

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

**STATE OF WEST VIRGINIA,  
Respondent**

**v.**

**PATRICK SHAWN COLLINS,  
Defendant Below, Petitioner**

**No. 15-0958  
(Gilmer County, No. 12-F-5)**

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**SUPPLEMENTAL REPLY BRIEF OF PETITIONER**

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## TABLE OF CONTENTS

Table of Authorities .....	iii
Argument .....	1
I. Contrary to the Assertions of the Respondent Warden, the Excessively Harsh Sentence In This Case Can Be Corrected On Appeal By Applying the Abuse of Discretion Standard; By Acknowledging That the Constitutional Issues Are Contained, Implicitly, in the Petitioner's <i>Pro Se</i> Pleadings in Circuit Court; Or By Applying the Doctrine of Plain Error .....	1
A. A Review of the Sentence in This Case is Not Dependent on a Consideration of Constitutional Issues And May Be Based on Abuse of Discretion Alone .....	1
B. Because of the Less Stringent Standard Applied to <i>Pro Se</i> Pleadings, the Petitioner Has, At Least Implicitly, Raised the Eighth Amendment Proportionality Issue in Circuit Court and Preserved the Issue for Appeal -- A Point Conceded by the Respondent State in One of Its Circuit Court Responses .....	2
1. <i>Pro Se</i> Pleadings Are Held To a Less Stringent Standard .....	2
2. The Eighth Amendment Proportionality Argument Is Contained, Implicitly, In the Petitioner's <i>Pro Se</i> filings -- A Point Previously Conceded By the Respondent State .....	5
C. The Doctrine of Plain Error Permits This Court to Consider the Constitutionality of Both the Petitioner's 10 to 25 Year Sentence and the Requirement of Lifetime Sex Offender Registration, Despite the Failure of the Petitioner to Explicitly Include References to the Constitution in His <i>Pro Se</i> Pleadings .....	6
II. Both the Petitioner's <i>Pro Se</i> Brief (Drafted By a Fellow Prisoner) and the Respondent's Supplemental Brief Erroneously Assert That the Petitioner "Had Sex" With a Fourteen-Year-Old Female. In Order to Properly Weigh the Severity of the 10 to 25 Year Sentence in This Case (Either Under an Abuse of Discretion Standard or Under an Eighth Amendment Proportionality Standard) the Erroneous and Overstated Allegations Should Be Corrected .....	9
Conclusion .....	11

TABLE OF AUTHORITIES

Caselaw:

*Blair v. Maynard*, 174 W.Va. 247, 324 S.E.2d 391 (1984) . . . . . 4

*Board of Zoning Appeals v. Tkacz*, 234 W.Va. 201, 764 S.E.2d 532 (2014) . . . . . 4

*Cottrill v. Cottrill*, 219 W.Va. 51, 631 S.E.2d 609 (2006) . . . . . 3-4, 5

*Erickson v. Pardus*, 551 U.S. 89 (2007) . . . . . 4

*Estelle v. Gamble*, 429 U.S. 97 (1976) . . . . . 4

*People v. Bowling*, 299 Mich. App. 552, 830 N.W.2d 800 (2013) . . . . . 8

*State v. Berrill*, 196 W.Va. 578, 474 S.E.2d 508 (1996) . . . . . 7

*State v. Head*, 198 W.Va. 298, 480 S.E.2d 507 (1996) . . . . . 1-2

*State v. Kerr*, 228 P.3d 1255 (Utah App. 2010) . . . . . 8

*State v. Seen*, 235 W.Va. 174, 772 S.E.2d 359 (2015) . . . . . 6, 7-8

*United States v. McNeil*, 375 Fed.Appx. 991 (11th Cir. 2010) . . . . . 8

Constitutional Provisions:

W.Va. Const., Art. III, Section 5 . . . . . 7, 9

U.S. Const., Eighth Amendment . . . . . 6, 7, 9

Statutes:

W.Va. Code § 61-8B-5 . . . . . 10

W.Va. Code § 61-8B-9 . . . . . 10

Rules of Court:

Rule 35(a), W.Va. Rules of Criminal Procedure ..... 3, 4

Rule 35(b), W.Va. Rules of Criminal Procedure ..... 2, 3, 4

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SUPPLEMENTAL REPLY BRIEF OF PETITIONER<sup>1</sup>

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ARGUMENT

I. CONTRARY TO THE ASSERTIONS OF THE RESPONDENT, THE EXCESSIVELY HARSH SENTENCE IN THIS CASE CAN BE CORRECTED ON APPEAL BY APPLYING THE ABUSE OF DISCRETION STANDARD; BY ACKNOWLEDGING THAT THE CONSTITUTIONAL ISSUES ARE CONTAINED, IMPLICITLY, IN THE PETITIONER'S *PRO SE* PLEADINGS IN CIRCUIT COURT; OR BY APPLYING THE DOCTRINE OF PLAIN ERROR.

A. A Review of the Sentence in This Case Is Not Dependent on a Consideration of Constitutional Issues and May Be Based on Abuse of Discretion Alone.

Although the constitutional issues in this case are compelling (as set forth in Parts II and III of the Supplemental Brief of the Petitioner), a review of the sentence in this case is not dependent on a consideration of the constitutional issues. Under *State v. Head*, 198 W.Va. 298,

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<sup>1</sup>This Supplemental Reply Brief was authorized by the Order of this Court of June 27, 2016, providing that any supplemental reply brief deemed necessary may be filed within 20 days of the respondent's brief.

301, 480 S.E.2d 507, 510 (1996), and numerous other rulings of this Court, the denial of the Petitioner's *pro se* Motion for Reduction of Sentence, filed under Rule 35(b) of the Rules of Criminal Procedure, is reviewable by this Court on a non-constitutional "abuse of discretion" standard.

As pointed out in Part I of the Supplemental Brief of the Petitioner, the Petitioner is currently serving a 10 to 25 year sentence for the victimless, regulatory violations of failing to update the sex offender registry in a timely manner, a sentence that is 40 to 100 times greater than the maximum sentence for his underlying offense. As set forth in the Supplemental Brief, the Circuit Court had numerous sentencing options short of imposing the 10 to 25 year sentence, including imposing various periods of confinement ranging up to six months in jail, followed by reinstatement to probation. Supplemental Brief of Petitioner, at 18-19.

This argument, based on an abuse of discretion in sentencing, is wholly independent of constitutional issues. The single reference (actually a cross-reference) in Part I of the Supplemental Brief to the constitutional argument, as set forth in later portions of the brief, is not an attempt, as the Respondent asserts, to insert the constitutional issue into the abuse of discretion argument. The argument for abuse of discretion in sentencing stands alone in the Supplemental Brief of the Petitioner, and as such is reviewable by this Court independent of any constitutional claim.

**B. Because of the Less Stringent Standard Applied to *Pro Se* Pleadings, the Petitioner Has, At Least Implicitly, Raised the Eighth Amendment Proportionality Issue in Circuit Court and Preserved the Issue for Appeal -- A Point Conceded by the Respondent State in One of Its Circuit Court Responses.**

1. Pro se pleadings are held to a less stringent standard.

Throughout the Respondent's Supplemental Brief, the Respondent challenges technical shortcomings in the Petitioner's pleadings during the time the Petitioner was representing himself, without counsel. The Respondent challenges the timeliness of the Petitioner's *pro se* Rule 35 Motion to Reconsider Sentence. Resp. Suppl. Brief, at 7, n.2. The Respondent challenges the choice of the *pro se* filing under Rule 35(b) rather than Rule 35(a). Resp. Suppl. Brief, at 7-8. The Respondent challenges the Petitioner's *pro se* choice of remedy. Resp. Suppl. Brief, at 12, n.6. The Respondent also challenges whether the issues were adequately raised and preserved below. Resp. Suppl. Brief, at 9. And throughout the Respondent's Supplemental Brief, now that the Petitioner has been appointed counsel, the Respondent challenges the Petitioner's efforts, through counsel, to overcome the inartful *pro se* drafting and address the substantive issues in this case.

In taking these positions, the Respondent overlooks the principle that *pro se* filings are not held to the same standards as pleadings filed by lawyers, and that, wherever possible, *pro se* cases should be decided on the merits. The less stringent standards for *pro se* filings have been recognized by this Court in numerous instances.

In *Cottrill v. Cottrill*, 219 W.Va. 51, 54, 631 S.E.2d 609, 612 (2006), for example, this Court held that a *pro se* litigant has a right to represent himself and that "a *pro se* litigant's other rights under the law should not be abridged simply because he or she is unfamiliar with legal procedures." Consequently, in *Cottrill*, this Court held that the Circuit Court, in hearing an appeal from Family Court, should have recognized the statute of limitations as a defense, even though it was pled for the first time on appeal.

In *Cottrill* the Court explained that the "skeletal argument" (that is, a reference to "the passage of time") by a *pro se* litigant, "is enough to preserve a claim [of the statute of limitations] for appeal, especially where the court can recognize the defense for itself . . ." As the Court concluded, "Cases should be decided on the merits, and to that end, justice is served by reasonably accommodating all parties, whether represented by counsel or not." 219 W.Va. at 56, 631 S.E.2d at 614, *quoting Blair v. Maynard*, 174 W.Va. 247, 253, 324 S.E.2d 391, 396 (1984).

Similarly, in *Board of Zoning Appeals v. Tkaczyk*, 234 W.Va. 201, 205, 764 S.E.2d 532, 536 (2014), this Court stated that it has "long held that non-lawyer, *pro se* litigants generally should not be held accountable for all of the procedural nuances of the law," and that "no person's cause or defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules."

As stated by the United States Supreme Court in *Erickson v. Pardo's*, 551 U.S. 89, 94 (2007), "a document filed *pro se* is 'to be liberally construed . . . and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers,'" *quoting Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

Had the Petitioner been represented by counsel in his post-sentencing efforts in Circuit Court, the Respondent would be correct that the Petitioner's Rule 35(b) Motion for Reduction of Sentence should have included a Rule 35(a) Motion for Correction of Sentence. If the Petitioner had been represented by counsel, the Respondent would also be correct that the Petitioner should have explicitly cited the Eighth Amendment prohibition against sentences that are disproportionate to the offense. Until this Court's Order of June 27, 2016, however, the

Petitioner was unrepresented by counsel and pleadings filed prior to that date should not be held to a stringent standard.

2. The Eighth Amendment proportionality argument is contained, implicitly, in the Petitioner's *Pro Se* filings -- a point previously conceded by the Respondent State in one of its Circuit Court responses.

Just as this Court recognized in *Cottrill v. Cottrill* that a *pro se* litigant's vague reference to the "passage of time" is sufficient, as a skeletal argument, to raise the defense of the statute of limitations, so too should the Court recognize that the Petitioner's *pro se* Motion for a Reduction of Sentence implicitly raises the point that his sentence is disproportionate to the offense.

In his *pro se* Motion for Reduction of Sentence, the Petitioner did not explicitly raise a constitutional claim about the proportionality of his sentence. Yet with *pro se* pleadings held to a less stringent standard, the Court should recognize -- as did the Respondent itself in a previous stage of this proceeding -- that contained within a request for a shorter sentence is the implicit assertion that the existing sentence is excessively harsh.

It is significant that in one of its responses in this case in Circuit Court, the Respondent has, in fact, conceded the point -- that the Petitioner's Motion implies that his sentence is disproportionate. (In order to obtain the right to have his current Motion for Reconsideration reviewed by the Circuit Court, the Petitioner filed a Petition for a Writ of Habeas Corpus, *Collins v. Plumley*, No. 14-C-19, Circuit Court of Gilmer County (August 5, 2014)). In its Response to the petition, the State forthrightly conceded, "The Petitioner implies that his sentence is *disproportionate* to the original conviction." State's Response to Petition for Writ of Habeas

Corpus, *Collins v. Plumley*, No. 14-C-19, Circuit Court of Gilmer County (Sept. 4, 2014). Pet. 2d Supp. App., at 4.<sup>2</sup>

As a consequence of the Respondent's argument in Circuit Court, proportionality was, in fact, raised at the Circuit Court level because the Respondent State raised it itself. As the Respondent conceded in Circuit Court, implicit in the Petitioner's *pro se* filings is the claim that his sentence is too severe -- is disproportionate to the offense.

Consequently, this Court should apply the less stringent standard to the Petitioner's *pro se* filings and recognize that the Eight Amendment proportionality claim has in fact, at least implicitly, been raised in Circuit Court and preserved for appeal.

C. The Doctrine of Plain Error Permits This Court to Consider the Constitutionality of Both the Petitioner's 10 to 25 Year Sentence and the Requirement of Lifetime Sex Offender Registration, Despite the Failure of the Petitioner to Explicitly Include References to the Constitution in His *Pro Se* Pleadings.

In *State v. Seen*, 235 W.Va. 174, 772 S.E.2d 359 (2015), in instances where a party failed to raise an issue in the court below, this Court reaffirmed the four-part test for the application of the plain error doctrine in order to overcome the failure and consider the issue on appeal. As the Court stated in *Seen*, "This Court has consistently held: '[t]o trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings."

Although the plain error found by this Court in *State v. Seen* and similar cases usually has been applied to *trial* error, this Court has also applied the plain error doctrine to errors in

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<sup>2</sup>The Petitioner's Motion to File a Second Supplemental Appendix, containing the State's Response in Circuit Court to the habeas petition, has been filed concurrently herein and is currently pending before the Court.

sentencing. In *State v. Berrill*, 196 W.Va. 578, 474 S.E.2d 508 (1996), for example, this Court found plain error at sentencing where neither the defendant nor his lawyer were given the opportunity to address the court before sentencing, and the lawyer failed to object. In remanding for re-sentencing with the right to allocution, the Court found all four components to exist. As the Court stated, "We find plain error, in that there was an error, that was plain, and that affected Mr. Berrill's substantial rights and seriously affected the fairness, integrity, or public reputation of the judicial proceedings. 196 W.Va. at 587-88, 474 S.E.2d at 517-18.

The Petitioner's constitutional claims in the present case similarly meet the standard for plain error. The Petitioner's sentence for his regulatory violations is 25 to 100 times greater than the penalty for the offense that placed him on the registry in the first place; the Petitioner's regulatory violations involved no attempt to conceal his identity; and the Petitioner has not committed any other offense of any nature. Consequently, the sentence does, in fact, contain error -- an error of constitutional magnitude by violating the proportionality principle contained in the Eighth Amendment to the United States Constitution and Art. III, Section 5 of the West Virginia Constitution.

Similarly, as set forth in Part III of the Supplemental Brief of Petitioner, the requirement of lifetime sex offender registration -- a period of time that, based on the Petitioner's life expectancy, is over 200 times longer than the penalty for the underlying offense -- is equally violative of the proportionality principle contained in the U.S. and West Virginia Constitutions.

In *State v. Seen*, the Court stated that "[a]lleged errors of a *constitutional* magnitude will generally trigger a review by this Court under the plain error doctrine." (emphasis added) The Court further explained that "Although it is a well-settled policy that the Supreme Court of

Appeals normally will not rule upon unassigned or imperfectly assigned errors, this Court will take cognizance of plain error involving a fundamental right of an accused which is protected by the constitution." 235 W.Va. at 181, 772 S.E.2d at 366.

The error in the present case is also "plain" (meeting the second factor in *State v. Seen*) because the degree of disproportionality is apparent on its face, and is neither subtle nor easily overlooked. The disproportionate aspects of both the lifetime registration and the 10-to-25 year sentence for the victimless, regulatory failures to update the registry in a timely manner -- in contrast to the 90-day maximum sentence for the underlying offense -- are both striking and undeniably "plain."

Similarly, the error, involving 10 to 25 years of the Petitioner's life, affects the substantial rights of the Petitioner -- the right to freedom from disproportionately excessive incarceration -- meeting the third factor in *State v. Seen*. And finally, because it cannot be reasonably disputed that the constitutionally-excessive penalties "seriously affects the fairness" of the proceeding, the errors meet the fourth and final factor in *State v. Seen*.

Courts in numerous jurisdictions have recognized that a plain error analysis is applicable to claims of cruel and unusual punishment. Such cases include *State v. Kerr*, 228 P.3d 1255 (Utah App. 2010) (applying plain error analysis in upholding a sentence when lawyer failed to object to a sentence enhancement as cruel and unusual punishment); *People v. Bowling*, 299 Mich. App. 552, 830 N.W.2d 800 (2013) (applying plain error analysis in upholding 100-year sentence when lawyer failed to object to cruel and unusual punishment); and *United States v. McNeil*, 375 Fed.Appx. 991 (11th Cir. 2010) (applying plain error analysis in upholding mandatory minimum sentence where lawyer failed to object to cruel and unusual punishment).

Consequently, based on the plain error, the Petitioner's failure to explicitly refer to the Eighth Amendment to the United States Constitution and to Art. III, Section 5 of the West Virginia Constitution in his *pro se* Motion for Reduction of Sentence, should not preclude this Court from considering the constitutional issues on appeal.

II. BOTH THE PETITIONER'S *PRO SE* BRIEF (DRAFTED BY A FELLOW PRISONER) AND THE RESPONDENT'S SUPPLEMENTAL BRIEF ERRONEOUSLY ASSERT THAT THE PETITIONER "HAD SEX" WITH A FOURTEEN-YEAR-OLD FEMALE. IN ORDER TO PROPERLY WEIGH THE SEVERITY OF THE 10 TO 25 YEAR SENTENCE IN THIS CASE (EITHER UNDER AN ABUSE OF DISCRETION STANDARD OR UNDER AN EIGHTH AMENDMENT PROPORTIONALITY STANDARD) THE ERRONEOUS AND OVERSTATED ALLEGATIONS SHOULD BE CORRECTED.

The Petitioner's *pro se* Brief, drafted by a fellow prisoner, contains a significant misstatement of the facts of this case. Page two of the *pro se* Brief erroneously states that "the Petitioner readily admits that he was convicted, at age twenty, of having consensual sex with a fourteen year old girl." The Respondent, in its Supplemental Brief, repeated the error by stating in its Statement of the Case and in its Argument that the Petitioner "had sex with a 14 year old girl." Respondent's Supplemental Brief, at i, 1, and 29.

In actuality, the Petitioner has never been charged with, let alone been convicted of, "having sex," as that term is traditionally understood to mean. That is, there has never been an allegation against the Petitioner of any form of genital-genital or oral-genital contact with a minor, let alone a conviction.

Instead, as fully set forth in the statement of facts contained in the Criminal Complaint that was filed against the Petitioner, the acts of the Petitioner can best be described as foreplay,

however serious, rather than as "having sex." Criminal Complaint, *State v. Patrick Shawn Collins*, No. 06-M-640, Magistrate Court of Lewis County, November 20, 2005. Pet. 2d Supp. App., at 1-2.<sup>3</sup>

For this reason, the Petitioner was originally charged with sexual assault in the third degree, an act involving either sexual intercourse *or* "sexual intrusion" with another person who is less than sixteen years old, in violation of W.Va. Code § 61-8B-5. The Petitioner pled guilty to the reduced charge of sexual contact in the third degree, an act involving sexual contact with a person unable to consent by "reason of being less than sixteen years old," in violation of W.Va. Code § 61-8B-9.

In weighing the penalties imposed in this case, the distinction is significant. The Petitioner served a 90-day sentence for engaging in what was initially charged as illegal foreplay with a minor who, by virtue of her age, was unable to consent. The Petitioner is now serving a 10 to 25 years sentence for the regulatory violations of failing to update, in a timely manner, the lifetime sex offender registration that was required as a result of the illegal foreplay.

The Petitioner does not dispute the illegality of his act. But in fairness to the Petitioner, in weighing the consequences of his act, including both the current 10 to 25 year sentence and the requirement of lifetime registration, he should be held to the facts of the case, rather than to the significantly more serious and erroneous allegation that he "had sex" with a fourteen-year-old female,<sup>4</sup> when in fact he did not.

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<sup>3</sup>As also set forth in footnote 2 regarding the State's Response to Petition for Writ of Habeas Corpus, the Petitioner's Motion to File a Second Supplemental Appendix, containing the criminal complaint, has been filed simultaneously herein and is currently pending before the Court.

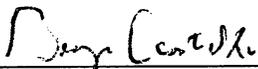
<sup>4</sup>An additional source of confusion in the facts of this case is that the statement of facts in the Criminal Complaint identifies the 14-year-old as the Petitioner's "cousin," Pet. Second Supp. App. (cont.)

## CONCLUSION

For the above reasons, the Order of the Circuit Court of Gilmer County, denying the Petitioner's Motion for Reconsideration of Sentence, should be reversed. This case should be remanded to the Circuit Court of Gilmer County with instructions for the imposition of a sentence that is proportionate to the character and degree of the offense. Additionally, upon remand, the Circuit Court of Gilmer County should be instructed to reduce the period of registration to a length of time that is proportionate to both the degree of the offense and the risk and potential harm of re-offending.

Respectfully submitted,

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(fn. 4, cont.) at 1, whereas the sex offender registry identifies the relationship as "family friend," Pet. Suppl. App., at 21. The Petitioner explains the discrepancy as arising from a relation that is a very distant cousin who was, in fact, a family friend. As such, both descriptions are substantially correct.

CERTIFICATE OF SERVICE

I, George Castelle, do hereby certify that on the 28<sup>th</sup> day of September, 2016, I served, by U.S. Mail, a copy of the foregoing Supplemental Reply Brief of Petitioner, upon:

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