (1st Cir.1990)) (*dicta*) (where client consents to interception of conversations with attorney, one party consent provision of Title III permits tapping). Therefore, unless evidence is obtained in violation of the provisions of Title III (and not some greater protection afforded under West Virginia statutory law), its admissibility is dependent upon the evidence satisfying the requirements of the Rules of Evidence.

In fact, under West Virginia Code § 62-1D-6, “[e]vidence obtained, directly or indirectly, by the interception of any wire, oral or electronic communication shall be received in evidence only in grand jury proceedings and criminal proceedings in magistrate court and circuit court: Provided, That evidence obtained in violation of the provisions of this article shall not be admissible in any proceeding.” Therefore, if this statute is constitutional, it would bar the introduction of the tape in *any* non-criminal proceeding, including, for example, a lawyer disciplinary proceeding held under this Court’s authority to regulate the practice of law in this State, *cf. Syl., State ex rel. Quelch v. Daugherty*, 172 W. Va. 422, 306 S.E.2d 233 (1983) (“The constitutional separation of powers, W. Va. Const. art. V, §.1, prohibits the legislature from regulating admission to practice and discipline of lawyers in contravention of rules of this Court. W. Va. Const. art. VIII, § 1”), because attorney disciplinary proceedings “are not criminal cases.”<sup>11</sup> *State v. Hays*, 61 S.E. 355, 356 (W. Va. 1908).

---

<sup>11</sup>Lawyers involvement with illegal drugs is actually all too common. *See, e.g., Office of Disciplinary Counsel v. Alderman*, 229 W. Va. 656, 734 S.E.2d 737 (2012) (*per curiam*); *Committee on Legal Ethics v. White*, 189 W. Va. 135, 428 S.E.2d 556 (1993); *Lawyer Disciplinary Bd. v. Askin*, 203 W. Va. 320, 322, 507 S.E.2d 683, 685 (1998); *Committee on Legal Ethics v. Roark*, 181 W. Va. 260, 382 S.E.2d 313 (1989).

VI.

CONCLUSION

For the forgoing reasons, a Writ of Prohibition should be granted.

Respectfully submitted,

STATE OF WEST VIRGINIA,  
*Petitioner,*

By counsel,

PATRICK MORRISEY  
ATTORNEY GENERAL

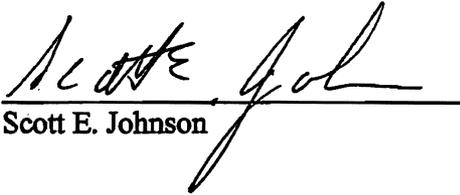


---

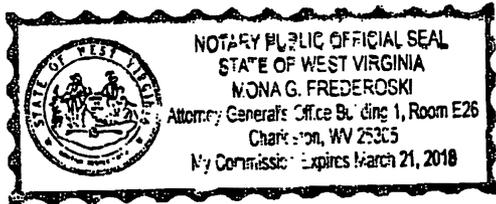
SCOTT E. JOHNSON  
SENIOR ASSISTANT ATTORNEY GENERAL  
State Bar No. 6335  
812 Quarrier Street, 6th Floor  
Charleston, WV 25301  
Telephone: 304-558-5830  
Fax: 304-558-5833  
E-mail: [sej@wvago.gov](mailto:sej@wvago.gov)  
*Counsel for Petitioner*

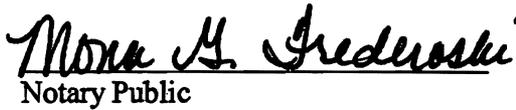
**VERIFICATION**

State of West Virginia, Kanawha county, to-wit: Scott E. Johnson, Senior Assistant Attorney General and counsel for the Petitioner named in the foregoing Petition being duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be on information, and that, so far as they are therein stated to be on information, he believes them to be true.

  
Scott E. Johnson

Taken, sworn to and subscribed before me this 25th day of July, A.D. 2013.



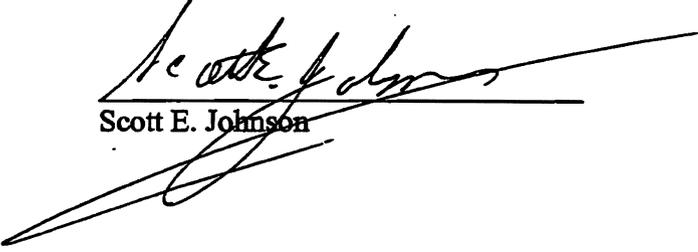
  
Mona G. Frederoski  
Notary Public

**CERTIFICATE OF SERVICE**  
**Upon all parties to whom**  
**a Rule to Show Cause**  
**should be served if issued**

I, Scott E. Johnson, Senior Assistant Attorney General and counsel for the Petitioner certify that on this 25th day of July, A.D. 2013, I served the Petition for a Writ of Prohibition and Petitioner's Appendix in Support of a Writ of Prohibition upon all parties to whom a Rule to Show Cause should be served if issued by depositing true and correct copies thereof in the United States Mail, first class postage pre-paid, addressed as follows:

The Honorable Robert A. Burnside, Jr.  
Judge, Circuit Court of Raleigh County  
c/o Hon. Paul Flanagan, Clerk  
Raleigh County Judicial Center  
222 Main Street  
Beckley, WV 25801

Timothy J. LaFon, Esquire  
Ciccarello, Del Giudice & LaFon  
1219 Virginia Street, East  
Charleston, WV 25301

  
\_\_\_\_\_  
Scott E. Johnson