

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

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**DOCKET NO.: 22-921
(Underlying Criminal Action: 22-F-8
Berkeley County Circuit Court)**

**State of West Virginia ex rel.
Catie Wilkes Delligatti, Prosecuting
Attorney of Berkeley County,
Petitioner**

v.

**The Honorable Bridget Cohee,
Judge of the Circuit Court of Berkeley
County, and Lateef Jabrall McGann,
Respondents**

SUMMARY RESPONSE

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SUMMARY RESPONSE

COMES NOW, the Defendant, Lateef Jabrall McGann, by and through his counsel, S. Andrew Arnold, Esq., pursuant to Rule 16 (h) of the Rules of Appellate Procedure and tenders the following summary response to the Petition for a Writ of Prohibition.

A. Standard of Review

"[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W. Va. Code, 53-1-1." Syl. pt. 2, State ex rel. Peacher v. Sencindiver, 160 W. Va. 314, 233 S.E.2d 425 (1977).

In Syllabus point 4 of State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996), this Court set forth the following standard for issuance of a writ of prohibition when it is alleged a lower court has exceeded its legitimate authority:

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

need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

The Circuit Court based its ruling to dismiss the matter on sound legal authority. Specifically, SER Ringer v. Boles, 151 W.Va. 864 (1967), and Holcomb v. Ballard, 232 W.Va. 253 (2013). Accordingly, the decision was not clear legal error. The State contests the result from below but does not establish sufficient grounds for a writ of prohibition.

The Circuit Court committed no clear legal error below, nor did it commit an oft repeated error or manifest persistent disregard for procedural or substantive law. Further, the Circuit Court's order raises no new and important problems of law or issue of first impression. Accordingly, the Respondent contends that the State has not offered sufficient grounds for issuing a writ of prohibition.

Ringer and *Holcomb* were decided on either side of the case the State relied upon in Circuit Court: State v. Crabtree 198 W. Va. 620 (1996). The *Crabtree* decision the State cites makes no mention of the *Ringer* legal authority. *Crabtree*, decidedly, did not overrule *Ringer*. The *Crabtree* decision was not, in fact, a case about the issue underlying here: an error in the charging document which was not corrected before the end of the subsequent term of court rendering continued prosecution in violation of the statute. *Crabtree* contains nine syllabus points, none of which is about the issue in *Ringer*.

Following the *Crabtree* decision, the issue in *Ringer* was again raised and addressed in *Holcomb*. In that case the *Ringer* point of law was written into syllabus point 2. The *Holcomb* decision makes no mention of the *Crabtree* decision whatsoever. The *Crabtree* Court knew how to overrule *Ringer* had it wished to do so, and it did not. A second opportunity arose to address the matter in *Holcomb* and the Court again made the point that harmless error does not apply in

recidivist proceedings. The error in this case was deemed properly not curable and the decision by the Circuit Court thus was not error at all, certainly not “clear legal error.”

The State now also offers State v. Hilberry 233 W. Va. 27, 754 S.E.2d 603 (2014) and State v. Masters 179 W. Va. 752, 373 S.E.2d 173 (1988) in support of its position. Neither of those cases overrule the *Ringer* or *Holcomb* decisions.

B. The trial court did not err by finding that the State’s amended recidivist information was neither timely amended nor subject to harmless error analysis.

The State asserts that it did indeed file the amended information before the term expiration provided for in 61-11-19, but it was not filed in the underlying recidivist case. A review of the file herein, reveals no corrected information. Were this matter to proceed to a trial, the State would (presumably) seek to have the Court instruct the jury on an information not filed in the case before the jury. In making this argument the State acknowledges the error presented here. Error is not harmless in recidivist proceedings. The Circuit Court relied upon legal authority in *Ringer* and *Holcomb* in dismissing this matter.

The Circuit Court did not, as the State avers, employ a heightened standard. Rather, the court applied existing case law and made a ruling well within its legitimate authority.

i. The State’s error herein was subject to the jurisdiction of *Holcomb*.

The procedural error in this case exists as the Court brought the Defendant before it on a document that the State acknowledges has a defect. The Court was required to bring the Defendant before it timely. The time period has now expired. The State avers here that the Court’s acknowledging this error and dismissing the case based upon the legal authority in *Ringer* and *Holcomb* amounts to “clear legal error.” The Court also noted in its ruling that the

language in *Crabtree*, which the State relied upon below, was not a syllabus point.

ii. The State did not cure its defect by filing its Amended Information in a different case file.

The State contends, as it did before the Circuit Court, that it could proceed to trial in this matter notwithstanding the error in the charging document. The State asserts that the corrected information was filed in another case and thus the matter may proceed. The *Ringer* and *Holcomb* decisions, however, provide that harmless error does not apply to recidivist proceedings. The corrected information has never been filed in this case.

If this were not a recidivist case the controlling law would certainly allow for correction of the error, but this is not a case in our common law tradition. As the State seeks a life sentence for a conviction for fleeing in a car with reckless indifference, the law provides that harmless error will not apply. (The State also seeks this life sentence using a crime the Defendant committed at age sixteen as a predicate offense - a case transferred to adult status).

“Being in derogation of the common law, such statutes are generally held to require a strict construction in favor of the prisoner.” *Holcomb*, syl. pt 2.

iii. The Court did not exceed its legitimate powers by granting the Defendant’s Motion to Dismiss as it did so upon existing case law.

The State asserts that it “furnished the Court with a copy of a proper recidivist information within 20 days of the Defendant’s conviction of the triggering offense.” Yet when the Defendant appeared in this underlying matter, 22-F-8, to answer to the Court in the term following his conviction, the erroneous information was the only information in the Court file. The docket sheet identifies no cured information filed even to this date. Furnishing the Court

with a cured information does not satisfy 61-11-19. The Circuit Court's ruling should not be deemed clear legal error as it is based on legal authority.

CONCLUSION

WHEREFORE, for the foregoing reasons the accused respectfully requests that this Honorable Court deny the Petition for Writ of Prohibition as the Circuit Court made a judgement that was well within its legitimate authority.

LATEEF JABRALL MCGANN

By counsel

/s/ S. Andrew Arnold

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CERTIFICATE OF SERVICE

I, S. Andrew Arnold, Esquire, hereby certify that I have served a copy of the foregoing **SUMMARY RESPONSE** upon the following counsel via electronic delivery, this 30th day of January 2023.

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