IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-469

STATE OF WEST VIRGINIA,
Respondent,

v.

RICHARD PAGE,
Petitioner.

RESPONDENT'S BRIEF

Appeal from the July 12, 2023, Order
Circuit Court of Jefferson County
Case No. 02-F-43

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INTRODUCTION

Petitioner Richard Page asks this Court to find that the Circuit Court of Jefferson County abused its discretion by refusing to permit Petitioner to withdraw his previously entered plea prior to sentencing. Although the unusual facts of this case involve a 2023 plea entered twenty years ago that the circuit court accepted when Petitioner finally returned to the court for sentencing in 2023, the rules governing the circuit court's discretion to reject or accept binding plea agreements remain unchanged whether sentencing occurs twenty days or twenty years after the parties' agreement. Specifically, Rule 32(e) of the West Virginia Rules of Criminal Procedure gives the circuit court discretion whether to accept a guilty or no contest plea—or to allow the defendant to withdraw it prior to sentencing. Pursuant to Rule 32(e), the circuit court "may" allow Petitioner to withdraw the 2003 plea if he presented a "fair and just reason." So Petitioner is not *entitled* to withdrawal, but the rules also do not tie the circuit court's hands in circumstances where it would be unfair to keep an agreement in place.

In this case the circuit court—the judge closest to all the facts and best able to assess credibility—determined that Petitioner's arguments against accepting the original plea failed to adequately demonstrate fair and just grounds. Because this determination is discretionary, by definition not every court faced with it might reach the same result. Here, for instance, the State was willing to agree to a different plea when the matter resurfaced in 2023. Even so, the State agrees now that the circuit court applied the right law to this atypical situation, and that its decision was well within its discretion. Petitioner cannot meet the high standard to show an abuse of discretion in refusing to grant his withdrawal request. Accordingly, Respondent State of West Virginia asks the Court to affirm.

ASSIGNMENT OF ERROR

Petitioner presents one assignment of error:

> The circuit court committed reversible error when it held that the defendant was not permitted to withdraw from the 2003 Proposed Plea Agreement by mutual consent of the parties prior to formal acceptance, formal entry and prior to sentencing.

Pet'r's Br. 1.

STATEMENT OF THE CASE

Petitioner was indicted by a Jefferson County grand jury in the September 2002 term of court for one count of burglary and one count of petit larceny. App. 1-3. Petitioner and his co-defendant were transient young adults who broke into the victim's residence while the victim was away from his home, ate the victim's food, and stole items from his home. App. 29-30. Petitioner confessed to the investigating officer, App. 34, and eventually negotiated a plea agreement. App. 13.

The agreement said that Petitioner would plead guilty to the burglary count and the State would dismiss the petit larceny count. App. 13. In addition, "[a]s a binding sentence," Petitioner would be sentenced to one-to-fifteen years in the penitentiary, and that sentence would be suspended for five years of probation. App. 13. The circuit court made all the required inquiries and findings to support the plea. App. 13-14. Petitioner then entered his guilty plea on February 21, 2003, and executed a written guilty plea that was tendered to the court and ordered filed. App. 13-14. The court deferred acceptance or rejection of the plea agreement, ordering the preparation of a "Pre-Plea Investigation Report and a Victim Impact Statement" to be filed prior to the next hearing on March 27, 2003. App. 14.

Petitioner did not appear for the March 27, 2003, sentencing hearing, and a capias was issued. App. 15-16. According to the circuit court's file, it appears that Petitioner was resolving simultaneous charges in Maryland and served two years of incarceration there. App. 71.

Approximately twenty years later Petitioner was pulled over for a traffic stop and arrested when the outstanding capias was found. App. 70.

Petitioner was granted a personal recognizance bond during a bond hearing on January 30, 2023. App. 67-74. At the hearing, Petitioner's counsel admitted that the original agreement "was a binding plea." App. 69. He explained that Petitioner forgot about the West Virginia proceedings—that "it was his belief that the plea had been entered potentially or he was on probation," and "he continued to lead his life." App. 69.

At a status hearing a few months later the circuit court and the parties discussed the difficult features of the then-twenty-year-old case. The State explained that the officers involved in the case were no longer available to testify, and that the victim was now elderly and may not be a strong witness. App. 79. Defense counsel laid out the factors in Petitioner's favor and asked the court "to A, let Mr. Page withdraw that plea, or B, reject it, because it is binding in nature." App. 83. The court also wrestled with the equities given the passage of time, yet recognized that "[t]he problem is just or fair reason [for withdrawing a plea] might not include forgetting" about it. App. 88. Ultimately, the court set another status conference to allow the parties time to resolve outstanding factual questions and discuss potential alternate resolutions. App. 90.

Petitioner and the State then negotiated a new plea agreement: Petitioner would plea to petit larceny and the State would recommend a fine—though with the understanding the court could impose a sentence up to a year. App. 95. At a hearing on May 31, 2023, the parties tendered the new signed plea agreement to the court. App. 94. The court ordered an updated pre-sentence report and scheduled another hearing for the potential change of plea. App. 97.

At the next hearing, the court started by explaining what had happened in 2003: The record showed that in February 2003, Petitioner signed "a written guilty plea," the court held a hearing

on it, and the plea "was received by the clerk's office on February 26th, 2003." App. 103-04. The court also found that "it was a binding plea as to sentencing" and the court "enter[ed] a plea of guilty to burglary"—but then "defer[red] acceptance or rejection of [the] plea agreement." App. 104. Then Petitioner "failed to appear and was gone for a period of approximately 20 years." App. 104. All of that left the parties "in a position of a plea binding upon the defendant that he cannot withdraw from, and left to the Court's discretion to determine whether to accept or reject the plea." App. 104. In short, once "a binding plea is entered," neither party "has the authority [to] tell the Court not to make a decision on whether to reject or accept that plea." App. 106. "It's in the form of a contract, and it's just left to the Court to determine whether to accept or reject it." App. 106.

Petitioner's counsel admitted he "underst[ood] that," but urged the court to focus "on the last ten years of Mr. Page's life" when "we don't see that criminal behavior we previously saw." App. 108. He explained that Petitioner "had made youthful errors and that he had worked to straighten out his life in the intervening 20 years." App. 104. And he said again that, after the Maryland incarceration, "I guess, as time passed, [Petitioner's] obligation to come back slipped his mind." App. 105. So given the "binding nature of the plea," counsel urged the court to "reject that plea" and let the parties "come back to the Court with something else." App. 110.

On Petitioner's criminal history, the State pointed out that "we can see some things [in Petitioner's criminal history] following that 2002 date," and "it's really after about 2013, '14" when his criminal record ended. App. 106. And the court emphasized that "upon reviewing the presentence investigation," although many entries were "driving offenses and unpaid fines," it was still "a rather long criminal history" that was not "really supportive of the idea that Mr. Page's been on the straight and narrow since he took care of whatever caused him to be incarcerated in 2002." App. 106-07.

Ultimately, the court was troubled that the parties were requesting it to "accept the, I forgot, excuse. . . . I forgot that I needed to be here in the jurisdiction." App. 110-111. It was also concerned that allowing withdrawal would "set a remarkable precedent" that "if you forget to appear and enough time goes by and even though you've gone forward and committed a whole string of other misdemeanor offenses," the court would conclude that "it doesn't serve the ends of justice to have the original conviction enforced." App. 111. Upholding "precedent that once an agreement is entered, the agreement should be honored" mattered, too. App. 111. The court further stated that "I can't see rewarding someone for not appearing, not meeting their obligations." App. 111.

So the court chose to accept the plea agreement proposed in 2003 and sentenced Petitioner to one-to-fifteen years of incarceration "suspended for a period of five years of supervised probation" in accordance with the binding plea agreement. App. 111-12. It explained that it would not "set the precedent of if you disappear long enough and you have a criminal history that continues that there's not a consequence for it." App. 112. The court also rejected the State's potential idea that Petitioner could be eligible for deferred adjudication because if the court accepted the plea, it was "bound to sentence him" under the plea agreement's terms. App. 110. But the court emphasized that if Petitioner did well on probation he could "come back here and ask[] to have it reduced." App. 112.

Petitioner appeals from that order.

SUMMARY OF ARGUMENT

Petitioner received the benefit of a fair, knowing, intentional, and intelligently negotiated binding plea agreement wherein Petitioner would be granted probation after committing the offense of burglary in 2003, and the remaining charge of petit larceny would be dismissed. App.

13. Pursuant to said agreement, Petitioner entered his oral and written plea of guilty to burglary in 2003, App. 13-14, and there is no miscarriage of justice for Petitioner to be held to the agreement he intentionally entered into with the State. Petitioner challenges the court's acceptance of the fairly negotiated binding plea agreement twenty years later. This was after he failed to appear for the sentencing hearing in 2003, a capias was issued that remained outstanding for twenty years, he continued committing misdemeanor offenses after the entry of his 2003 plea, and he was finally brought to appear before the court after the execution of the capias.

Rule 32(e) of the West Virginia Rules of Criminal Procedure provides that the court *may* permit withdrawal of the plea if the defendant shows any fair and just reason. This determination is a discretionary decision for the court, Syl. pt. 1, *State v. Harlow,* 176 W.Va. 559, 346 S.E.2d 350 (1986), and a trial court's decision on a motion to withdraw a guilty plea will be disturbed only if the court has abused its discretion. *State v. Keith D.*, 235 W. Va. 421, 423, 774 S.E.2d 502, 504 (2015). Entitlement to withdrawal of his plea only occurs if the court rejects the binding plea agreement. W. Va. R. Crim. P. 11(e)(4).

Petitioner cannot show an abuse of discretion in the refusal to allow the requested withdrawal. While Petitioner desires to enter an even more favorable plea to the misdemeanor offense of petit larceny simply due to the passage of time, and the fact that he has not been charged with any new crimes for the last ten years, App. 71-72, that argument does not overcome the reasons Petitioner's withdrawal was rejected. Petitioner "forgot" to appear after serving his Maryland sentence, and continued to commit crimes thereafter. The lower court properly found that Petitioner should not be rewarded for failing to appear for decades by allowing him to enter a more favorable plea now. Petitioner must be held to his word and the contract he entered into with the State.

Petitioner has failed to demonstrate the circumstances necessary for any entitlement or right to withdraw his plea that supersedes the court's discretion, and has further failed to show the court abused its discretion by accepting the plea agreement originally entered and intended by the parties. Therefore, Petitioner's argument fails.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rule of Appellate Procedure 18(a)(3) and (4), oral argument is not necessary because the facts and legal arguments are adequately presented in the briefs and the record. And because the case involves the application of settled law, it is appropriate for resolution by memorandum decision.

STANDARD OF REVIEW

When reviewing a court's decision whether to permit a Petitioner to withdraw a plea prior to sentencing, this Court has held:

> Notwithstanding that a defendant is to be given a more liberal consideration in seeking leave to withdraw a plea before sentencing, it remains clear that a defendant has no absolute right to withdraw a guilty plea before sentencing. Moreover, a trial court's decision on a motion under Rule 32(d)* of the West Virginia Rules of Criminal Procedure will be disturbed only if the court has abused its discretion.

Keith D., 235 W. Va. at 423, 774 S.E.2d at 504 (quoting syl. pt. 2, *Duncil v. Kaufman,* 183 W.Va. 175, 394 S.E.2d 870 (1990)).

* At the time that *Duncil* was decided in 1990, the portion of Rule 32 regarding the withdrawal of guilty and nolo contendere pleas was located at subsection (d). The current version amended in 1995 now includes the same language in subsection (e).

ARGUMENT

I. Withdrawing A Rule 11(e)(1)(C) Plea Is A Matter Of Discretion, Not Entitlement.

Rule 11 of the West Virginia Rules of Criminal Procedure directs what happens next after the State and a criminal defendant enter a plea agreement. Upon "entering" a guilty plea, the prosecutor may (as relevant here) "[m]ove for dismissal of other charges" and "[a]gree that a specific sentence is the appropriate disposition of the case." W. Va. R. Crim. P. 11(e)(1)(A), (C). When the parties reach an agreement, the court "require[s] the disclosure of the agreement in open court." W. Va. R. Crim. P. 11(e)(2). Then, in cases where "the agreement is of the type specified in subdivision (e)(1)(A), (C), or (D)," the court has three options: It "may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report." *Id.* The Court may not modify the agreement. Syl. pt. 2, *State ex rel. Forbes v. Kaufman*, 185 W. Va. 72, 404 S.E.2d 763 (1991) (the trial court's options for a Rule 11(e)(1)(C) plea include "either accept[ing] or reject[ing] the entire agreement, but it may not accept the guilty plea and impose a different sentence.").

The Court *may* allow the defendant to withdraw the plea in certain circumstances before sentencing. Rule 32(e) provides the authority governing the withdrawal of a Rule 11(e)(1)(C) guilty plea: "If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit withdrawal of the plea if the defendant shows any fair and just reason." W. Va. R. Crim. P. 32(e). The determination of what constitutes a "fair and just reason" is a discretionary decision for the circuit court. *See* syl. pt. 1, *Harlow*, 176 W. Va. 559, 346 S.E.2d 350 (Rule 32(e) "permits" withdrawal). Withdrawal in that case is not automatic or a right. If the court *rejects* the plea, then it is required to "afford the defendant the opportunity to then withdraw the plea." W. Va. R. Crim. P. 11(e)(4). So too for some Rule 11(e)(1)(B) pleas,

which involve a sentencing recommendation: If the court decides "not to follow the recommended sentence, it must give the defendant the right to withdraw the guilty plea." Syl. pt. 2, *State v. Cabell*, 176 W. Va. 272, 342 S.E2d 240 (1986). But for a plea with a binding sentence, withdrawal remains a matter of judicial discretion under Rule 32(e).

To be sure, some circumstances may be serious enough that not allowing withdrawal may be legal error. Concerns about the "knowing and voluntary nature of petitioner's plea" are enough even to reject a plea, for instance. *State v. Spaulding*, No. 11-1081, 2012 WL 5908385, at *2 (W. Va. Supreme Court, Nov. 19, 2012) (memorandum decision). But in most cases, Rule 32(e) trusts the discretion of the circuit judge, who is most familiar with the defendant and the facts on the ground. That discretion is extremely strong: "[T]he decision whether to accept or reject a plea agreement is vested almost exclusively with the circuit court." Syl. pt. 3, *State ex rel. Brewer v. Starcher*, 195 W. Va. 185, 465 S.E.2d 185 (1995).

Petitioner claims the law is not "definitive" as to a defendant's ability to withdraw from a binding plea agreement before the circuit court decides whether to accept it. Pet'r's Br. 4, 6. But Rule 32(e) is encompassing: withdrawal is discretionary under the "fair and just reason" standard at any point "before sentencing." W. Va. R. Crim. P. 32(e). It does not distinguish whether a request for withdrawal is made prior to or after a court accepts a plea. Whether the court has accepted the plea yet when the defendant moves for withdrawal can be a factor for the court to consider and weigh in its discretionary decision. *See State v. Huff*, 180 W. Va. 75, 78, 375 S.E.2d 438, 441 (1988) ("Given that the plea had not even been accepted by the court ... the record established that the appellant, who maintained his innocence, had a 'fair and just reason' to withdraw his plea" after learning the victims had recanted their statements.). But it does not change Rule 32(e)'s "may permit" language. The rule's discretionary "fair and just" standard is broad

enough to give room to deal with whatever circumstances the circuit court may face—even admittedly unusual ones like those here.

Petitioner is also wrong that comparing Rule 32(e) to the Federal Rules of Criminal Procedure helps his case. Yes, the federal rules are more permissive, allowing a defendant to withdraw a plea "before the court accepts the plea, for any reason or no reason." Fed. R. Crim. P. 11(d)(1) (quoted at Pet'r's Br. 7 n.3). But the choice not to follow that aspect of the federal rules matters—it shows West Virginia's intent to specifically distinguish state practice from this aspect of federal practice. *See Brooks v. Isinghood*, 213 W. Va. 675, 678, 584 S.E.2d 531, 534 (2003) ("A federal case interpreting a federal counterpart to a West Virginia rule of procedure may be persuasive, but it is not binding or controlling."). Unlike the federal rule's separate approaches to withdrawal before and after the court "accepts" the plea, Fed. R. Crim. P. 11(d)(1)-(2), West Virginia's Rule 32(e) provides the same discretionary standard at all times before sentencing.

II. The Circuit Court Did Not Abuse Its Discretion In Accepting Petitioner's Plea.

Applying the Rule's plain-text meaning to the facts here shows Petitioner is wrong that he should have been entitled to withdraw his plea unilaterally or that the parties should otherwise be entitled to amend the original agreement. He agreed to a binding Rule 11(e)(1)(C) plea that the circuit court entered in 2003. The circuit court had full authority to accept that plea later, and Petitioner cannot show—looking at all the facts—that the court abused its discretion in refusing to allow withdrawal.

A. The 2003 Plea Agreement Was Binding.

To begin, Petitioner entered into a binding Rule 11(e)(1)(C) plea. Although Petitioner says that some of the documents and transcripts appear to be unavailable now, Pet'r's Br. 8, the record contains everything needed to resolve that question. Specific language in the Plea Proposal Order entered February 26, 2003, substantiates the agreement's terms: "The Defendant would plead

guilty to Burglary, a felony as set forth in the Count I of the indictment," and in exchange "[t]he State would dismiss Count II of the indictment." App. 13. The plea followed Rule 11(e)(1)(C) in "[a]gree[ing] that a specific sentence is the appropriate disposition of the case"—it described a "binding sentence" of one-to-fifteen years suspended for five years supervised probation. App. 13. The record reflects that the circuit court ensured Petitioner entered his guilty plea pursuant to Rule 11's requirements and the safeguards for knowing and voluntary pleas in this Court's precedents. App. 13-14. And—importantly—it shows that Petitioner, "in open Court, did *enter a plea of guilty*" and "executed a written guilty plea form witnessed by the Deputy Clerk of this Court and by his counsel." App. 14 (emphasis added).

That is all that was needed to turn the next steps over to the circuit court under Rule 11(e). Petitioner suggests that "the absence of a record from the 2003 plea proposal hearing" raises questions about what Petitioner knew about "the binding nature of the plea." Pet'r's Br. 11. But Petitioner does not raise any assignment of error connected to the knowing and voluntary nature of his plea. And he agrees his plea "was negotiated under Rule 11(e)(1)(C)," Pet'r's Br. 6, which makes irrelevant Rule 11(e)(2)'s requirement to advise that the defendant "has no right to withdraw the plea" if the Court rejects the sentencing recommendation. Petitioner also gives no reason to doubt the accuracy of the circuit court's plea proposal order. And that order says that when Petitioner entered his plea, the court explained that it did "defer acceptance or rejection of said plea agreement." App. 14. In other words, everything here shows that the parties understood they had done their part in negotiating and entering the plea, and the next move belonged to the circuit court to determine whether to accept or reject it. As the circuit court rightly put it later, the whole "purpose of submitting a binding plea to the Court is to await the Court's agreement to be bound by the terms." App. 90. Petitioner's choice to enter the plea in open court meant that after that

point (and unless the court rejected it, syl. pt. 2, *Cabell*, 176 W. Va. 272, 342 S.E.2d 240) he was not entitled to withdraw it.

Petitioner is also incorrect that the parties should have been permitted to *mutually* amend the agreement after Petitioner entered his guilty plea. He offers no support for the theory that he was not bound "prior to formal acceptance" and "sentencing," and thus that the parties should have been able to "jointly withdraw[]." Pet'r's Br. 10-11. Nor do the general contract-law principles he at times invokes fill that gap. To be sure, "[p]lea agreements normally arise in the form of unilateral contracts." *State v. Myers*, 204 W. Va. 449, 458, 513 S.E.2d 676, 685 (1998). So "the plea bargaining process has overtones of contract law and on occasion" the Court uses "contractual terminology in discussing the enforceability of a plea agreement against a prosecutor." *Myers v. Frazier*, 173 W. Va. 658, 672 n.21, 319 S.E.2d 782, 796 n. 21 (1984). But "a plea agreement is subject to principles of contract law insofar as its application insures a defendant receives that to which he is reasonably entitled." *Brewer*, 195 W. Va. at 192, 465 S.E.2d at 192. In other words, contract-law principles can protect defendants by not leaving them in a worse place if the State reneges. They are not a tool to enable defendants to back out of an agreement after-the-fact. Instead, the rules governing withdrawal concern what happens after a defendant enters a plea. After all, "[w]ere withdrawal automatic in every case where the defendant decided to alter his tactics and present his theory of the case to the jury, the guilty plea would become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim." *United States v. Hyde*, 520 U.S. 670, 677 (1997).

That rule makes sense because pleas are unlike typical contracts that affect just the parties—plea agreements involve the "public interest in the fair administration of justice." *Myers*, 173 W. Va. at 665, 319 S.E.2d at 790. The rules thus ensure that trial courts can account for factors

like "the general public's perception that crimes should be prosecuted" and "right to have the crimes actually committed fairly prosecuted," as well as "the interests of the victim" and "the protection of the rights of third persons." *Id.* at 666, 319 S.E.2d at 790. Given that, it is unsurprising that the rules vest trial courts with significant discretion whether to accept or reject a plea—as well as with determining when it is and is not appropriate to allow defendants to escape the deals they struck.

B. The Circuit Court Exercised Appropriate Discretion Holding Petitioner To His Agreement.

So the only question left is whether the circuit court erred in declining to let Petitioner withdraw his plea. It did not. "[A] trial court's decision on a motion under Rule 32(d) [now (e)] of the West Virginia Rules of Criminal Procedure will be disturbed only if the court has abused its discretion." *Keith D.*, 235 W. Va. at 423, 774 S.E.2d at 504 (quoting syl. pt. 2, *Duncil,* 183 W. Va. 175, 394 S.E.2d 870). Here, the court did not find Petitioner's reasons for withdrawing his guilty plea to be persuasive enough to satisfy the "fair and just" standard, and that determination was not an abuse of the court's discretion simply because it does not align with Petitioner's desired resolution or because reasonable minds might have weighed the competing factors differently.

Certainly, factors like "the length of time that had passed," Pet'r's Br. 8, are relevant to the court's discretionary calculus. And the lower court was well aware of the unusual timing here. The problem for Petitioner's argument is that the Court considered other legitimate factors too, and found them weightier. Petitioner argued, for instance, that he had not acquired new charges in the last ten years. App. 106. But the circuit court considered the ten years of criminal history *after* his plea and found that his "rather long criminal history" as a whole was "not really supportive of the idea that [Petitioner has] been on the straight and narrow since he took care of whatever caused him to be incarcerated in 2002." App. 106-07. Similarly, the circuit court was unpersuaded

by Petitioner's response that he "forgot to appear" after serving time in Maryland. App. 111. And it was deeply troubled about the precedent it would set to say that if "enough time goes by" someone who "committed a whole other string of misdemeanor offenses" could claim it unjust to enforce the plea they originally entered. App. 111. In the court's view, it could not "see rewarding someone for not appearing, not meeting their obligations, by saying well we'll agree to not accept this plea and drop it down to a misdemeanor." App. 111.

Though a different decision maker may have weighed the factors differently in this atypical case, Petitioner cannot show that any of those factors are inappropriate or that the circuit court placed unsupportable weight on any of them. In other words, simply because the lower court *could* have chosen to allow withdrawal does not mean it was *required* to.

This case is not like *Huff,* for instance, where this Court held that the trial court should have allowed withdrawal. There, the lower court had "reluctantly" accepted the plea based on an apparent view that was the appropriate result absent any "suggestion of prosecutorial misconduct." *Id.* at 76, 375 S.E.2d at 440. But Rule 32's "fair and just" standard does not require so high a bar as that. Instead, this Court held it was enough that circumstances had changed materially from the time the defendant entered the plea to when the court accepted it: the defendant's "primary motivation" for accepting the plea was "fear of being prosecuted" for sexual offenses involving minors, and defense counsel did not know when advising the defendant about the plea that the alleged child victims had partially recanted their statements. *Id.* Especially because the defendant had "continued to maintain his innocence" on the other charges, this significant change in the nature of the evidence against him gave the defendant a fair and just reason to withdraw his plea. *Id.*

Here, though, Petitioner does not argue he is innocent or that circumstances changed in a way that would have made him unlikely to enter the plea back in 2003 had he known about them. He argues only that the life he lived after his admitted criminal conduct in 2003 and the happenstance of not being brought before the circuit court sooner should allow him to withdraw his plea now. The circuit court did not abuse its discretion in finding those facts unpersuasive. Indeed, nothing about the "length of time that had passed" between the entry of the plea in 2003 and Petitioner's appearance in court in 2023, "the available NCIC report," or "the 2003 file," Pet'r's Br. 9, call the fairness of the *original* pea agreement into question. Petitioner does not argue it would have been unjust or unfair to accept the agreement in 2003. Holding him to what should have happened twenty years ago is not either.

Nor do the cases Petitioner cites demonstrate any abuse of discretion here. Start with *State v. Harlow*. There, the Court found a fair and just reason existed for withdrawal of a plea because the State violated the terms of the plea agreement in which the State agreed to recommend probation by making certain statements "which were contrary to the prosecutor's recommendation of probation" in that they "referred to the [petitioner's] lack of cooperation and his refusal to follow orders in making drug purchases." *Id.* at 560, 346 S.E.2d at 351. This Court held that the prosecutor's failure to remain neutral as agreed was a "sufficiently fair reason to enable the [petitioner] to withdraw his pleas prior to sentencing." *Id.* at 561, 346 S.E.2d at 352. The Court had found analogous circumstances a few years earlier in *State v. Olish*, 164 W. Va. 712, 716, 266 S.E.2d 134, 136 (1980), where a prosecutor agreed to stand silent at sentencing on a murder conviction, but had indicated to probation that petitioner should be sentenced without mercy. *Harlow*, 176 W. Va. at 561, 346 S.E.2d at 352. The Court found the prosecutor's conduct and

statement was contrary to its agreement in the plea, and thus constituted a fair basis for permitting withdrawal of the petitioner's guilty plea. *Id.*

Petitioner's final case sounds a similar breach-of-agreement theme: *State v. Shrader*, 234 W. Va. 381, 765 S.E.2d 270 (2014), involved a lower court's determination that the petitioner had not successfully completed treatment, which was a condition in the plea for dismissal of all charges, despite the fact that the treatment providers reported petitioner was fully compliant and had finished the program. *Id.* at 391, 765 S.E.2d at 280. This Court determined the petitioner "fulfilled all the conditions of the plea agreement at issue in this case and the circuit court erred in concluding that the conditions were violated by the Petitioner." *Id.* And in that case, "specific performance of the plea agreement or permitting the defendant to withdraw his plea" were both appropriate "remedies for a broken plea agreement." *Id.* (quoting syl. pt. 8, *SER Brewer*, 195 W. Va. 185, 465 S.E.2d 185).

So all of Petitioner's cases reflect the area where "principles of contract law" do apply to pleas: ensuring "a defendant receives that to which he is reasonably entitled." *Brewer*, 195 W. Va. at 192, 465 S.E.2d at 192. This case, though, involves no allegations the State or court breached the plea agreement's terms, or that Petitioner is not getting the fair benefit of the bargain he struck. Quote the opposite; he wants to get out of the deal because he wants a more lenient sentence now. None of his cases support his claim that the circuit court erred saying no.

In this vein of argument, Petitioner also suggests that the fact *he* may have breached the plea agreement by his later misdemeanors could be a basis for withdrawal. Pet'r's Br. 8 n.4. The theory goes that including a provision that the State can terminate the agreement if the defendant commits additional crimes before sentencing is a common plea-agreement term. *Id.* Putting aside for the moment that Petitioner is only speculating that the 2003 plea contained a provision like

that—the circuit court's plea proposal order does not discuss one, App. 13-14—on Petitioner's own theory the agreement could be "deemed null and avoid *at the discretion of the State*." Pet'r's Br. 8 n.4 (emphasis added). The State did not ask for that remedy, so it is difficult to see how the circuit court could be charged with legal error enforcing a still-live agreement at sentencing.

And finally, it does not matter to the legal result that the circuit court originally appeared willing to accept a new plea. Pet'r's Br. 9-10. The parties and court all wrestled with the right way to approach this unusual case at a series of status hearings before the court ultimately accepted the original plea. But by the time the court made its decision, it had reviewed the record and correctly found that the 2003 plea was "binding as to sentencing" and that Petitioner had "enter[ed] a plea of guilty to burglary." App. 104. It correctly read the rules to mean that those facts meant the plea was "binding upon the defendant" and that the court had to "determine whether to accept or reject the plea." App. 104. And then it discharged that duty based on all the facts—including the facts in the updated presentencing report, App. 47-65, which the circuit court did not have earlier when it talked about its potential willingness to accept a different plea. So once again, at most the circuit court's original leanings suggest that more than one outcome could have been a permissible exercise of discretion. They do not show that this one was.

The circuit court properly determined, using the discretion Rules 32 provides, that Petitioner did not present a fair or just reason to warrant withdrawing his plea. And it followed Rule 11 in finishing what the court had started 20 years before and accepting the parties' agreement.

CONCLUSION

For the foregoing reasons, the Court should affirm Petitioner's conviction and sentence.

Respectfully Submitted,

STATE OF WEST VIRGINIA
Respondent
By counsel,

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ATTORNEY GENERAL

/s/ *Gail V. Lipscomb*

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-469

STATE OF WEST VIRGINIA,
Respondent,

v.

RICHARD PAGE,
Petitioner.

CERTIFICATE OF SERVICE

I, Gail V. Lipscomb, do hereby certify that on the 16th day of January 2024, I served a true and accurate copy of the foregoing ***"Respondent's Brief"*** on the below-listed individuals *via* the West Virginia Supreme Court of Appeals E-filing System, File & ServeXpress, pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure.

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