

No. 32784 – *Shawn Pethel, aka Shawn Pethel, Petitioner Below, Appellee v. Thomas McBride, Warden, Mount Olive Correctional Center, Respondent Below, Appellant*

**FILED**

**July 12, 2006**

Starcher, J., dissenting:

released at 3:00 p.m.  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

I write separately to express my disagreement with the majority decision. In my judgment *Alabama v. Bozeman*, 533 U.S. 146, 121 S.Ct. 2079, 150 L.Ed.2d 188 (2001) clearly controls the outcome of this case and the circuit court should be affirmed.

To avoid what should be the obvious application of *Bozeman* to this case, the majority spews out a “parade of the horrors” from the facts in the underlying case simply to poison the water to persuade the reader of the opinion that *this* defendant should be granted no relief. Next, the majority has “manufactured” a series of syllabus points that are result-oriented with obfuscated meanings, all to avoid writing anything that might be favorable to a criminal defendant with whom it is easy to find disfavor. I disagree with using a parade of the horrors to serve as “persuasive language” when the facts of the criminal charges in the underlying case are not really relevant to deciding the case. This case should have been decided on what happened procedurally below and the law – not how bad a defendant’s past conduct may appear to be.

First, I believe that the procedural aspect of the majority opinion – which states that post-conviction habeas corpus actions under *W.Va. Code*, 53-4A-1 (1967) may not be used to test the validity of procedures under the *Interstate Agreement on Detainers Act* (“IAD”), *W.Va. Code*, 62-14-1, *et seq.* (1971) because the IAD post-dates the habeas statute,

*W.Va. Code*, 53-4A-1 (1967) – is clearly wrong.

The habeas statute, *W.Va. Code*, 53-4A-1(a) (1967), states in part that:

Any person convicted of a crime and incarcerated under sentence of imprisonment therefor who contends that . . . the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under the common law *or any statutory provision* of this State . . . , may . . . file a petition for a writ of habeas corpus ad subjiciendum, and prosecute the same, seeking release from such illegal imprisonment, correction of the sentence, the setting aside of the plea, conviction and sentence, or *other relief* . . .

(Emphasis added). The interpretation given to this statute by the majority excludes by implication from the post-conviction habeas corpus procedure all issues arising from statutes adopted by our Legislature after 1967. This is not logical, nor do I believe that such an interpretation was intended by the Legislature.

We held in Syllabus Point 4 of *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981) that “. . . an applicant [for habeas corpus relief] may . . . petition [under *W.Va. Code*, 53-4A-1, *et seq.* (1967)] the court on the following grounds: . . . a change in the law, favorable to the applicant, which may be applied retroactively.” *Bozeman* was applied retroactively by the U.S. Supreme Court. *Bozeman* was decided after Pethel’s conviction and sentencing. Thus, the legal landscape was changed favorable to Pethel, and under *Losh*, the matter is properly before this Court.

Second, the majority opinion holds that dismissals under the West Virginia IAD may be with or without prejudice; this is likewise clearly wrong. The majority opinion on this point turns on Congressional passage of amendments to the federal IAD in 1988

which permitted dismissals and under the federal IAD to be either with or without prejudice, 18 U.S.C. App. 2 § 9, and upon our state Constitutional rule making authority. The opinion, however, ignores the fact that *Bozeman* was decided *after* the passage of the federal amendments. Furthermore, *Bozeman* involved an interpretation of Alabama's IAD which contains the same dismissal language as West Virginia's IAD.<sup>1</sup>

Finally, the majority opinion ignores express language in *Bozeman*, where the U.S. Supreme Court stated:

As “a congressionally sanctioned interstate compact” within the Compact Clause of the United States Constitution, Art. I, § 10, cl. 3, the [Interstate Agreement on Detainers] is a federal law subject to federal construction.

533 U.S. at 149, 121 S.Ct. at 2082, 150 L.Ed.2d at 192 (*quoting New York v. Hill*, 528 U.S. 110, 111, 120 S.Ct. 659, 662 (2000), and citing *Carchman v. Nash*, 473 U.S. 716, 719, 105 S.Ct. 3401, 87 L.Ed.2d 516 (1985); *Cuyler v. Adams*, 449 U.S. 433, 442, 101 S.Ct. 703, 66 L.Ed.2d 641 (1981)).

We recognized this principle in Syllabus Point 3 of *State v. Inscore*, \_\_\_ W.Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (No. 32855, June 26, 2006), where we stated:

The Agreement on Detainers, *W.Va. Code*, 62-14-1[1971] is a congressionally-sanctioned interstate compact within the Compact Clause, *U.S. Const.*, Art.1, § 10, cl. 3, and thus is a federal law subject to federal construction.

The majority has chosen to ignore the ruling in *Bozeman* and charts a separate path,

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<sup>1</sup>*Bozeman* was decided in 2001. The affected Alabama conviction was in 1997.

notwithstanding the clear federal construction by the U.S. Supreme Court and our recent holding in *Inscore*. A federal construction and the clear language of *Bozeman* requires a dismissal of the instant case – as the U.S. Supreme Court did in *Bozeman* and the circuit court below did in the instant case.

I can understand why the majority finds the conduct of the defendant giving rise to the underlying case distasteful; so do I. Nevertheless, as distasteful as the facts may be, I believe my oath of office provides me no other choice but to respect the decision of the United States Supreme Court.

There are times as judges and justices when we are called upon to make difficult decisions. Sometimes those decisions are not only distasteful, but likely to be unpopular with the public. This case exemplifies such a circumstance. Having served as circuit judge I know the difficulty that is present when such decisions affect the very community in which we live. However, we are called to a higher duty – to uphold the rule of law. This is what the circuit judge in this case did below. And I applaud him for his courage.

Respectfully, I dissent, and I am authorized to say that Justice Albright joins in this dissent.