

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 14-0868

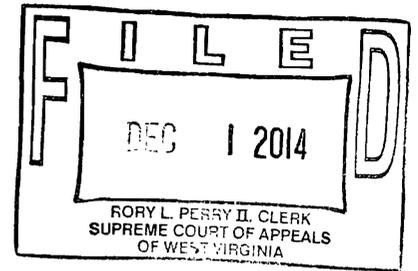
STATE OF WEST VIRGINIA,

Petitioner,

v.

STEPHEN WESTLEY HATFIELD,

Respondent.



From the Circuit Court of Wayne County, West Virginia

RESPONDENT'S BRIEF

J. Timothy DiPiero (W.Va. I.D. No. 1021)
Lonnie C. Simmons (W.Va. I.D. No. 3406)
**DITRAPANO, BARRETT, DIPIERO,
MCGINLEY & SIMMONS, PLLC**
P.O. Box 1631
Charleston, West Virginia 25326-1631
Telephone: (304) 342-0133
Tim.Dipiero@dbdlawfirm.com
Lonnie.Simmons@dbdlawfirm.com

Counsel for Respondent Stephen Westley Hatfield

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I.

ASSIGNMENTS OF ERROR

A.

Whether this Court has jurisdiction to decide this case where under these facts, the State has no legal right to file an appeal, the State is not entitled to extraordinary relief, and the State failed to comply with the mandatory and jurisdictional deadlines set out in Rules 5(b) and (g) of the Rules of Appellate Procedure and W.Va.Code §58-5-30?

B.

Whether the trial court, in carrying out the interests of justice, correctly dismissed the indictment, with prejudice, in light of the admitted violation of Hatfield's constitutional rights, which has resulted in over twenty-seven years of illegal incarceration, the death of Hatfield's critical expert witnesses, and the knowing destruction of virtually all physical evidence?

II.

STATEMENT OF THE CASE

A.

This Court lacks jurisdiction to decide this case

Respondent Stephen Westley Hatfield (hereinafter referred to as Hatfield) respectfully submits the compelling facts proving this Court lacks jurisdiction in this case are undisputed. The final order entered by the Honorable Special Judge James O. Holliday, dismissing with prejudice the indictment against Hatfield, was entered on April 17, 2014. (JA at 235).¹ The State's notice of appeal would have been due on or about May 17, 2014, but the State waited until July 30, 2014, about three and one half months **after** the final order had been entered, to file its **MOTION FOR LEAVE TO FILE NOTICE OF APPEAL OUT OF TIME**. (JA at 1499). To perfect its appeal, the State was required under Rule 5(g) of Rules of Appellate Procedure to file its appeal brief and appendix no later than August 17, 2014. However, the State failed to do so. On August 27, 2014, after the State failed to perfect its appeal and this Court no longer had jurisdiction to consider any issues to be raised by the State, Hatfield filed **RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION AND, ALTERNATIVELY, BRIEF IN OPPOSITION TO STATE'S MOTION FOR LEAVE TO FILE NOTICE OF APPEAL OUT OF TIME**.² On

¹References to the Joint Appendix prepared by the State will be designated as "(JA at ____)." One of the unique challenges in this case is the fact there never was a trial. Thus, the Joint Appendix consists of pleadings, orders, medical records, exhibits, and a few hearing transcripts containing some testimonial evidence.

²The State did not include in the Joint Appendix both of Hatfield's motions to dismiss filed with this Court and also did not include the Court's scheduling order. Hatfield assumes this Court may take judicial notice of pleadings filed before the Court as well as its own orders.

September 3, 2014, this Court entered an order, without specifically addressing Hatfield's **MOTION**, granting the State's motion, and setting out a briefing schedule.³ On October 30, 2014, Hatfield filed **RESPONDENT'S SECOND MOTION TO DISMISS FOR LACK OF JURISDICTION**.⁴ At the time this **BRIEF** was written, the State had not responded to nor had this Court addressed this motion. Because the jurisdictional issue is dispositive in this case and has not been definitively addressed by the Court, Hatfield respectfully seeks a ruling addressing this issue.⁵

B.

Dismissal of the indictment with prejudice is appropriate under these facts

1.

District Court in *Hatfield IV* holds this Court's decisions in *Hatfield II* and *III* were contrary to clearly established federal law

From the belatedly filed six-page **PETITIONER'S BRIEF**, a reader unfamiliar with the extended history of this case might think the issue raised is very simple. However, to appreciate how this Court now is faced with issuing a decision, which will be referred to as *Hatfield V*, it is important for the Court to view the present appeal in the context of the four preceding decisions. To date, this Court has issued three separate decisions involving Hatfield-- *State v. Hatfield*, 186

³See footnote 2 of this **BRIEF**.

⁴See footnote 2 of this **BRIEF**.

⁵This decision will provide the Court with an opportunity to address what it meant in advising all counsel, in an Administrative Order entered December 10, 2012, that the 2010 amendments to the West Virginia Rules of Appellate Procedure "**must be strictly observed by litigants.**" (Emphasis added).

W.Va. 507, 413 S.E.2d 162 (1991)(*Hatfield I*), *State v. Hatfield*, 206 W.Va. 125, 522 S.E.2d 416 (1999)(*Hatfield II*), and *Hatfield v. Painter*, 222W.Va. 622, 671 S.E.2d 453 (2008)(*Hatfield III*).

The United States District Court for the Southern District of West Virginia has issued one decision involving Hatfield--*Hatfield v. Ballard*, 878 F.Supp.2d 633 (S.D.W.Va. 2012)(*Hatfield IV*).⁶

The Honorable Judge Robert Chambers detailed the constitutional inadequacies of the actions taken by the trial court prior to accepting Hatfield's initial guilty plea, 878 F.Supp.2d at 659:

As of the date of the plea hearing, no constitutionally adequate competency hearing had been held. Even if the initial hearing had been constitutionally sufficient (which it unquestionably was not), the combination of (1) Petitioner's intervening suicide attempt, (2) his desire to plead guilty against the advice of counsel, and (3) counsels' proffers that Mr. Hatfield's treating physicians believed his desire to plead guilty to be another attempt at suicide, all raised serious doubts as to Petitioner's competency on that day. The recent suicide attempt triggered a new obligation to inquire into Petitioner's competency; the plea hearing also presented Judge Maynard with an opportunity to remedy his prior error and afford Petitioner an adequate hearing. **By failing to do so, the trial judge abdicated his constitutional responsibility to avoid convicting a potentially incompetent defendant. This decision was contrary to clearly established federal law as described *supra* at § III.B.1 and entitles Petitioner to relief under 28 U.S.C. § 2254(d)(1).** (Emphasis added).

In the hearing held before the Judge Chambers, the State was represented by then Managing Deputy Attorney General Barbara H. Allen. For the first time in the long and tortured history of this case, counsel for the State had the intellect, integrity, and courage to concede on the record that Hatfield had never received the constitutionally adequate competency hearing to which he was entitled.⁷ 878 F.Supp.2d at 658-59.

⁶The recommended decision by United States Magistrate Cheryl Eifert, most all of which was adopted by Judge Chambers, can be found at *Hatfield v. Parsons*, 2011 WL 5822122 (S.D. W.Va. 2011).

⁷Judge Chambers noted, 878 F.Supp.2d at 658-59:

After considering the State's concession, the briefs, and the arguments, and after reviewing in detail this Court's decisions in *Hatfield I, II, and III*, Judge Chambers summarized, 878 F.Supp.2d at 661:

In the *per curiam* opinion discussed in detail *supra* at § II.B.3, three justices in *Hatfield II* affirmed the remand proceedings by characterizing *Hatfield I* as a remand to develop the record and not a reversal of the original convictions. **The two dissenting Justices (along with the affidavit from former Justice Neely) accurately noted that “[n]o competency hearing has ever been held regarding [Petitioner]. It is axiomatic that the conviction of a legally incompetent defendant or the failure of the trial court to provide an adequate competency determination violates due process by depriving the defendant of his constitutional right to a fair trial.”** *Hatfield II*, 522 S.E.2d at 421 (Starcher, C.J., dissenting).

While the Court accepts the majority opinion in *Hatfield II*, it cannot avoid the conclusion that this decision once again denied Petitioner his clearly established constitutional right to a fair competency hearing. By narrowly construing *Hatfield I* to require nothing more than a remand for development of the record, *Hatfield II* affirmed the constitutionally inadequate proceedings that led to the second appeal. **In so doing, the West Virginia Supreme Court once again deprived Petitioner of his right to a fair competency hearing. *Hatfield II* is contrary to clearly established federal law as determined by the Supreme Court of the United States.**

At oral argument, however, the Respondent abandoned this objection and agreed with Petitioner that a constitutionally adequate competency hearing was never held. In so doing, the Respondent recognized the central point of Petitioner's argument and of the Magistrate Judge's proposed findings: The issue is not Petitioner's competency but rather the failure to afford him a constitutionally adequate hearing prior to making that determination. *Pate, Drope*, and *Medina* make it very clear that the Due Process clause requires the State to provide a criminal defendant with “a reasonable opportunity to demonstrate that he is not competent to stand trial.” *Medina v. California*, 505 U.S. 437, 451, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992).

* * *

Admirably, Judge Hoke recognized the injustice of the proceedings up to this point and sought to rectify the situation. The facts of these proceedings were already discussed in great detail *supra* at §§ II.B.4 and 5, and the West Virginia Supreme Court's holding was analyzed in the procedural default portion of this opinion *supra* at §§ III.A. 1 and 2. **The Court will revisit *Hatfield III* here only to reiterate that, to the extent that it affirms the constitutionally inadequate processes that lead up to this appeal, *Hatfield III* is contrary to clearly established federal law as determined by the Supreme Court of the United States.** (Emphasis added).

Consequently, Judge Chambers set aside Hatfield's convictions of one count of first degree murder and two counts of malicious wounding, and ordered the State to discharge Hatfield, unless the State decided to try him in a timely fashion. 878 F.Supp.2d at 662. On July 11, 2012, one day after *Hatfield IV* was issued, the State decided not to appeal the District Court's decision and filed a document in the Circuit Court of Wayne County, explaining its intent to go forward with the existing indictment against Hatfield. (JA at 1353).

Also on July 11, 2012, a letter was sent to Chief Justice Menis Ketchum from the Honorable Judges Darrell Pratt and James H. Young, Jr., explaining they were disqualified because they had been Wayne County Prosecuting Attorneys either at the time of Hatfield's original guilty plea or his State habeas corpus proceedings. On July 12, 2012, Chief Justice Ketchum issued an order disqualifying Judge Pratt and Judge Young and appointing Special Judge Holliday to preside over this case. (JA at 1356).

2.

Prior to Hatfield filing his initial State habeas corpus petition, virtually all of the physical evidence obtained from the crime scene was destroyed with the knowledge and consent of the State, but without providing any notice to Hatfield or his counsel

Some time after October 3, 2012, the present Wayne County Prosecutor learned that virtually all of the evidence gathered in this case previously had been destroyed. (JA at 139).⁸ On September 1, 2000, before Hatfield had filed his initial State habeas corpus action, Judge Pratt, who was the Wayne County Prosecuting Attorney when Hatfield was charged with these crimes, entered an **ORDER FOR DESTRUCTION OF EVIDENCE OR EXHIBITS**. (JA at 1285). This order resulted in the physical evidence gathered from the crime scene in this case in the possession of law enforcement being deliberately destroyed.⁹ This **ORDER** led to the destruction of the physical evidence obtained in this case, including a tape recorder and tape from Hatfield's telephone answering machine.¹⁰

⁸Counsel for Hatfield respectfully asks this Court to address the critical issue of preserving evidence by revisiting "Circuit Court Record Retention Schedule," which was promulgated on November 29, 1990, and amended effective September 1, 1995. Under this rule, clerks are advised criminal evidence in their possession can be destroyed by court order and with notice to all parties within thirty days after the expiration of the appeal period. This rule, which is modeled after W.Va.Code §57-5-11, fails to take into account the state and federal habeas corpus processes that are available subsequent to the original appeal. This rule and this statute also fail to address, as in the present case, who has authority to destroy evidence in the possession of law enforcement. Finally, in practice, destruction of evidence orders are entered without any notice to the defendant or his counsel. In the present case, the problem created by this Court's rule and the statute is the State is left trying to prove a criminal case where all of the physical evidence obtained at the crime scene deliberately has been destroyed and the defendant loses any exculpatory evidence that may have been available but for the senseless destruction of this evidence. Thankfully, most circuit court clerks ignore this Court's rule and this statute. Otherwise, most of the successful DNA exclusion cases exonerating innocent defendants that have occurred in this State never would have happened.

⁹Despite this **ORDER**, for unknown reasons, the gun allegedly used was not destroyed. (JA at 138).

¹⁰Because this tape was destroyed, neither the State nor Hatfield can prove the content of any messages left on Hatfield's telephone answering machine the day before the shootings that occurred in this case. Hatfield did represent in the briefs filed below, based upon information and belief, that the tape contained a message left by Dewey Meyers, who was the alleged victim in one of the malicious wounding counts. (JA at 23-24). Thus, the destruction of this tape recording, which would have permitted the jury to listen to what Mr. Meyers said and to hear the tone of his voice, has been lost forever and with it any exculpatory value it had.

The ultimate decision to have the evidence destroyed before Hatfield had filed his initial State habeas corpus action lies with the Wayne County Prosecutor's Office. Judge Darrell Pratt testified when he received a proposed destruction of evidence order he relied on the Prosecutor's office as having determined the status of the case to ensure the destruction of evidence did not compromise a case. (JA at 1365 [Tr. 21–22]).¹¹ Likewise, the Wayne County Detachment of the West Virginia State Police also relied on the Prosecutor's office to determine whether anything was pending legally before submitting an order for the destruction of evidence. (JA at 1365 [Tr. 66–69]; *see also* JA at 1456 [Tr. 28]).

3.

While clearly Hatfield's medical and psychological history and multiple suicide attempts raised questions about his lack of criminal responsibility and mental competency, the State failed in its obligation to make a constitutionally adequate record resolving these issues

While the essential facts are stated repeatedly in *Hatfield I, II, III, and IV*, it is important for the present Court to see the actual record made in this case on whether Hatfield was criminally responsible at the time of the crime and mentally competent when he pleaded guilty. While the guilty plea was found by Judge Chambers to have been obtained in violation of clearly established federal law and the convictions were vacated, the present Court still needs to have an understanding of this part of the record to evaluate the correctness of Special Judge Holliday's decision to dismiss with prejudice the indictment returned against Hatfield.

¹¹In assembling the Joint Appendix, the State sometimes placed a number on the first page of a hearing transcript, but did not place any numbers on the subsequent pages. In this **BRIEF**, the reference to the actual transcript number will be placed in brackets.

The first time a formal question was raised regarding Hatfield's mental competency was on June 10, 1988, when counsel for Hatfield moved for a psychiatric examination, which was granted in an order entered July 7, 1988, based in part on the testimony of Hatfield's treating psychiatrist, Dr. Johnnie L. Gallemore, Jr., who began treating Hatfield when he attempted suicide while being hospitalized for the gun shot wounds he suffered during the arrest. This order required Hatfield to be confined at the Weston State Hospital for psychiatric examination, treatment, and care. (JA at 249). On August 15, 1988, Judge Robert Chafin entered another order, based upon the request of treating psychiatrist Dr. Calvin R. Sumner, to extend Hatfield's stay at Weston State Hospital for an additional twenty days. (JA at 252). On October 12, 1988, after the August 1, 1988 report from Dr. Herbert C. Haynes had been submitted to the trial court, Special Judge Elliott Maynard, who was assigned to this case to replace Judge Chafin, entered an order requiring Hatfield to be examined by Dr. Ralph S. Smith, Jr. (JA at 258).

On January 27, 1989, a hearing was held purportedly to determine Hatfield's mental competency. (JA at 446 [1/7/89 Tr. 49]). Previous to this hearing, Dr. Gallemore had provided testimony regarding his preliminary findings and the need for additional hospitalization and Dr. Haynes had issued a written report concluding Hatfield was not mentally competent at the time of the crime or to stand trial. (JA at 446 [6/10/88 Tr. 8]; JA at 92). Also, psychologist Earnest Watkins had determined Hatfield was not criminally responsible at the time of the crime, but was mentally competent to stand trial. (JA at 108).

At this hearing, the State presented Judge Maynard with a short one-page letter from Dr. Smith, the psychiatrist selected by the State to examine Hatfield, and Dr. Smith stated in this letter Hatfield was competent to stand trial, but he had not yet determined whether Hatfield was criminally

responsible. (JA at 129). As of January 27, 1989, Dr. Smith had not issued any written report. (JA at 446 [1/7/89 Tr. 50]).

Without hearing any testimony from any of the psychiatrists or psychologists, who actually had treated and counseled Hatfield over an extended period of time, Judge Maynard simply declared, “Based upon that report [Dr. Smith’s one-page letter] and on the facts and circumstances of this case that have been developed in the evidence so far, I will declare the defendant to be competent to stand trial and will order that he stand trial.” (JA at 446 [1/7/89 Tr. 51]). On January 31, 1989, Judge Maynard entered an order finding Hatfield to be competent. (JA at 267).

During the February 27, 1989 hearing, counsel for Hatfield once again noted that Dr. Gallemore and Dr. Haynes had expressed their opinions that Hatfield was not criminally responsible at the time of the crime nor was he mentally competent to stand trial. (JA at 446 [2/27/89 Tr. 72-73]). Hatfield’s counsel specifically advised Judge Maynard that Hatfield’s treating psychiatrist had stated Hatfield lacked the judgment to enter a plea. (JA at 446 [2/27/89 Tr. 79]). After engaging in an extensive colloquy with Hatfield, Judge Maynard stated, again without hearing any testimony from any psychiatrist, psychologist or other mental health professional, “Well, I must tell you at this juncture, gentlemen, I think Mr. Hatfield is competent to enter his plea. I think he meets the threshold tests of competency. I think he’s competent.” (JA at 446 [2/27/89 Tr. 99]). After Judge Maynard made this determination, counsel for Hatfield explained once again that Hatfield’s treating psychiatrists have concluded Hatfield was not mentally competent to stand trial and they were concerned the entry of a guilty plea at this time was “merely another suicide attempt.” (JA at 446 [2/27/89 Tr. 101-02]).

After advising Hatfield of his rights and going through the usual guilty plea procedure, Judge Maynard accepted Hatfield's plea of guilty to all three charges. On March 10, 1989, Judge Maynard entered an order accepting Hatfield's guilty plea and scheduling a sentencing hearing. (JA at 278).

On December 6, 1989, Dr. Gallemore testified that Hatfield began suffering from a very severe major depressive disorder around April 1, 1988. (JA at 446 [12/6/89 Tr. 172-75]). Dr. Haynes also testified briefly at this hearing and acknowledged that he had provided his August 1, 1988 report on Hatfield's mental condition to the trial court. (JA at 446 [12/6/89 Tr. 186-87]). At the end of this hearing, Judge Maynard sentenced Hatfield to serve life without the possibility of parole for the murder of Tracy Ann Andrews. (JA at 446 [12/6/89 Tr. 199]). On December 27, 1989, Judge Maynard entered the sentencing order. (JA at 286).

The only other evidence regarding Hatfield's mental competency occurred near the end of his State habeas corpus action. After the Honorable Judge Jay M. Hoke entered the final order granting habeas corpus relief on January 31, 2005, he entered an order, pursuant to W.Va.Code §27-6A-1 through -9, requiring Hatfield to be examined by a psychiatrist and a psychologist to determine whether Hatfield at that time was mentally competent. (JA at 1289). Pursuant to this order, Hatfield was examined by Dr. David Clayman and Dr. Mark Casdorff, who issued reports finding Hatfield presently was mentally competent. (JA at 1301, 1314). On April 2, 2004, Judge Hoke entered an order appointing Dr. Ralph Delano Webb to review the existing medical records and reports and to provide a written report. (JA at 220,). In Dr. Webb's report, he concluded based upon a review of the documents, that Hatfield was neither criminally responsible nor mentally competent at the time of the guilty plea. (JA at 217).

4.

Record developed on the destruction of virtually all of the physical evidence, the death of Dr. Haynes and Dr. Gallemore, who had observed, treated, and counseled Hatfield in 1988, the death of other nonexpert witnesses, and the inability of Hatfield to present his defense based upon the death of these critical expert witnesses and the passage of time

As noted in Part II(B)(2) of this **BRIEF**, a record was made on how the evidence obtained from the crime scene was destroyed. Judge Pratt, Judge Young, Sheriff Farley, retired State Trooper Michael Watts, who served as the Detachment Commander for the Hamlin office, and Okey Napier, an investigator employed by the Wayne County Prosecutor's office, provided testimony. Once the record was completed, Hatfield filed a motion to dismiss the indictment. (JA at 3).

After reviewing the briefs and considering the arguments, on April 17, 2014, Special Judge Holliday issued a thirteen-page **ORDER DISMISSING THE INDICTMENT**. Special Judge Holliday noted:

Dr. Gallemore, who found Defendant Hatfield not criminally responsible and not competent to stand trial, passed away on April 24, 2012. Dr. Haynes, who similarly found Defendant Hatfield to be neither criminally responsible nor competent to stand trial, died on July 24, 2013. Mr. Watkins, the psychologist who found Defendant Hatfield competent to stand trial but not criminally responsible, is no longer licensed. Additionally, Defendant Hatfield intended to call Jim York, Tom Ferrell, and Dr. Willard Daniels as witnesses at trial; however, these witnesses have also passed away. Finally, it should also be noted that a majority of the physical evidence collected in this case has been destroyed. (JA at 239-40).

The death of Hatfield's most critical expert witnesses, who had observed, counseled, and treated Hatfield beginning in 1988, soon after he was arrested, was found by Special Judge Holliday to be extremely prejudicial to Hatfield's ability to present his defense that he lacked criminal

responsibility. United States Magistrate Eifert gave the following summary of the medical and psychological records available for review, 2011 WL at *22:

A written evaluation of competency prepared by Dr. Gallemore, Hatfield's treating psychiatrist, is not included in the record. The report of the prosecution's psychiatrist, Dr. Smith, contains no supportive findings or explanation and his final report, which was the subject of the motion to continue, was not made a part of the appellate or habeas record. **In addition, because none of the medical experts was permitted to testify regarding competency, a retrospective reviewer is unable to determine the standard of competency against which the experts measured Hatfield or their experience and expertise in making such determinations. In short, the record is notably incomplete.**¹²

After a thorough discussion of the facts and applicable case law, Special Judge Holliday concluded:

29. In addition to the inability to conduct a retrospective criminal responsibility evaluation, many non-expert witnesses are dead, evidence has been destroyed, and the length of time it took for Defendant Hatfield's constitutionally inadequate competency hearing to be rectified have further rendered defense of his case nearly impossible. Defendant's due process and speedy trial rights would once again be violated if this Court found otherwise.

30. In short, the passage of time has prejudiced Defendant Hatfield to such an extent that he cannot properly defend his case. Consequently, the indictment is hereby **DISMISSED WITH PREJUDICE**. (JA at 246).

¹²Magistrate Eifert concluded it would be unfeasible for a retrospective evaluation to be made on Hatfield's mental competency and criminal responsibility based upon this limited record. While Judge Chambers recognized the limitations in the record and the constitutional issues inherent in any retrospective evaluation of Hatfield, he rejected this recommendation holding it was not necessary to address it at this time and because the issue had not been thoroughly briefed. 878 F.Supp.2d at 662. Special Judge Holliday performed the analysis and agreed with the conclusion reached by Magistrate Eifert.

III.

SUMMARY OF ARGUMENT

Where an indictment is dismissed for reasons other than it was bad or insufficient, the State has no right to appeal, under W.Va.Code §58-5-30, but the State may seek extraordinary relief through a petition for writ of prohibition. In the present case, the indictment was dismissed because Hatfield's constitutional rights had been violated, therefore, the State cannot appeal this ruling. The State did not file a petition for a writ of prohibition, did not make any arguments suggesting the trial court had exceeded or acted outside of its jurisdiction, made no claim that the trial court's alleged abuse of its powers was so flagrant the State was deprived of its right to prosecute the case or deprived of a valid conviction, did not verify its petition as required for a writ of prohibition by W.Va.Code §53-1-3, did not ask for a rule to show cause as required for a writ of prohibition by W.Va.Code §53-1-5, and failed to promptly present its challenge to Hatfield's conviction. Even if the State had filed a petition for a writ of prohibition, not only was the petition untimely, but also the State could never meet the much higher standard required in a claim for extraordinary relief, of proving Special Judge Holliday somehow acted in excess of his jurisdiction. Just as Special Judge Holliday clearly had the jurisdiction to deny Hatfield's motion to dismiss, he just as clearly had the authority and jurisdiction to grant it.

If somehow the Court determines the State has the right to appeal the dismissal of the indictment in this case, despite the specific language in W.Va.Code §58-5-30, and this Court's prior decisions, then this appeal must be dismissed because the State failed to comply with Rule 5(b) of the Rules of Appellate Procedure, which required the State to file its notice of appeal within thirty

days after the final order. Similarly, under W.Va.Code §58-5-30, the State must appeal the dismissal order within thirty days of the final order.

The State did not file its appeal brief or any appendix within four months after the final order was entered on April 17, 2014. Rule 5(g) is written in mandatory language—failure to perfect an appeal “will result in the case being dismissed from the docket of the Court.” Unless the Court decides to overrule its prior cases or to rewrite the language in Rule 5(g), the State’s failure to perfect its appeal within four months from the date of the final order “will result in the case being dismissed from the docket of the Court.

Merely engaging in plea discussions does not constitute extraordinary circumstances under Rule 5(f) of the Rules of Appellate Procedure justifying the failure of the State to file its notice of appeal within thirty days after the final order was entered and to perfect its appeal after four months by filing its appeal brief and appendix. The failure of the State to comply with these mandatory and jurisdictional deadlines, without showing extraordinary circumstances, requires this Court to dismiss this case because the Court lacks jurisdiction to decide this case.

In this case, the trial court accepted the guilty plea at a time when it was uncontroverted, based upon the opinions expressed by the mental health experts who had examined Hatfield, that he lacked criminal responsibility at the time of the crime and, as admitted by the State, such plea was accepted prior to holding a constitutionally inadequate competency hearing. Despite these constitutional violations, Hatfield has been incarcerated for over twenty-seven years.

While the question as to whether any defendant was criminally responsible at the time of the crime necessarily is retrospective, under the unique facts of this case, the case law developed discouraging retrospective mental competency evaluations is applicable. When prosecution is

delayed because of the accused's mental incapacity to stand trial, or as in the present case, where the constitutional rights of the accused are violated by failing first to hold a constitutionally adequate competency hearing before incarcerating the defendant for over twenty-seven years, the difficulty of determining whether the defendant was criminally responsible at the time of the crime is increased. Passage of time makes proof of any fact more difficult. When the fact at issue is as subtle as a mental state, the difficulty is immeasurably enhanced.

In this case, where the critical expert witnesses, who had observed, treated, and counseled Hatfield soon after the crime, now are dead, their contemporaneous notes have never been found, they never presented detailed testimony explaining their findings, their methodology, or the standard they applied, it is impossible for Hatfield to present his defense that he lacked criminal responsibility at the time of the crime. Based upon the violation of Hatfield's due process and speedy trial rights, the deaths of these expert witnesses as well as the deaths of other witnesses, the passage of time, and the intentional destruction of most of the physical evidence obtained from the crime scene, the interests of justice require the indictment in this case to be dismissed with prejudice.

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Hatfield believes the jurisdictional, procedural, and substantive issues raised as a result of the State's brief have far-reaching effects beyond this specific case, requiring Rule 20 argument and a published decision authored by a member of this Court, rather than relegating the resolution of these critical issues in a memorandum decision, which would have limited precedential value. *State v. McKinley*, ___ W.Va. ___, ___ S.E.2d ___, 2014 WL 5032604 (2014).

V.

ARGUMENT

A.

This Court has no jurisdiction to decide this case

1.

Under W.Va.Code §58-5-30, the State has no right to appeal where an indictment is dismissed based upon the violation of a criminal defendant's constitutional rights

This Court always has an obligation to ensure it has jurisdiction to decide a case. Syllabus Point 1, *James M. B. v. Carolyn M.*, 193 W.Va. 289, 456 S.E.2d 16 (1995). Under W.Va.Code §58-5-30, the State can file an appeal from the dismissal of an indictment only where the indictment was determined to be bad or insufficient.¹³ In the present case, the indictment was dismissed based upon the violation of Hatfield's constitutional rights and there was no finding that the indictment somehow was bad or insufficient.¹⁴

¹³An appeal filed by the State when an indictment is dismissed is governed by W.Va.Code §58-5-30, which provides:

Notwithstanding anything hereinbefore contained in this article, whenever **in any criminal case an indictment is held bad or insufficient by the judgment or order of a circuit court**, the State, on the application of the attorney general or the prosecuting attorney, may obtain a writ of error to secure a review of such judgment or order by the supreme court of appeals. **No such writ of error shall be allowed unless the State presents its petition therefor to the supreme court of appeals, or one of the judges thereof, within thirty days after the entry of such judgment or order.** (Emphasis added).

¹⁴In Syllabus Point 1 of *State v. Zain*, 207 W.Va. 54, 528 S.E.2d 748 (1999), this Court explained what is meant by a bad or insufficient indictment in W.Va.Code §58-5-30:

The limited right of the State to appeal an order dismissing an indictment found to be bad or insufficient has been recognized repeatedly by this Court. *See State v. Adkins*, 182 W.Va. 443, 388 S.E.2d 316 (1989)(The dismissal of an indictment for violating the three-term rule cannot be appealed under W.Va.Code §58-5-30); *State v. Walters*, 186 W.Va. 169, 411 S.E.2d 688 (1991)(State does not have the right to appeal a criminal complaint filed in magistrate court that later was dismissed in circuit court, under W.Va.Code §58-5-30, which only allows appeals of bad or insufficient indictments).

Where an indictment is dismissed for reasons other than it was bad or insufficient, the State has no right to appeal, but may seek extraordinary relief through a petition for writ of prohibition. In Syllabus Point 5 of *State v. Lewis*, 188 W.Va. 85, 422 S.E.2d 807 (1992), this Court held:.

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.**" (Emphasis added).¹⁵

An indictment is considered bad or insufficient pursuant to West Virginia Code § 58-5-30 (1998) (Supp.1999) when within the four corners of the indictment it: (1) fails to contain the elements of the offense to be charged and sufficiently apprise the defendant of what he or she must be prepared to meet; and (2) fails to contain sufficient accurate information to permit a plea of former acquittal or conviction.

¹⁵*See also State v. Macri*, 199 W.Va. 696, 487 S.E.2d 891 (1996)(Court molded the State's appeal as a petition for a writ of prohibition and held the indictments dismissed were valid, even where the assistant prosecutor involved was not a citizen of West Virginia); *State v. Angell*, 216

In the present case, the State did not file a petition for a writ of prohibition, did not make any arguments suggesting the trial court had exceeded or acted outside of its jurisdiction, made no claim that the trial court's alleged abuse of its powers was so flagrant the State was deprived of its right to prosecute the case or deprived of a valid conviction, did not verify its petition as required for a writ of prohibition by W.Va.Code §53-1-3, did not ask for a rule to show cause as required for a writ of prohibition by W.Va.Code §53-1-5, and failed to promptly present its challenge to Hatfield's conviction. On this final point, this Court in footnote 15 of *Lewis*, cited the thirty day time period in the federal rules and in W.Va.Code §58-5-30, in explaining what the Court meant when it says the State must seek the petition for writ of prohibition promptly.

Hatfield respectfully submits the State had no legal right to appeal the dismissal of the indictment in this case and clearly, even if the State had filed a petition for a writ of prohibition, not only was the petition untimely under *Lewis*, but also the State could never meet the much higher standard required in a claim for extraordinary relief, of proving Special Judge Holliday somehow acted in excess of his jurisdiction. Just as Special Judge Holliday clearly had the jurisdiction to deny Hatfield's motion to dismiss, he just as clearly had the authority and jurisdiction to grant it.

W.Va. 626, 609 S.E.2d 887 (2004)(State filed an appeal and petition for writ of prohibition to challenge dismissal of indictment where counsel for Workers' Compensation appointed as assistant prosecutors); *State ex rel. Maynard v. Bronson*, 167 W.Va. 35, 277 S.E.2d 718 (1981)(Prohibition inappropriate because trial court clearly had the jurisdiction to dismiss indictment under Agreement on Detainers); *State ex rel. Forbes v. Canady*, 197 W.Va. 37, 475 S.E.2d 37 (1996)(Appropriate to consider the State's challenge to the dismissal of an indictment through a writ of prohibition, based upon the State's argument the trial court exceeded its jurisdiction in dismissing the indictment because the State failed to comply with joinder requirements set out in Rule 8 of the Rules of Criminal Procedure); *State ex rel. Rusen v. Hill*, 193 W.Va. 133, 454 S.E.2d 427 (1995)(Where trial court dismissed indictment as a discovery sanction, State had the right to file a writ of prohibition to challenge that ruling).

2.

The State failed to file its notice of appeal within thirty days of the final order, in violation of Rule 5(b) and W.Va.Code §58-5-30, and failed to perfect its appeal within four months after the final order, in violation of Rule 5(g)

If somehow the Court determines the State has the right to appeal the dismissal of the indictment in this case, despite the specific language in W.Va.Code §58-5-30, and this Court's prior decisions, then this appeal must be dismissed because the State failed to comply with Rule 5(b) of the Rules of Appellate Procedure, which required the State to file its notice of appeal within thirty days after the final order. Similarly, under W.Va.Code §58-5-30, the State must appeal the dismissal order within thirty days of the final order.

In Syllabus Points 1, 2, and 3 of *State v. Jones*, 178 W.Va. 627, 363 S.E.2d 513 (1988), this Court recognized the limited right of the State to file an appeal, but emphasized the failure of the State to follow the mandatory procedural requirements would be grounds for dismissal:

1. Our law is in accord with the general rule that the State has no right of appeal in a criminal case, except as may be conferred by the Constitution or a statute.

2. Other jurisdictions, including the federal courts, that have statutes enabling the government to appeal within a certain time limit have held that compliance with the time limit is mandatory.

3. Where the State does not file a petition to appeal with this Court within thirty days from the date of the entry of the order dismissing an indictment as required by W.Va.Code, 58-5-30, the appeal will be dismissed as improvidently awarded.

In several cases, this Court has noted the time limits contained in W.Va.Code §58-5-4, and -30, and in the Rules of Appellate Procedure are mandatory and jurisdictional. *E.g.*, *Asbury v. Mohn*, 162 W.Va. 662, 256 S.E.2d 547 (1979); *Wheeling Dollar Saving and Trust Co. v. Singer*, 162

W.Va. 502, 250 S.E.2d 369 (1978); *State ex rel. Johnson v. McKenzie*, 159 W.Va. 795, 226 S.E.2d 721 (1976); *Kentucky Fried Chicken of Morgantown, Inc. v. Sellaro*, 158 W.Va. 708, 214 S.E.2d 823 (1975); *State v. Legg*, 151 W.Va. 401, 151 S.E.2d 215 (1966). This Court also has held the jurisdictional limits established by the Legislature generally cannot be altered by this Court, as stated in Syllabus Point 1 of *West Virginia Department of Energy v. Hobet Mining and Construction Co.*, 178 W.Va. 262, 358 S.E.2d 823 (1987):

“Where the Legislature has prescribed limitations on the right to appeal, such limitations are exclusive, and cannot be enlarged by the court. *State v. De Spain*, 139 W.Va. 854, 81 S.E.2d 914, 916 (1954).

Clearly, compliance with the time periods in which to file an appeal is critical because, absent extraordinary circumstances, the failure to do so robs this Court of any jurisdiction to address the appeal. In this case, the State’s inexcusable failure to perfect its appeal within four months after the final order being challenged means this Court has no jurisdiction to now hear the matter. *Hobet Mining*, 178 W. Va. at 264, 358 S.E. 2d at 826 (failure to file a timely appeal presents a jurisdictional infirmity precluding the Court from accepting the appeal). Under this Court’s Rules of Appellate Procedure, when a petition for appeal is filed more than four months after the final ruling, and the appeal time is not tolled and otherwise there are no extraordinary circumstances, this Court will not consider the appeal. *See, e.g., Cronin v. Bartlett*, 196 W.Va. 324, 472 S.E.2d 409 (1996)(Once this Court realized the appeal petition had been filed about eight days too late, the appeal was dismissed as improvidently granted); *City of Philippi v. Weaver*, 208 W.Va. 346, 540 S.E.2d 563 (2000)(Notice of appeal and appeal brief filed late, rendering appeal untimely).

This Court has held under certain circumstances specifically prescribed in the Rules of Appellate Procedure, it has the authority to suspend or enlarge the time required for perfecting an appeal. *See, e.g.*, Syllabus Point 2, *First National Bank of Bluefield v. Clark*, 181 W.Va. 494, 383 S.E.2d 298 (1998), *overruled in part* Syllabus Point 1, *Coonrod v. Clark*, 189 W.Va. 669, 434 S.E.2d 29 (1993)(At the time this decision was issued, the standard applied for obtaining an extension of time was good cause, whereas in the present version of Rule 5(f), the Court requires a showing of exceptional circumstances when the notice of appeal was not filed in a timely manner); *Talkington v. Barnhart*, 164 W.Va. 488, 264 S.E.2d 450 (1980)(This Court held the failure to provide notice of the filing of the transcript in a civil case was not a jurisdictional defect); *State ex rel. Johnson v. McKenzie, supra*, (This Court approved the practice of resentencing defendants so as to extend the time for filing criminal appeals).

This case provides the Court with an opportunity to explain how the 2010 amendments to the Rules of Appellate Procedure will be applied in a case where a notice of appeal was not timely filed **and** the appellant failed to perfect its appeal within four months after the entry of the final order being challenged. The most instructive decision from this Court applying these new rules in a case where the appellee asserted the appeal had been filed late is *Boardwine v. Kanawha Charleston Humane Association*, ___ W.Va. ___, ___ S.E.2d ___, 2013 WL 5989159 (2013). *See also State v. Allman*, ___ W.Va. ___, ___ S.E.2d ___ (No. 13-0779, 11/6/14)(Notice of appeal filed one day late excused by this Court under the good cause standard). In *Boardwine*, the final order had been entered December 18, 2012, the notice of appeal was filed by the *pro se* appellant one day late on January 18, 2013, **but the appeal brief and appendix were filed within four months of the final**

order. This Court first required the *pro se* appellant to explain why the notice of appeal was filed one day late.

After concluding the *pro se* appellant had shown good cause for filing the notice of appeal one day late, this Court made a distinction between an appellant filing a late notice of appeal, which is procedural, and failing to perfect the appeal, which is jurisdictional:

[I]t is a petitioner's failure to perfect his appeal, not his failure to file a timely notice of appeal, that deprives the Court of jurisdiction to hear an appeal. See W.Va.Code § 58-5-4; Rule 5(f), W.V.R.A.P. (Emphasis added). *Id.*, at n.2.

The initial provisions in Rule 5(f) explain how an appellant can seek an extension of the appeal time when the appellant already has filed a timely notice of appeal:

Unless otherwise provided by law, **an appeal must be perfected within four months of the date the judgment being appealed was entered in the office of the circuit clerk**; provided, however, that the circuit court from which the appeal is taken or the Supreme Court may, for good cause shown, by order entered of record, extend such period, not to exceed a total extension of two months, if a complete notice of appeal was timely and properly filed by the party seeking the appeal.” (Emphasis added).

Under this rule, where the appellant files a timely notice of appeal, the circuit court or this Court has the authority to extend the appeal time up to two months for good cause shown. Thus, any extension of the appeal time would have been requested and obtained **AFTER** a timely notice of appeal was filed and **PRIOR** to the expiration of the four month jurisdictional limit. In the present case, because the State failed to file a timely notice of appeal, it would not have been permitted under this provision in Rule 5(f) to seek any extension of the time needed to perfect its appeal.

Rule 5(g) provides:

An appeal is perfected by timely and properly filing, in the Office of the Clerk of the Supreme Court, an original and the number of copies required by Rule 38 of: (1) the petitioner's brief prepared in

accordance with Rule 10 and (2) the appendix record prepared in accordance with Rule 7, unless the Court has specifically provided by order that an appendix record is not required. Failure by the petitioner to perfect an appeal will result in the case being dismissed from the docket of the Court.

Thus, in *Boardwine*, because the appellant had perfected his appeal by filing his appeal brief with an appendix within four months after the final order, this Court concluded it had jurisdiction to decide the appeal.

In contrast, the State in this case failed to timely perfect its appeal. The State did not file its appeal brief or any appendix within four months after the final order was entered on April 17, 2014. Rule 5(g) is written in mandatory language—failure to perfect an appeal “will result in the case being dismissed from the docket of the Court.” Unless the Court decides to overrule its holding in *Boardwine* or to rewrite the language in Rule 5(g), the State’s failure to perfect its appeal within four months from the date of the final order “will result in the case being dismissed from the docket of the Court.” Consequently, under Rule 5(g), Hatfield respectfully submits this case has to be dismissed from the Court’s docket because the Court does not have jurisdiction to take any action in this case.

Although the State relies in its **MOTION** upon Rule 39(b) of the Rules of Appellate Procedure, which is the general rule permitting parties to seek more time to do a particular act, Hatfield respectfully submits Rule 5 is the more specific rule governing the situation where the party is not merely asking leave for more time to file a brief, but rather is seeking an extension of time so this Court does not lose its jurisdiction over the appeal. The latter provisions in Rule 5(f) explain the applicable procedure where the appellant fails to file a timely notice of appeal, but does file a motion with this Court seeking to be excused from that violation and to proceed with the appeal:

Upon motion filed on or before the deadline for perfecting an appeal, the Court may grant leave to the petitioner to perfect an appeal where a notice of appeal has not been filed and a scheduling order has not been entered. **Such relief will only be granted in extraordinary circumstances**, and if the motion is granted, the Court may, in its discretion, deny oral argument or impose other sanctions for failure to comply with the Rules. (Emphasis added).

In this case, because the State failed to file a timely notice of appeal, but did file its **MOTION** with this Court before the four months to perfect its appeal had expired, this provision in Rule 5(f) is controlling. This rule needs to be read in conjunction with Rule 5(g), which addresses the four month jurisdictional limit for perfecting an appeal. Thus, under the initial provision in Rule 5(f), where a timely notice of appeal is filed, the circuit court as well as this Court have the authority to extend the time for perfecting the appeal up to two months.

Under the latter provision in Rule 5(f), where a notice of appeal is filed untimely, but the appellant has filed a motion with this Court seeking leave to go forward with the appeal, the only rational reading of this provision in Rule 5(f) is this Court does have the authority to grant leave to such a petitioner to perfect the appeal if extraordinary circumstances are shown, but due to the jurisdictional limit, the perfection of the appeal would have to be accomplished within four months after the final order was entered. Otherwise, the distinction the Court has made between the initial part of Rule 5(f), where a timely notice of appeal is filed, and the latter part of Rule 5(f), where an untimely notice of appeal is filed, but a motion for leave is filed with this Court within the four month jurisdictional limit, would be completely unnecessary and nonsensical. Furthermore, for this Court to extend the appeal time under the second scenario beyond the original jurisdictional limit, this Court also would need to rewrite Rule 5(g) and reverse its decision in *Boardwine* as well as the other decisions by this Court regarding the limitations to its jurisdiction,

An examination of the State's **MOTION** reveals no extraordinary circumstances caused the State to delay filing its notice of appeal. Despite the language in Rule 11(e)(6) of the West Virginia Rules of Criminal Procedure, prohibiting the admissibility of plea discussions,¹⁶ as well as the specific admonition in Rule I(8) of the Standards of Professional Conduct, which provides "a lawyer should not send copies of correspondence between counsel to the court," the State nevertheless attaches to its **MOTION** correspondence and emails generated between counsel discussing possible pleas to resolve this case. The State also mentions the last conversation with counsel for Hatfield occurred on July 22, 2014.

The State's argument for failing to file a timely Rule 5(b) notice of appeal is counsel for the State and Hatfield were engaged in plea discussions. The State seeks to persuade this Court that merely engaging in plea discussions somehow constitutes "extraordinary circumstances" sufficient to excuse the State's failure to perfect its appeal.

There was nothing preventing the State from filing its notice of appeal on or about May 17, 2014, when it was due. Special Judge Holliday's law clerk emailed a signed copy of the order to counsel of record on April 16, 2014. At no point did counsel have any discussion suggesting the

¹⁶In *State v. Hanson*, 181 W.Va. 353, 360, 382 S.E.2d 547, 554 (1989), this Court held:

Both the federal and state versions of Rule 11(e)(6)(D) now specifically provide that statements made to a state's attorney during plea negotiations are not admissible even though the agreement is not consummated or the guilty plea is later withdrawn. The recognized purpose of the rule is to encourage parties who are negotiating to be frank and open with one another, a result which would not be possible if plea offers or other fact statements could later be admitted into evidence. E.g., *United States v. Grant*, 622 F.2d 308 (8th Cir.1980); *United States v. Robertson*, 582 F.2d 1356 (5th Cir.1978); *United States v. Verdoorn*, 528 F.2d 103 (8th Cir.1976). (Emphasis added).

State simply could ignore the procedural and jurisdictional rules established by this Court while the parties explored plea discussions. Of course, absent an appropriate order entered by the trial court, counsel involved in a criminal or civil case do not have the authority somehow to alter the mandatory deadlines established by this Court in its Rules.

The State acknowledges in its **MOTION** it was not until **June 27, 2014**, more than one month **after** the notice of appeal was due, that counsel for the State met for the first time with the victims to discuss the plea negotiations. Once again, the State could have filed a timely notice of appeal and subsequently met with the victims to discuss plea negotiations, rather than completely ignore this Court's procedural rules and then later hope the Court will bail the State out.

The State does not cite any case law providing authority for its assertion that engaging in plea discussions somehow excuses the failure to file a timely notice of appeal and counsel for Hatfield has not found any decision by this Court addressing what it means by extraordinary circumstances sufficient to excuse the late filing of an appeal.

This Court has not had an opportunity to issue any decision addressing what is meant in Rule 5(f) by extraordinary circumstances. Applying the plain meaning of these words, does anyone really think the fact that a prosecutor and defense counsel were discussing possible plea discussions is such an extraordinary circumstance that the mere existence of such discussions justifies the failure of the State to file a timely notice of appeal and ultimately the failure to perfect its appeal? Hatfield respectfully submits such an excuse would not meet a good cause standard either.

In *Beckman v. State of Washington, Department of Social and Health Services*, 102 Wash.App. 687, 11 P.3d 313 (2000), the Washington Court of Appeals was faced with a motion filed by the State of Washington seeking leave to pursue an appeal that had been filed ten days late. For the State of Washington to prevail, it had to prove exceptional circumstances caused the appeal to

be filed late. In rejecting the arguments asserted and explaining what is meant by exceptional circumstances, the Court explained, 102 Wash.App. at 693-94, 11 P.3d at 316-17:

The phrase 'extraordinary circumstances' was defined in *Reichelt v. Raymark Indus., Inc.*, 52 Wash.App. 763, 765, 764 P.2d 653 (1988). There, the Court of Appeals refused to extend the time for filing a notice of appeal that was filed, as here, 10 days late. The appellant argued that 'extraordinary circumstances' existed because one of the two trial attorneys left the firm during the 30 days following entry of judgment, and the firm's appellate attorney had an unusually heavy work load. The court rejected the argument and summarized the cases allowing late filings:

In each case, the defective filings were upheld due to 'extraordinary circumstances,' *i.e.*, circumstances wherein the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control. In such a case, the lost opportunity to appeal would constitute a gross miscarriage of justice because of the appellant's reasonably diligent conduct. RAP 18.8(b).

Reichelt, 52 Wash.App. at 765–66, 764 P.2d 653; *see also Shumway v. Payne*, 136 Wash.2d 383, 394–97, 964 P.2d 349 (1998) (reiterating and reemphasizing stringent standard of RAP 18.8(b) noted in *Reichelt*); *Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wash.2d 366, 849 P.2d 1225 (1993); *Pybas v. Paolino*, 73 Wash.App. 393, 401, 869 P.2d 427 (1994). **The court found the lack of prejudice to the respondent irrelevant and noted that the prejudice of granting an extension of time would be 'to the appellate system and to litigants generally, who are entitled to an end to their day in court.'** *Reichelt*, 52 Wash.App. at 766 n. 2, 764 P.2d 653. (Emphasis added).

Hatfield has found some case law addressing whether exceptional circumstances were shown to excuse the late filing of an appeal or pleading. For example, under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), a petitioner convicted in state court has one year and ninety days from the date of the final order issued in state court to file a federal habeas corpus action. When

a petitioner fails to file a federal habeas corpus petition within this time limit, the petitioner must demonstrate extraordinary circumstances justifying the delay.

In *Rouse v. Lee*, 339 F.3d 238, 251 (4th Cir. 2003), the Fourth Circuit rejected the petitioner's assertion that his health problems and the negligence of his counsel constituted extraordinary circumstances preventing him from filing his habeas corpus petition in a timely manner:

Because Rouse has not shown that extraordinary circumstances beyond his control prevented him from timely filing his federal habeas petition, the district court did not err in holding that he is not entitled to equitable tolling under our existing "extraordinary circumstances" test applied in *Harris v. Hutchinson* [209 F.3d 325 (4th Cir. 2000)] and *Spencer v. Sutton*, 239 F.3d 626 (4th Cir. 2001)].

See also Van Horn v. Ballard, 2010 WL 5872405 (N.D.W.Va. 2010)(Alleged attorney negligence and fact petitioner represented himself for a time *pro se* insufficient to meet extraordinary circumstances test); *Geraci v. Senkowski*, 211 F.3d 6, 9 (2d Cir.2000) (holding that a mistake by counsel as to the calculation of time remaining to file a petition did not constitute "extraordinary or unusual circumstances that would justify equitable tolling of the AEDPA's one-year limitation period"); *LaChance v. Cunningham*, 2009 WL 8122 (N.D.N.Y. 2009)("Extraordinary circumstances" are events which were "beyond [petitioner's] control" and which prevented successful filing during the one-year time period.).

In the present case, counsel for the State knew about the final order, had expressed his intent to file an appeal, and simply did not file a notice of appeal within thirty days after that order had been entered. The State easily could have, and should have, filed a timely notice of appeal while counsel for the State and Hatfield explored possible plea negotiations. The State has not shown any diligence in pursuing this appeal because the only pleading filed is its **MOTION**, whereas the *pro se* litigant in *Boardwine* managed to file his appeal brief and appendix within the four month jurisdictional

limit. Hatfield respectfully submits there is nothing extraordinary about a prosecutor and defense counsel engaging in plea negotiations and, therefore, Hatfield asks this Court to reject the State's assertion that somehow such discussions constitute extraordinary circumstances justifying the State's failure to file a timely appeal. If this Court follows its own rules and case law, this case should be dismissed immediately.

B.

The trial court, in carrying out the interests of justice, correctly dismissed the indictment, with prejudice, in light of the admitted violation of Hatfield's constitutional rights, which has resulted in over twenty-seven years of illegal incarceration, the death of Hatfield's critical expert witnesses, and the knowing destruction of virtually all physical evidence

The State's argument is this case should proceed forward without the State suffering any negative consequences where:

1. Hatfield has been incarcerated for over twenty-seven years, based upon a guilty plea accepted by the trial court at a time when **all of the experts** who addressed the issue were of the opinion Hatfield lacked criminal responsibility¹⁷ and without ever providing him the constitutionally adequate competency hearing¹⁸ to which he was entitled;

¹⁷When evidence is presented that the accused lacked criminal responsibility, the State has the burden of proving the sanity of the accused beyond a reasonable doubt. Syllabus Point 3, *State v. Daggett*, 167 W.Va. 411, 280 S.E.2d 545 (1981). See also Syllabus Point 2, *State v. Milam*, 163 W.Va. 752, 260 S.E.2d 295 (1979).

¹⁸Where there is reason to believe that a criminal defendant may not be mentally competent, it is mandatory that a full evidentiary hearing be held on the question of the defendant's competency. Syllabus Points 1, 2, and 3 of *State v. Milam*, 159 W.Va. 691, 226 S.E.2d 433 (1976); *Drope v. Missouri*, 420 U.S. 162, 43 L.Ed.2d 103, 95 S.Ct. 896 (1975); *Pate v. Robertson*, 383 U.S. 375, 15 L.Ed.2d 815, 86 S.Ct. 836 (1966); see also *State ex rel. Kessick v. Bordenkircher*, 170 W.Va. 331, 294 S.E.2d 134 (1982); *State v. Swiger*, 175 W.Va. 578, 336 S.E.2d 541 (1985).

2. Dr. Haynes and Dr. Gallemore, who had concluded, based upon their extensive involvement with Hatfield, that Hatfield was not criminally responsible nor mentally competent, died before they could ever make an extensive record on the mental health treatment they provided, their observations of Hatfield closer to the time of the crime, all of the bases for their opinions, and the standard they were applying in reaching their opinions; and
3. Virtually all of the evidence obtained from the crime scene was destroyed, with the knowledge and approval of the State, but without any notice of such destruction being given to Hatfield or his counsel.

According to the State's logic, the parties simply should scrape together whatever evidence the State has not otherwise knowingly destroyed, obtain testimony from any surviving witnesses, ignore the loss of exculpatory evidence, and require Hatfield to proceed without the critical irreplaceable testimony from Dr. Haynes and Dr. Gallemore.

Special Judge Holliday disagreed with the State's arguments and concluded the indictment had to be dismissed with prejudice, in light of the violation of Hatfield's constitutional rights. In one of his initial conclusions of law, Special Judge Holliday held, "This Court notes that, although the circuit court initially found Defendant Hatfield competent to stand trial, albeit at a constitutionally inadequate hearing, **it allowed Defendant to enter guilty pleas in the face of several doctors's uncontroverted opinions that Defendant lacked criminal responsibility.**" (Emphasis added). (JA at 240-41). This conclusion is critical because not only was Hatfield permitted to enter a guilty plea prior to the trial court holding a constitutionally adequate mental competency hearing, but this guilty plea was accepted in light of the two treating psychiatrists and one psychologist concluding Hatfield was not criminally responsible. By the time the guilty plea was accepted, Dr. Smith had not issued any report addressing whether or not Hatfield was criminally responsible.¹⁹

¹⁹As far as counsel for Hatfield knows, Dr. Smith has never issued any report addressing whether or not he believes Hatfield was criminally responsible.

Thus, Special Judge Holliday was concerned not only about the now admitted failure of the trial court to provide Hatfield with a constitutionally adequate mental competency hearing, but also the trial court accepting a guilty plea in light of these undisputed opinions that Hatfield was not criminally responsible. Now that Dr. Haynes and Dr. Gallemore are dead, the question addressed by Special Judge Holliday was whether Hatfield could go forward with this defense, when these critical witnesses, who had treated him soon after his arrest, no longer are available. After quoting this Court's language in *State v. Sanders*, 209 W.Va. 367, 549 S.E.2d 40 (2001), regarding the difficulties in performing a retrospective competency examination, Special Judge Holliday noted:

Although these pronouncements concern retrospective competency evaluations, this Court notes that all criminal responsibility determinations are, by definition, retrospective. As such, no similar pronouncements can be found regarding the ability to conduct criminal responsibility evaluations following the passage of long periods of time, such as the nearly 26 years that have elapsed since the crimes in this matter were committed. As a result, this Court looks to the law concerning the ability to conduct retrospective competency evaluations in determining whether a retrospective criminal responsibility evaluation following the passage of over 25 years can be made and in informing its decision generally. (JA at 241).²⁰

²⁰United States Magistrate Eifert had similar concerns, 2011 WL 5822122 at *22:

In the present case, 23 years have elapsed since Hatfield's competency hearing. By comparison, in *Dusky*, the Supreme Court expressed concern over a retrospective competency hearing more than one year after the initial hearing. *Dusky*, 362 U.S. at 403. In *Pate*, the Supreme Court expressed concerns over a retrospective competency hearing six years after the initial hearing. *Pate*, 383 U.S. at 386–87. In *Drope*, the Supreme Court found that a retrospective competency hearing six years after the initial competency hearing would not be adequate. *Drope*, 420 U.S. at 183. Undoubtedly, the 23-year lapse of time in this case weighs heavily against a finding that a retrospective competency hearing would be “meaningful” in any sense of the word.

Thus, Special Judge Holliday held the case law governing when a retrospective competency evaluation was appropriate was relevant to the question of Hatfield's criminal responsibility and he cited the following factors from *Sanders*, 209 W.Va. at 381, 549 S.E.2d at 54, which courts consider in deciding whether a retrospective competency evaluation is possible:

In making a determination as to whether it is appropriate to remand a case for purposes of permitting a retrospective competency hearing, an appellate court should consider the following factors:

(1) the passage of time, (2) the availability of contemporaneous medical evidence, including medical records and prior competency determinations, (3) any statements by the defendant in the trial record, and (4) the availability of individuals and trial witnesses, both experts and non-experts, who were in a position to interact with defendant before and during trial, including the trial judge, counsel for both the government and the defendant, and jail officials.

Special Judge Holliday applied these factors and concluded:

In considering these factors, this Court finds that it would not be appropriate to permit a retrospective competency evaluation or, by extension, a retrospective criminal responsibility evaluation. First, more than 25 years have elapsed since Defendant Hatfield committed these crimes. The Supreme Court of the United States found that a defendant's due process rights would not be adequately protected should the Court remand the case for a retrospective competency evaluation where only six years had elapsed since the defendant's trial. *Drope v. Missouri*, 420 U.S. 162, 183, 95 S.Ct. 896, 909 (1975) ("Given the inherent difficulties of such a nunc pro tunc determination under the most favorable of circumstances, we cannot conclude that such a procedure would be adequate here."). This length of time also plays in to consideration of the fourth factor: the availability of witnesses who interacted with Defendant. In the 25 years since the crime was committed, Drs. Gallemore and Haynes have died, and Mr. Watkins is no longer a licensed psychologist. Other witnesses, including Jim York, Tom Ferrell, and Dr. Willard Daniels, have also passed away. Moreover, the record on the minimal competency undertaken was not fully developed. Outside of Dr. Gallemore's brief testimony at that hearing, which was not subject to cross-examination, no other psychiatrist or psychologist testified. Also, medical reports reportedly forthcoming were not provided. In

sum, much contemporaneous medical evidence has been lost.²¹ Lastly, because this case did not proceed to trial, we do not have a trial record from which we can review any statements by Defendant Hatfield in the event he had taken the stand. (JA at 242-43).

After citing this Court's decision in *State v. Bias*, 177 W.Va. 302, 310, 352 S.E.2d 51, 60 (1986), for the proposition that "due process is the primary constitutional protection against prejudice to the defense caused by passage or lapse of time," Special Judge Holliday cited the following quote in *Bias*, 177 W.Va. at 311, 352 S.E.2d at 61, from *Williams v. United States*, 250 F.2d 19, 21-23 (D.C.Cir. 1957), and concluded these same findings were applicable in the present case:

When prosecution is delayed because of the accused's mental incapacity to stand trial, the difficulty of determining whether the accused was mentally responsible at the time of the crime is increased. Passage of time makes proof of any fact more difficult. When the fact at issue is as subtle as a mental state, the difficulty is immeasurably enhanced. Courts must on occasion risk the increased difficulty of proof. But the interest of justice requires that there be no difficulty which is reasonably avoidable. There is a duty to minimize the difficulty so that the judgment, when ultimately reached, may be relied on as the closest approach to truth of which the judicial process is capable. That duty rests upon the accused as well as upon the Government-upon the accused because his is the burden, in the first instance of making some showing of insanity, [citations omitted]; upon the Government because it has the burden, once there has been some showing of insanity, of establishing beyond a reasonable doubt that the crime was not the product of mental illness. (Emphasis added). (JA at 243).

After citing *State ex rel Smith v. Scott*, 164 W.Va. 231, 280 S.E.2d 811 (1981), Special Judge Holliday held a full development of the issues regarding Hatfield's sanity at the time of the crime

²¹In connection with State habeas corpus action, which resulted in *Hatfield III*, counsel for Hatfield had filed with the Wayne County Circuit Clerk's office all of Hatfield's medical and psychological and mental health records. Noticeably absent from the records located were any contemporaneous notes made by Dr. Haynes, Dr. Gallemore, or any other mental health professional who treated Hatfield at that time. Thus, these critical contemporaneous medical records are not available to be reviewed by any other expert.

is nearly impossible today because Dr. Haynes and Dr. Gallemore are dead and their opinions are confined to their reports, which do not fully explain how their findings relate to their conclusions on criminal responsibility. “As a result, evidence regarding the medical philosophy upon which their opinions were based and of the methodology used in formulating the opinions is not available. Additionally, an evaluating psychologist is no longer licensed. In short, too much time has elapsed and too many witnesses are unavailable for a meaningful development of this issue to take place during a trial.” (JA at 244-45).

Special Judge Holliday concluded a criminal responsibility evaluation over 25 years after the crime was committed would be “inappropriate and nearly impossible at this late juncture.” (JA at 245). In elaborating on this point, Special Judge Holliday concluded:

As defense of this case would center primarily on Defendant Hatfield’s mental state at the time the crimes were committed, to find otherwise would place Defendant Hatfield in the untenable position of defending against serious charges without the ability to put on evidence necessary for his defense. As stated above, “[w]hen the fact at issue is as subtle as mental state, the difficulty [of proving facts] is immeasurably enhanced. Courts must on occasion risk the increased difficulty of proof. But the interest of justice requires that there be no difficulty which is reasonably avoidable.” *Bias*, 177 W.Va. At 311, 352 S.E.2d at 61. Here, the interest of justice mandates dismissal of the indictment in this case. Although “[i]t is perfectly reasonable to let the question of insanity go to a jury after full development of the issue,” such development in this instance would be unreliable at best given the length of time that has passed. *State ex rel. Smith v. Scott*, 164 W.Va. at 233-34, 280 S.E.2d at 813. (JA at 245-46).

Regardless of whether the Court treats the State’s challenge of Special Judge Holliday’s **ORDER DISMISSING THE INDICTMENT** as an appeal or a request for a writ of prohibition, nothing in the State’s challenge comes close to refuting his thorough factual and legal analysis.

In addition to the legal analysis applied by Special Judge Holliday, Hatfield also respectfully submits this Court’s holding in *State v. Foddrell*, 171 W.Va. 54, 297 S.E.2d 829 (1982), regarding

post-indictment delay and speedy trial concerns, further supports the dismissal of the indictment in this case.²² While Special Judge Holliday does mention Hatfield’s “due process and speedy trial rights” are implicated, he chose not to cite *Foddrell* or to engage in that analysis. *Foddrell* provides additional legal reasons supportive of Special Judge Holliday’s decision to dismiss the indictment with prejudice.

Counsel for Hatfield has conducted extensive research, trying to find any case with comparable facts. The closest case found is *Cox v. State*, 550 S.W.2d 954 (Tenn. 1997). In *Cox*, the defendant was deemed initially to be insane and was institutionalized in a mental healthy facility for over ten years without first being convicted of any crime. Through the years, the state opposed efforts to have the criminal case tried, leaving this defendant to remain institutionalized for a decade.

²²In Syllabus Point 2 of *Foddrell*, this Court held:

A determination of whether a defendant has been denied a trial without unreasonable delay requires consideration of four factors: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant’s assertion of his rights; and (4) prejudice to the defendant. The balancing of the conduct of the defendant against the conduct of the State should be made on a case-by-case basis and no one factor is either necessary or sufficient to support a finding that the defendant has been denied a speedy trial.

The delay in this case is directly attributable to the State’s failure to provide Hatfield with a constitutionally adequate competency hearing, failure to prove beyond a reasonable doubt Hatfield was criminally responsible at the time of the crime, particularly in light of the then existing uncontroverted evidence from the experts supporting his insanity defense, which delay was compounded by the State’s desperate efforts to hang on to this invalid conviction by thwarting any efforts made by Hatfield to make a record of his incompetency and lack of criminal responsibility and opposing all challenges to the conviction. Hatfield clearly is prejudiced by the passage of time, death of his critical expert witnesses, which eliminates his ability effectively to present the defense that he lacked criminal responsibility at the time of the crime, and the intentional destruction of virtually all evidence obtained. Consequently, the *Foddrell* factors also justify the dismissal of the indictment with prejudice.

Eventually, when it was determined this defendant was mentally competent to go to trial, he was convicted and he appealed.

In setting aside the conviction and dismissing the criminal prosecution, the Tennessee Court of Criminal Appeals cited *Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972), and held, 550 S.W.2d at 956:

The delay was perhaps the longest ever to come to the attention of this Court. The reason for the delay was because the State opposed both the request of the defendant to be tried and certifications by the staff of Central State Hospital to the effect that the defendant, while medicated, was sane. The State was successful for many years in convincing juries that the accused should not be tried. The prejudice is obvious. **There was a strong likelihood that the defendant could have demonstrated that he was insane at the time the crime was committed if tried soon after being served with the indictment after the passage of the first two years when he was found to be sane by the examiners.** Four juries did find him insane after he had been certified competent by the staff at Central State Hospital during the years involved. It is quite conceivable that these same juries would have found that the insanity predated the crime. Indeed, from the medical history found in the record, it is quite probable such a finding would have been made. **Sane or not, the anxiety and mental anguish that must accompany the frustration of the right to assert a defense and the increasing difficulty to establish it after many years must be even more pronounced when one is forced to spend the intervening time in a madhouse for the criminally insane.** (Emphasis added).

The similarities between the facts in *Cox* and the present case are self-evident. The main difference is the defendant in *Cox* spent a decade in a mental health institution waiting to be prosecuted on criminal charges while in the present case, Hatfield has spent over twenty-seven years in prison in violation of his due process and speedy trial rights based upon a conviction obtained in clear and admitted violation of his constitutional rights. As Special Judge Holliday and the Tennessee Court noted, the passage of time has made it extremely difficult for the lack of criminal

responsibility to be proven. The result in both cases should be the same—the dismissal of the criminal prosecution, with prejudice.

The rationale used by Special Judge Holliday in support of his order dismissing the indictment with prejudice is based upon decisions from the United States Supreme Court as well as this Court. The finding that all experts who had expressed their opinions found Hatfield was not criminally responsible at the time of the crime is critical. In light of that fact and the State's burden to prove a defendant is sane beyond a reasonable doubt, Special Judge Holliday correctly concluded the failure to provide Hatfield with a constitutionally adequate competency hearing was not the only deficiency in this case. By focusing on whether Hatfield today effectively could present his lack of criminal responsibility defense, Special Judge Holliday noted the critical experts were dead and they had never testified at any length regarding their findings, methodology, or the medical-legal standard they applied in concluding Hatfield was not criminally responsible. While their reports are available, Special Judge Holliday found the reports were inadequate to provide the contemporaneous medical records an expert would need to present this defense effectively. The decision is well reasoned, supported by existing case law, and consistent with the interests of justice. Clearly, Special Judge Holliday accepted this Court's assignment to this case very seriously and he has provided a persuasive order that the State barely mentions in its appeal brief.

It is appropriate that Special Judge Holliday, who was the last circuit court judge to sentence Hatfield, is the jurist to bring this case to an end. Special Judge Holliday has the most familiarity with the factual and legal history of this case, he was specifically selected and reappointed to this case by Chief Justice Ketchum at a time when Special Judge Hoke was still the judge assigned to Hatfield's criminal case, and historically this Court has entrusted Special Judge Holliday with challenging cases, including the special investigations into the West Virginia State Police laboratory

cases. Hatfield respectfully submits in the event this Court decides it somehow has jurisdiction to decide this case, the final order issued by Special Judge Holliday should be upheld by this Court.

V.

CONCLUSION

For the foregoing reasons, Respondent Stephen Westley Hatfield respectfully moves the Court to dismiss this case because the Court lacks jurisdiction, based upon W.Va.Code §58-5-30, and the State's failure to comply with the mandatory and jurisdictional deadlines mandated by Rule 5 and W.Va.Code §58-5-30. Alternatively, in the event this Court somehow concludes it has jurisdiction, despite the State's violation of this Court's mandatory rules, then Hatfield respectfully moves the Court to affirm the well reasoned decision issued by Special Judge James O. Holliday, and order that Hatfield be released immediately from prison.

STEPHEN WESTLEY HATFIELD, Respondent,

–By Counsel–



J. Timothy DiPiero (W.Va. I.D. No. 1021)

Lonnie C. Simmons (W.Va. I.D. No. 3406)

DITRAPANO, BARRETT, DIPIERO,

MCGINLEY & SIMMONS, PLLC

P.O. Box 1631

Charleston, West Virginia 25326-1631

Telephone: (304) 342-0133

lonnie.simmons@dbdlawfirm.com

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 14-0868

STATE OF WEST VIRGINIA,

Petitioner,

v.

STEPHEN WESTLEY HATFIELD,

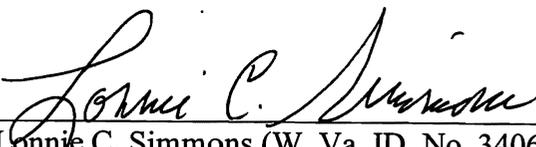
Respondent.

From the Circuit Court of Wayne County, West Virginia

CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, counsel for the defendant herein, do hereby certify that a true and correct copy of the foregoing **RESPONDENT'S BRIEF** was served upon the following counsel of record by placing same in the United States Mail, postage prepaid, this 1st day of December, 2014, and addressed as follows:

Thomas M. Plymale
Prosecuting Attorney
P.O. Box 758
Wayne, West Virginia 25570
(304) 272-6395



Lonnie C. Simmons (W. Va. ID. No. 3406)