

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL. :
STATE OF WEST VIRGINIA, :

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PETITIONER, :

Case No.: 25-80

-VS- :

THE HONORABLE JOSEPH BARKI, :
JUDGE OF THE CIRCUIT COURT :
OF OHIO COUNTY, :

AND :

SHAWN PETHTEL, :

RESPONDENTS. :

TO: The Honorables, the Justices of the Supreme Court of Appeals of West Virginia:

Hon. William R. "Bill" Wooton, Chief Justice
Hon. Tim Armstead, Chief Justice
Hon. Elizabeth D. Walker, Justice
Hon. C. Haley Bunn, Justice
Hon. Charles S. Trump, IV, Justice

Hon. C. Casey Forbes, Clerk of Court

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SHAWN PETHTEL, :
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RESPONDENTS. :

**THE RESPONDENT, SHAWN PETHTEL'S
SUMMARY RESPONSE IN OPPOSITION
TO PETITION FOR WRIT OF PROHIBITION**

Arising from the December 26, 2024 Ohio County Circuit Court Order granting Criminal Rule 35(a) relief in the underlying Ohio County Circuit Court Criminal Action No.: 99-F-72

Respectfully submitted,

Shawn Pethtel,

Respondent,

By: _____



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(III) STATEMENT OF THE CASE

The State’s criminal case against the respondent in 99-F-72 resulted in conviction. That followed with an appeal, two State habeas corpus cases including 14-C-17, a federal case, continuation of filings in the criminal case, rulings from the Supreme Court of Appeals of West Virginia, numerous pleadings from defense counsel, State’s counsel, and the respondent himself in *pro se* fashion.

Below is an abbreviated, shortened statement of facts:

On September 13th, 1999, the Ohio County Grand Jury indicted the defendant-respondent, Shawn Pethtel for:

20 counts of sexual assault in the 3rd degree in violation of W.Va. Code 61-8B-5(a)(2);

3 counts of filming a minor engaged in sexually explicit conduct in violation of W.Va. Code 61-8C-2(b);

2 counts of possession with the intent to deliver in violation of W.Va. Code 60A-4-401;

1 count of nighttime burglary in violation of W.Va. Code 61-3-11(a);

5 counts of conspiracy in violation of W.Va. Code 61-10-31; and

1 count of grand larceny in violation of W.Va. Code 61-3-13(a).

See Indictment in Case No. 99-F-72.

(At the time of indictment, the respondent was serving a 1 year sentence in Ohio for violating parole. *See State vs Pethtel*, No. 13-1139, Memorandum Decision (W.Va., Nov. 20, 2014), at p. 1.)

On September 14th, 1999, an arrest warrant (*capias*) was issued for the respondent. *See* September 14, 1999 Warrant (*Capias*) for Arrest of Defendant.

On September 18th, 1999, the prosecution placed a detainer on the respondent in Ohio and the respondent executed forms initiating a voluntary return and request for final disposition pursuant to the Interstate Agreement on Detainers Act, WV Code 62-14-1 through 62-14-7. *See State vs Pethel*, No. 13-1139, Memorandum Decision (W.Va., Nov. 20, 2014), at p. 1.

On September 27th, 1999, a hearing was held at which the respondent was not present. *See* October 5, 1999 Order. The Trial Court/Judge Fred Risovich scheduled the matter to return on October 12, 1999. *Id.*

On October 12th, 1999, the Trial Court/Judge Fred Risovich arraigned the respondent. *See* October 30, 1999 Order. The Trial Court/Judge Fred Risovich remanded him to the custody of the Sheriff “and eventually back to the State of Ohio to continue serving his prison term.” *See* October 12, 1999 Arraignment transcript.

On October 18th, 1999, a hearing was held at which the respondent was present and the Trial Court/Judge Fred Risovich withdrew Chris Adams, Esq. and appointed Don Yannerella, Esq. to represent him. *See* October 18th, 1999 hearing transcript. The prosecution stated that after the October 12th hearing and after the prosecution had the respondent transported from Ohio, he realized that defense trial counsel would want to confer with the respondent. *Id.* at 10. At the hearing, the following was stated:

Mr. Smith: Your Honor, after the last hearing, after I had the Defendant transported from Ohio, I realized that his attorney would want to confer with him. So I called the authorities in Noble County and they agreed that Mr. Pethel could stay here for an indefinite period. So I anticipate he will be remaining –

The Court: The problem is I don’t want him for an indefinite period. I don’t want our county to have to pay the costs of keeping him. I think that – how far is Noble County from here? Where is Noble County?

Mr. Adams: It’s about an hour, Your Honor.

The Court: I think Mr. Yannerella lives in Ohio or around that area, doesn't he?

Mr. Smith: No, he lives in Washington County, Your Honor.

The Court: Okay. Well, you can keep him here for three more days to give him the chance to initially meet with Mr. Yannerella, and then Mr. Yannerella will just have to make trips since Mr. Pethel doesn't have that enjoyment, okay?

Mr. Smith: Yes, Your Honor.

The Court: Okay. Then he is remanded to the custody of the Sheriff.

Id.

On October 20th, 1999, the Trial Court/Judge Fred Risovich withdrew Don Yannerella, Esq. from representing the respondent and appointed Laura Spadaro, Esq. The Trial Court/Judge Fred Risovich allowed the respondent to remain in West Virginia for 3 additional days to meet with Ms. Spadaro. *See* October 20, 1999 hearing transcript.

On November 18th, 1999, defense trial counsel moved to dismiss based on West Virginia's violation of the interstate agreement on detainers by returning the respondent to Ohio without holding his trial first. She subsequently filed a supporting memorandum.

On November 23rd, 1999, defense trial counsel filed a motion to suppress the initial search of the respondent's residence and a supporting argument. She also filed a motion to suppress a search of the trash located within the curtilage of the respondent's residence and supporting argument. She further filed a motion to suppress items seized on April 2nd, 1999 pursuant to an April 2nd, 1999 search warrant which was based on evidence from a March 31st, 1999 search. And she filed a motion to suppress items seized on March 31st, 1999 pursuant to a March 30th, 1999 search warrant.

On November 29th, 1999, defense trial counsel filed a motion to appoint co-counsel.

On November 30th, 1999, a hearing was held at which the respondent was not present. *See* Nov. 30, 1999 hearing transcript. The Trial Court/Judge Fred Risovich determined that the respondent was sent back to Ohio at his request to facilitate straightening up certain probationary matters that he had pending in Ohio. *Id.* at 4. But the prosecution stated that he could not recall that specifically. *Id.* The Trial Court/Judge Fred Risovich concluded that it would behoove the respondent to have his probation revocation straightened up in Ohio and receive due process there and that the Trial Court/Judge Fred Risovich had accommodated him by sending him back to Ohio. *Id.* Defense trial counsel stated that the prosecution failed to send appropriate paperwork – an F6 form – to Ohio to have the respondent brought back to West Virginia. *Id.* at 6. An order was entered withdrawing Christopher Adams, Esq. from representing the respondent.

On December 1st, 1999, the respondent filed a *pro se* motion to dismiss based on violation of the interstate agreement on detainers.

On December 3rd, 1999, defense trial counsel filed a motion for fees for a professional investigator. She also filed a notice of intent to rely on the defense of alibi and a request for bill of particulars.¹

On December 7th, 1999, a hearing was held at which the respondent was not present due to incarceration in Ohio; he was resisting return to West Virginia. *See* January 10, 2000 Order. The Trial Court/Judge Fred Risovich found that the respondent appeared for arraignment and was returned to Ohio for his own best interest in that he had a probation violation and his return to Ohio would assist the respondent in dealing with it. *Id.* The Trial Court/Judge Fred Risovich continued the trial date over the objection of defense trial counsel and rescheduled the case for January 14th, 2000 Docket Day. *Id.* Defense trial counsel moved the court for additional

¹ The request for bill of particulars is located in habeas corpus file, case no.: 03-C-506.

discovery and co-counsel. *Id.* The Trial Court/Judge Fred Risovich decided to rule on the motions when the respondent returned to West Virginia. *Id.*

On January 14th, 2000, a hearing was held at which the respondent was not present due to his Ohio incarceration. *See* January 31, 2000 Order. The Trial Court/Judge Fred Risovich continued the case until the respondent was returned from Ohio. *Id.*

On March 28, 2000, pursuant to defense trial counsel's motion, the Trial Court/Judge Fred Risovich withdrew Laura Spadaro, Esq. from representing the respondent and appointed Joe Moses, Esq. *See* March 28, 2000 Order.

On March 31, 2000, pursuant to defense trial counsel's motion, the Trial Court/Judge Fred Risovich withdrew Joe Moses, Esq. from representing the respondent and appointed Steven Vogrin, Esq. *See* March 31, 2000 Order.

Pursuant to the request of the Ohio County Prosecuting Attorney, on April 5th, 2000, the Hon. Cecil H. Underwood, Governor of the State of West Virginia, made requisition to the Governor of the State of Ohio to apprehend and deliver the respondent to West Virginia authorities.

On April 7th, 2000, the Hon. Bob Taft, Governor of the State of Ohio, issued an arrest warrant for the respondent.

Upon completion of his Ohio sentence, the respondent was extradited to West Virginia pursuant to a May 1, 2000 Ohio court order. *See State vs Pethel*, No. 13-1139, Memorandum Decision (W.Va., Nov. 20, 2014), at p. 3.

On May 4th, 2000, a hearing was held at which the respondent appeared with counsel. *See* May 16th, 2000 Order. Since the respondent was returned to the Trial Court/Judge Fred Risovich's jurisdiction on May 1st, the Trial Court/Judge Fred Risovich granted the State's

motion to continue for term over the respondent's objection. *Id.* And pursuant to motion, the Trial Court/Judge Fred Risovich withdrew Steven Vogrin, Esq. from representing the respondent and appointed Michael Alberty, Esq. *See* May 4, 2000 Order.

On May 11th, 2000, a hearing was held. *See* May 18th, 2000 Order. The Trial Court/Judge Fred Risovich scheduled a July 18th evidentiary suppression hearing and July 26th trial. *Id.* And pursuant to motion, the Trial Court/Judge Fred Risovich withdrew Michael Alberty, Esq. from representing the respondent and appointed Franklin Lash, Esq. *Id.*

On May 15th, 2000, pursuant to defense trial counsel's motion, the Trial Court/Judge Fred Risovich withdrew Franklin Lash, Esq. and appointed John Yeager, Esq. *See* May 16, 2000 Order.

On July 13, 2000, a hearing was held at which the Trial Court/Judge Fred Risovich determined that additional information was needed in order to consider the respondent's motion to dismiss. *See* July 28, 2000 Order. The Trial Court/Judge Fred Risovich set the case for hearing on July 26th and granted defense trial counsel's motion to continue the trial date until August 22nd, 2000. *Id.*; *see also* July 13, 2000 hearing transcript.

On July 26th, 2000, a hearing was held at which the Trial Court/Judge Fred Risovich denied the respondent's motion to dismiss and motion to sever and scheduled the suppression hearing for August 10th. *See* August 9th, 2000 Order.

On July 29th, 2000, an Order was entered pertaining to restrictions on viewing videotapes.

On August 10, 2000, a hearing was held at which the State moved to continue the suppression hearing and defense trial counsel moved to continue the trial into the September, 2000 term of court. *See* Oct. 4, 2000 Order. The Trial Court/Judge Fred Risovich granted the motions. *Id.*

On September 18, 2000, a hearing was held at which the Trial Court/Judge Fred Risovich heard evidence, denied the respondent's motions to suppress, and set the trial for November 16th, 2000. *See* October 2nd, 2000 Order; *see also* Sept. 18, 2000 hearing transcript.

On November 13th, 2000, a hearing was held at which the Trial Court/Judge Fred Risovich denied the respondent's motion for severance. *See* November 29th, 2000 Order; November 13th, 2000 hearing transcript.

Immediately prior to the beginning of the November 16th, 2000 trial, the Trial Court/Judge Fred Risovich reconsidered its severance ruling and severed the counts involving "sexual assault" and "filming a minor engaged in sexually explicit conduct" from those involving "burglary" and "possession of a controlled substance" by severing counts 1-23 and 30 from counts 24-29 and 31-32. *See* Verdict Order. The Trial Court/Judge Fred Risovich set trial on counts 24-29 and 31-32 on November 28th. *Id.*

At trial, the respondent was found guilty of 20 counts of sexual assault of the 3rd degree; 3 counts of filming a minor engaged in sexually explicit conduct; and 1 count of conspiracy. *See* Verdict Form; *see also* November 28, 2000 Verdict Order.

On November 27th, 2000, a hearing was held at which the respondent decided not to go through with a plea agreement. *See* November 27, 2000 hearing transcript.

On November 28th, 2000, a plea hearing was held at which the respondent plead guilty to Count 24 possession of marijuana with the intent to deliver and Count 26 burglary with Counts 25, 27, 28, 29, 31, and 32 dismissed. *See* November 28, 2000 hearing transcript, at 4. Sentencing was left to the Trial Court/Judge Fred Risovich discretion. *Id.*

On December 5th, 2000, the sentencing hearing was held and the Trial Court/Judge Fred Risovich sentenced the respondent to 1 to 5 years on each of counts 1 – 20 (sexual assault); 10

years on each of counts 21 – 23 (filming); 1 – 5 years on count 24 (possession of marijuana); 1 – 15 years on count 26 (burglary); and 1 to 5 years on count 30 (conspiracy), to be served consecutively. *See* December 21, 2000 Sentencing Order. Pursuant to defense trial counsel’s motion, the Trial Court/Judge Fred Risovich withdrew John Yeager, Esq., and appointed Mark Panepinto, Esq. as appellate counsel. *Id.*

On August 7, 2002, pursuant to motion, the Trial Court/Judge Fred Risovich ordered the return of certain property to the respondent. *See* August 15, 2002 Order. (Additional motions and pleadings were later filed in further regard to this issue.)

On August 17, 2003, appellate counsel served the *Defendant’s Motion to Dismiss, with Prejudice, Pursuant to Recent Clarification of Interstate Agreement on Detainers Act (IADA) in Alabama v. Bozeman, 121 S. Ct. 2079 (2001).*

On September 25, 2003, the respondent filed a petition for writ of habeas corpus in Civil Action No.: 03-C-506 for (1) violations of the Interstate Agreements on Detainers Act and *Alabama vs Bozeman, 121 S. Ct. 2079 (2001)*; and (2) ineffective assistance of defense trial counsel because counsel permitted the respondent to enter a post-trial guilty plea to untried counts in light of obvious IADA violations.

On December 5th, 2003, a habeas hearing was held at or about which time the respondent decided to hold off on his habeas case and proceed with direct appeal on the underlying case. *See* January 16, 2004 habeas Order.

On December 19, 2003, the petition for appeal in the underlying case was finally filed, the delay attributable to delay in obtaining transcripts.

On April 1, 2004, this Court refused the petition for appeal in the underlying case. *See State vs Pehtel, No. 13-1139, Memorandum Decision (W.Va., Nov. 20, 2014), at 3.*

On May 6, 2004, the Supreme Court refused the respondent's previously-filed petition for writ of prohibition. *See State vs Pethtel*, No. 13-1139, Memorandum Decision (W.Va., Nov. 20, 2014), at 3.

On August 31, 2004, the respondent filed a motion for summary judgment in his habeas case.

On September 17th, 2004, a hearing was held and habeas corpus relief was granted.

On November 17th, 2004, the Trial Court/Judge Arthur Recht entered the habeas order and invalidated and reversed the respondent's convictions and sentences, with execution of the Order stayed until December 15, 2004.

On December 6, 2004, this Court granted the State's motion to stay the execution of the habeas corpus order for the pendency of the appeal.

On July 5, 2005, this Court granted the State's petition for appeal of the habeas corpus order.

On June 8, 2006, this Court reversed the Trial Court/ Judge Arthur Recht's November 16th habeas corpus Order. *See Pethel vs McBride*, 219 W.Va. 578, 638 S.E.2d 727 (2006).

On June 4th, 2007, the respondent filed a petition for writ of habeas corpus in federal court. On September 25, 2008, the United States District Court for the Northern District of West Virginia found that a violation of the IAD occurred in the petitioner's case, but ultimately dismissed the case.

On August 18, 2010, the Fourth Circuit Court of Appeals affirmed the dismissal. *See Pethel vs Ballard*, 617 F.3d 299 (4th Cir. 2010), *cert. denied*, 131 S. Ct. 2873 (2011).

On April 10, 2012, the respondent served his *Motion to Correct an Illegal Sentence*.

On June 21, 2012, the Trial Court/Judge Arthur Recht denied the respondent's motion. *See* June 21, 2012 Order.

On July 18, 2012, the respondent filed his *pro se* notice of appeal.

On May 20, 2013, the respondent served his *Motion for a Hearing on Motion to Dismiss*, in reference to his August 17, 2003 motion.

On June 19th, 2013 or June 21, 2013, the Trial Court/ Arthur Recht denied said motion. *See* June 19, 2013 Order; *see* Docket Sheet, at pg. 7.

On June 28, 2013, this Court affirmed the Trial Court/Arthur Recht's June 21, 2012 order. *See State vs Pethtel*, No. 12-0838, Memorandum Decision (W.Va., June 28, 2013).

On January 21st, 2014, the respondent filed another petition for habeas corpus and memorandum in support, in Case No.14-C-17.

On August 25th, 2014, the respondent filed his *Motion for Reconsideration of Sentence*.

On September 16, 2014, the Trial Court/Arthur Recht denied said motion. *See* September 16, 2014 Order.

On October 17, 2014, this Court affirmed the Trial Court/Arthur Recht's June 19th, 2013 Order. *See State vs Pethtel*, No. 13-1139, Memorandum Decision, 2014 W. Va. LEXIS 1084 (W.Va., Nov. 20, 2014), at 3 n.6 – "Petitioner's August 18, 2003, motion to dismiss was not ruled upon until the circuit court denied petitioner's subsequent motion for a hearing thereon by order entered June 19, 2013. It is the circuit court's denial of this motion that is the subject of the instant appeal."

In the 14-C-17 case, the parties engaged in legal briefing and oral argument including three amended petitions for writ of habeas corpus, response briefs, and numerous other pleadings, some of which were *pro se*. Several hearings were also held.

On January 22, 2018, the Trial Court/Judge Ronald Wilson ruled that as a matter of law, the petitioner had not waived any issues in his prior habeas corpus proceeding. See January 22, 2018 Memorandum Order.

On or about July 28, 2021, the defense filed *The defendant-petitioner, Shawn Pethtel's Third Amended Petition for Writ of Habeas Corpus ad Subjicendum and Memorandum in Support*.

On August 16, 2021, an evidentiary hearing was held in the habeas corpus case.

On September 16, 2022, a hearing was held in the habeas corpus case. See October 7, 2022 Agreed Order

In November and December, 2022, the defense filed additional pleadings.

As of April, 2023, the Trial Court/Judge Ronald Wilson had not ruled on the third habeas corpus petition.

On April 11, 2023, the defense filed *The petitioner, Shawn Pethtel's Motion for Rule 35 Relief* in the underlying criminal case in Ohio County case number 99-F-72.

On or about April 16, 2024, the defense filed *The petitioner, Shawn Pethtel's Motion for Rule 35 Relief* in the underlying criminal case in Ohio County case number 99-F-72.

On or about July 5, 2024, the defense filed *The petitioner, Shawn Pethtel's Exhibits Regarding Motion for Rule 35 Relief*.

On July 15, 2024, a hearing was held regarding the Criminal Rule 35 motion and the habeas corpus case where the Trial Court/Judge Ronald Wilson set a deadline for the State to respond to the Rule 35 motion and also decided to essentially hold the habeas corpus case in abeyance pending ruling on the Rule 35 motion. See July 15, 2024 hearing transcript. See also August 2, 2024 *Order for July 15, 2024 Hearing*.

On August 30, 2024, the defense filed *The petitioner, Shawn Pethtel's Submission of Additional Authority in Support of the Rule 35 Motion*.

The State responded to the Rule 35 motion.

On September 26, 2024, the defense filed *The Petitioner's Reply to State's Response to Rule 35(A) motion*.

On December 26, 2024, the Trial Court/Judge Ronald Wilson granted Rule 35(a) relief, effecting the immediate release of the respondent-defendant, Shawn Pethtel.

On January 6, 2025, the defense filed a motion to dismiss the habeas corpus case without prejudice since he had been released from prison.

The State's *Petition for Writ of Prohibition* follows.

(IV) STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Rule 18(a) of the West Virginia Rules of Appellate Procedure reads that "Oral argument is unnecessary when: (1) all of the parties have waived oral argument; or (2) the appeal is frivolous; or (3) the dispositive issue or issues have been authoritatively decided; or (4) the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument."

The respondent acknowledges that the decisional process would not be significantly aided by oral argument.

(V) ARGUMENT

(A) The standards of review

The standard of review for writs of prohibition

(1) The West Virginia Code 53-1-1 reads:

The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter

in controversy, or, having such jurisdiction, exceeds its legitimate powers.

(2) *State ex rel. Games-Neely v. Overington*, Syl. Pts. 2-4, 230 W.Va. 739, 742 S.E.2d 427

(2013) reads:

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." Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

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." Syl. Pt. 5, *State v. Lewis*, 188 W.Va. 85, 422 S.E.2d 807 (1992).

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)." Syl. Pt. 2, *State ex rel. Kees v. Sanders*, 192 W.Va. 602, 453 S.E.2d 436 (1994).

(3) A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court.

Prohibition will issue only in clear cases. *Brown v. Arnold*, 125 W. Va. 824, 26 S.E.2d 238, 1943 W. Va. LEXIS 55 (W. Va. 1943). And "issuance by the Court of an extraordinary writ is not a matter of right, but of discretion sparingly exercised." Rule 16(a), West Virginia Rules of

Appellate Procedure.

(4) “To justify the execution of a writ of prohibition, a petitioner has the burden of showing that the lower court's jurisdictional usurpation was clear and indisputable and, because there is no adequate relief at law, the extraordinary writ provides the only available and adequate remedy.”

State ex rel. Rose L. v. Pancake, 209 W.Va. 188, 191, 544 S.E.2d 403 (2001)(citing *State ex rel. Allen v. Bedell*, 193 W.Va. 32, 37, 454 S.E.2d 77, 82 (1994)) –,”

(5) “The court has acted, whatever its action may amount to. Prohibition does not lie after action has been had. It is "a preventive rather than a corrective remedy" and cannot be used after the act is done.” *Town of Hawk's Nest v. County Court*, 55 W. Va. 689, 48 S.E. 205 (1904)(citing *Haldeman v. Davis*, 28 W. Va. 324 (1886)).

(6) *State ex rel. Williams v. Narick*, 164 W. Va. 632, 638-39, 264 S.E.2d 851 (1980)(citing *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979)) reads:

In most of the cases where a rule has been issued the question has been exclusively legal and not a mixed question of fact and law. This court is not engineered to be as efficient a finder of fact as a trial court because of the cumbersome procedures for taking depositions. When, however, there is a clear legal question it is often efficient to come in prohibition. . . . However, where the proper resolution of the legal question first depends upon a proper finding of disputed facts, then the efficiency of prohibition disappears because of mechanical problems in fact finding inherent in multimember courts. In that event, surely, the relative adequacy of a remedy by appeal becomes correspondingly enhanced.

In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

Hinkle v. Black, Syl. Pt. 1, 164 W. Va. 112, 262 S.E.2d 744 (1979); *Conley v. Spillers*, 171 W.

Va. 584, 301 S.E.2d 216 (1983); *State ex rel. Strickland v. Daniels*, 173 W. Va. 576, 318 S.E.2d 627 (1984); *Ash v. Twyman*, 174 W. Va. 177, 324 S.E.2d 138 (1984); *Board of Educ. v. Starcher*, 176 W. Va. 388, 343 S.E.2d 673 (1986); *State ex rel. King v. MacQueen*, 182 W. Va. 162, 386 S.E.2d 819 (1986); *State ex rel. Elish v. Wilson*, 189 W. Va. 739, 434 S.E.2d 411 (1993); *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 470 S.E.2d 205 (1996); *State ex rel. Cavender v. McCarty*, 198 W. Va. 226, 479 S.E.2d 887 (1996).

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The standard of review for Criminal Rule 35 rulings

In *State v. Morris*, No. 23-114, 2025 W. Va. LEXIS 7, 2025 WL 65748 (Jan. 10, 2025) this Court quoted Syl. Pt. 1 in *State v. Head*, 198 W. Va. 298, 480 S.E.2d 507 (1996), for the following standard of review:

In reviewing the findings of fact and conclusions of law of a circuit court concerning an order on a motion made under Rule 35 of the West Virginia Rules of Criminal Procedure, we apply a three-pronged standard of review. We review the decision on the Rule 35 motion under an abuse of discretion standard; the underlying facts are reviewed under a clearly [*4] erroneous standard; and questions of law and interpretations of statutes and rules are subject to a de novo review.

(B) Prohibition does not lie where an act has already been done and, as such, the Court should dismiss the case.

Prohibition does not lie after action has been had; it is "a preventive rather than a corrective remedy" and cannot be used after the act is done. *Town of Hawk's Nest v. County Court*, 55 W. Va. 689, 48 S.E. 205 (1904)(citing *Haldeman v. Davis*, 28 W. Va. 324 (1886)).

The Trial Court/Judge Ronald Wilson acted in December, 2024 when it granted Rule 35 relief.

Thus, the Trial Court/Judge Ronald Wilson already acted and the State is impermissibility attempting to use the writ as a corrective measure.

Therefore, the State's petition for writ of prohibition must be denied.

(C) The State has not shown that the Trial Court/Judge Ronald Wilson's Order is clearly erroneous as a matter of law.

(1) Res judicata does not apply.

Res judicata does not apply to bar the respondent's Rule 35(a) motion and relief.

State v. Porter, 182 W. Va. 776, 392 S.E.2d 216 (1990) reads:

The primary issue in this appeal is the appellant's contention [***7] that the State violated [*779] [**219] principles of collateral estoppel, as embodied in the fifth amendment's guarantee against double jeopardy, by trying the appellant for the murder of Roger Pelfry following the appellant's acquittal in the trial for the murder of Mark Pelfry.

The United States Supreme Court, in *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), recognized that the principle of collateral estoppel is embodied in the fifth amendment's double jeopardy clause. The petitioner in *Ashe* was one of four defendants charged with the armed robbery of six men who were engaged in a game of poker. The petitioner was charged on six counts of armed robbery, one count for each victim. The petitioner was then tried for the armed robbery of one of the victims. The prosecution's case consisted of the testimony of four of the six victims, including the victim in the count for which the petitioner was tried. Two of these witnesses testified that there were only three robbers, not four, and these two witnesses could not even identify the petitioner *Ashe*. Another witness could only identify the petitioner by voice, and still another, only by size and actions. The weaknesses [***8] in the prosecution's case resulted in an acquittal. The jury found that the prosecution's evidence was insufficient. Thereafter, the petitioner was tried again, this time for the armed robbery of another victim. The witnesses in the second trial were mostly the same as those in the first trial, but their testimony on the issue of the petitioner's identity was substantially stronger. Moreover, the prosecution at the second trial did not call one of the witnesses from the first trial, whose testimony on the identity issue was very weak at the first trial. The jury in the second trial found the petitioner guilty. The petitioner sought habeas corpus relief, based upon a double jeopardy claim. The Supreme Court, in an opinion by Justice Stewart, held that because "[t]he single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers," and "the jury by its verdict found that he had not" been one of the robbers, then collateral estoppel barred a subsequent prosecution. 397 U.S. at 445, 90 S. Ct. at 1195, 25 L. Ed. 2d at 476. In reaching this conclusion, the Supreme Court stated:

HN2 'Collateral estoppel' is an awkward phrase, but it stands [***9] for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any

future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in *United States v. Oppenheimer*, 242 U.S. 85[, 37 S. Ct. 68, 61 L. Ed. 161 (1916)]. As Mr. Justice Holmes put the matter in that case, 'It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.' 242 U.S., at 87[, 37 S. Ct. at 69, 61 L. Ed. at 164]. As a rule of federal law, therefore, '[i]t is much too late to suggest that this principle is not fully applicable to a former judgment in a criminal case, either because of lack of "mutuality" or because the judgment may reflect only a belief that the Government had not met the higher burden of proof exacted in such cases of the Government's evidence as a whole although not necessarily as to [***10] every link in the chain.' *United States v. Kramer*, 289 F.2d 909, 913 [(2d Cir. 1961)].

Ashe, 397 U.S. at 443, 90 S. Ct. at 1194, 25 L. Ed. 2d at 475 (footnote omitted).

However, HN3 before a reviewing court may determine whether collateral estoppel would bar a subsequent prosecution, that is to say, whether it can be determined that the first jury decided issues of fact in favor of the accused, the court must have before it the record of the first trial in order to compare it with the subsequent prosecutions.

The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach [*780] [**220] of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' The inquiry 'must be set in a practical [***11] frame and viewed with an eye to all the circumstances of the proceedings.' *Sealfon v. United States*, 332 U.S. 575, 579[, 68 S. Ct. 237, 240, 92 L. Ed. 180, 184 (1948)]. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.

Ashe, 397 U.S. at 444, 90 S. Ct. at 1194, 25 L. Ed. 2d at 475-76 (footnote omitted) (quoting *Mayers & Yarbrough, Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 38-39 (1960)).

The Supreme Court's decision in *Ashe* has been followed by state courts. See, e.g., *Prince v. State*, 431 So. 2d 565, 568 (Ala. Crim. App. 1982), cert. denied, 431 So. 2d 568 (Ala. 1983), cert. denied, 468 U.S. 1204, 104 S. Ct. 3571, 82 L. Ed. 2d 870 (1984); *DeSacia v. State*, 469 P.2d 369, 380 (Alaska 1970); *In re*

Crow, 4 Cal. 3d 613, 623, 483 P.2d 1206, 1214, 94 Cal. Rptr. 254, 262 (1971) (en banc); *Spencer v. State*, 438 So. 2d 864, 866 (Fla. Dist. Ct. App. 1983); *State v. Ingenito*, 87 N.J. 204, 209, 432 A.2d 912, 914 (1981); [***12] *People v. Abbott*, 113 Misc. 2d 766, , 449 N.Y.S.2d 853, 861 (Sup. Ct. 1982); *State v. Thomas*, 61 Ohio St. 2d 254, 260, 400 N.E.2d 897, 903, 15 Ohio Op. 3d 262, cert. denied, 449 U.S. 852, 101 S. Ct. 143, 66 L. Ed. 2d 64 (1980); *Commonwealth v. Zimmerman*, 498 Pa. 112, , 445 A.2d 92, 95 (1981); *Ex parte Robinson*, 641 S.W.2d 552, 556 (Tex. Crim. App. 1982); *State v. Spanbauer*, 108 Wis. 2d 548, 550-51, 322 N.W.2d 511, 512 (Ct. App. 1982). 3Link to the text of the note See also 3 J. Cook, *Constitutional Rights of the Accused* § 23:9 (2d ed. 1986 & Supp. 1988); 2 W. LaFave & J. Israel, *Criminal Procedure* § 17.4 (1984 & Supp. 1989); 1 C. Torcia, *Wharton's Criminal Law* § 72 (14th ed. 1978 & Supp. 1989); see generally annotation, *Modern Status of Doctrine of Res Judicata in Criminal Cases*, 9 A.L.R.3d 203 (1966 & Supp. 1989).

[***13] Accordingly, we hold that HN4 the principle of collateral estoppel applies in a criminal case where an issue of ultimate fact has once been determined by a valid and final judgment. In such case, that issue may not again be litigated between the State and the defendant.

* * * * *

Additionally, *State v. Lewis*, No. 19-0121, 2020 W. Va. LEXIS 324 (May 26, 2020)

reads:

In Syllabus Point 2 of *Losh v. McKenzie*, 166 W. Va. 762, 277 S.E.2d 606 (1981), we held, as follows:

A judgment denying relief in post-conviction habeas corpus is res judicata on questions of fact or law which have been fully and finally litigated and decided, and as to issues which with reasonable diligence should have been known but were not raised, and this occurs where there has been an omnibus habeas corpus hearing at which the applicant for habeas corpus was represented by counsel or appeared [*8] pro se having knowingly and intelligently waived his right to counsel.

(Emphasis added). Here, all six of the alleged errors brought by petitioner have been raised in his previous appeals and have been **fully and finally litigated**. Accordingly, because petitioner has raised, or could have raised these issues in earlier appeals, he is barred from attempting to re-litigate them here. See, e.g., *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Thus, the circuit court did not abuse its discretion in denying petitioner's Rule 35(a) motion to correct illegal sentence as it was beyond the scope of the Rule under which it was filed.

Assuming arguendo that petitioner's arguments were not barred by res judicata,

we find that the arguments would still be inappropriate for appeal.

(bold emphasis added).

In Respondent Pethtel's case, any prior Rule 35 motions did not address the blatant illegality of the Trial Court/Judge Fred Risovich's holding the respondent's silence against him when imposing maximum, consecutive sentences. This issue was simply not presented. Thus, there was no full, fair, and final ruling or adjudication of this issue. Accordingly, the Trial Court/Judge Ronald Wilson was right to hear and adjudicate this issue in the Rule 35 motion for relief. Indeed, "Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal."

Further, Rule 35(a) reads that courts "...may correct an illegal sentence at any time." Accordingly, even Rule 35 permits correction of an illegal sentence notwithstanding the failure of a prior Rule 35 motion. And when it comes to application of criminal rules versus common law, the rules trump. Indeed, "West Virginia Rules of Criminal Procedure are the paramount authority controlling criminal proceedings before the circuit courts of this jurisdiction; any statutory or common-law procedural rule that conflicts with these Rules is presumptively without force or effect." *State v. Simmons*, 239 W. Va. 515, 801 S.E.2d 530 (2017) (citing *State v. Davis*, 178 W.Va. 87, 90, 357 S.E.2d 769, 772 (1987) (holding that W.Va. R. Crim. Pro. 7(c)(1) supersedes the provisions of W. Va. Code § 62-9-1 (1931), to the extent that the statute requires the indorsement of the grand jury foreman and attestation of the prosecutor on the reverse side of the indictment), overruled on other grounds, *State ex rel. R.L. v. Bedell*, 192 W.Va. 435, 452 S.E.2d 893 (1994)).

Therefore, under common law and Rule 35, res judicata does not apply here.

- (2) **Procedurally, the Trial Court/Judge Ronald Wilson's ruling was legally correct and not clearly erroneous as a matter of law: the Trial Court/Judge Ronald Wilson's Order is read/construed/interpreted to mean that the sentence was illegal and therefore ripe for review under Rule 35(a).**

Rule 35 reads:

RULE 35. Correction or Reduction of Sentence

(a) Correction of Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time period provided herein for the reduction of sentence.

(b) Reduction of Sentence. A motion to reduce a sentence may be made, or the court may reduce a sentence without motion within 120 days after the sentence is imposed or probation is revoked, or within 120 days after the entry of a mandate by the supreme court of appeals upon affirmance of a judgment of a conviction or probation revocation or the entry of an order by the supreme court of appeals dismissing or rejecting a petition for appeal of a judgment of a conviction or probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

The defense made the Rule 35 motion pursuant to Rule 35(a), not 35(b).

The Trial Court/Judge Ronald Wilson did not improperly conflate or confuse the Rule 35(a) timing requirement with that of Rule 35(b).

The Trial Court/Judge Ronald Wilson's Order reads:

The sentence imposed upon the Petitioner is worse than the sentence imposed upon criminals who murder people and are given a life sentence with the possibility of mercy. A criminal defendant who has committed serious crimes retains basic human dignity of our judicial system and should be treated as a human being in sentencing by a judge focusing on rehabilitation and addressing the root cause of his behavior rather than solely punishing him through a life sentence. This is especially true at this time in our history when so many people are addicted to controlled substance and commit crimes caused by their addiction.

The petitioner has now served 24 years in prison, and for that reason and all the other reasons stated in this Memorandum Order, the Court will GRANT the Petitioner's Rule 35 motion, in part, by modifying the Petitioner's sentence.

The Court acknowledges that any of the allegations of misconduct by the judge

alone would not mean that it was an illegal sentence. But, taking them together, it is certainly a sentence that may not be illegal by itself, by taking into consideration the impact on the Petitioner's life and our duty to support and believe in Due Process in the Constitution of the United State and in the Constitution of the State of West Virginia, it certainly is not an acceptable sentence nor it is acceptable conduct by a judge.

State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell, 228 W. Va. 252, 228 W. Va. 252

(2011) discusses the interpretation/construction of court orders:

It has been recognized that HN8 "[t]he interpretation of a court order is a question of law, which we review de novo." Appeal of Langenfeld, 160 N.H. 85, 89, 993 A.2d 232, 236 (2010) (citation omitted). Accord *Prins v. Director of Revenue*, No. WD 71833, 333 S.W.3d 17, 2010 Mo. App. LEXIS 1540, 2010 WL 4607404, at *2 (Mo. Ct. App. Nov. 16, 2010); *In re Salesky*, 157 N.H. 698, 702, 958 A.2d 948, 952 (2008).

[**737] [*267] Next, in conducting our plenary review, we are guided by the general rules of construction which dictate that we consider the language of the lower court's order on par with that of other legal instruments. In other words, HN9 "[c]ourt orders and judgments are to be construed under the same rules of interpretation as those applied to other written instruments." *McLeod v. McLeod*, 723 S.W.2d 777, 779 (Tex. App. 1987) (citation omitted). Accord *In re Marriage of Brown*, 776 N.W.2d 644, 650 (Iowa 2009); *Pare v. Wyeth, Inc.*, 2005 PA Super 85, 870 A.2d 378, 381 (Pa. Super. Ct. 2005).

Thus, as is the case when we examine statutes, ⁷Link to the text of the note contracts, ⁸Link to the text of the note and the like, when we review lower court orders, we must determine whether the order's language is ambiguous. See *Pare*, 870 A.2d at 381 (counseling that review of lower court's order requires "examin[ation of] the order to determine if its terms are clear or ambiguous" (citation omitted)). "[I]f [a court's order] conveys more than one meaning such that a reasonable person may fairly and honestly differ in the construction of the terms, then the language is ambiguous, and the appellate court must ascertain the intent of the trial court in entering the order." *Prins*, 2010 Mo. App. LEXIS 1540, 2010 WL 4607404, at *2 (internal quotations and citations omitted). Accord *Pare*, 870 A.2d at 381. Such intent is ascertained by reference to the record of the lower court's proceedings, *Prins*, 2010 Mo. App. LEXIS 1540, 2010 WL 4607404, at *2, and through the judge's prior statements regarding the order's intended effect, *McLeod*, 723 S.W.2d at 779.

In contrast to ambiguous orders, which must be construed before their terms can be applied, unambiguous orders must be applied as they are written without reference to extraneous matters. Stated otherwise, "[w]here the [lower court's] order is unambiguous the [court's] intent must be discerned solely from the plain

meaning of the words used." Pare, 870 A.2d at 381 (internal quotation and citation omitted). Thus, "[w]hen the judgment or order on its face is plain and unambiguous, extrinsic matters may not be considered to give the decree a different effect from that expressed by the literal meaning of the words used therein." McLeod, 723 S.W.2d at 779 (citation omitted).

HN10 To afford the lower court's order its true effect, we must further consider the precise words used by the lower tribunal in rendering its ruling. "In construing a court order, we look to the plain meaning of the words used in the document." Langenfeld, 160 N.H. at 89, 958 A.2d at 236 [***2] (citation omitted). Accord Salesky, 157 N.H. at 703, 958 A.2d at 952. This is so because the words of the order, themselves, give meaning to the order's ruling: "The meaning of the order must be discerned from the plain meaning of the words used in the order." Bishop v. Bishop, 858 So. 2d 1234, 1237 (Fla. Dist. Ct. App. 2003) (citation omitted). Thus, "we give force and effect to every word, if possible, in order to give the decree a consistent, effective and reasonable meaning in its entirety." Brown, 776 N.W.2d at 650 (citation omitted).

Finally, HN11 "[a]s a general matter, a court decree or judgment is to be construed with reference to the issues it was meant to decide." Langenfeld, 160 N.H. at 89, 958 A.2d at 236 (citation omitted). Accord Salesky, 157 N.H. at 703, 958 A.2d at 952. Accordingly, an order

should be construed in accordance with its evident intention. Indeed the determinative factor is the intention of the court as gathered from all parts of the decree. Effect is to be given to that which is clearly implied as well as to that which is expressed. Of course, in determining this intent, we take the decree by its four corners and try to ascertain from it the [**738] [*268] intent as disclosed [***3] by the various provisions of the decree.

Brown, 776 N.W.2d at 650 (internal quotations and citations omitted).

To summarize these rules of construction governing the interpretation of a lower court's order, we therefore hold that HN12 the interpretation of a court's order is a question of law, which we review de novo. When interpreting a court's order, we apply the same rules of construction as we use to construe other written instruments. We further hold that an ambiguous court order must be construed before it can be applied. Conversely, a court order whose language is plain need not be construed, but should be applied according to the plain meaning of the words used in the order.

The Trial Court/Judge Ronald Wilson in Respondent Pethtel's case ruled that while the sentence may not be illegal by itself, when taking into consider various factors, it is not acceptable; the Trial Court/Judge Ronald Wilson then modified/reduced the respondent's

sentences pursuant to Rule 35.

Accordingly, this Court must construe the Order with reference to the issues it was meant to decide and in accordance with its evidence intention: the determinative factor is the intention of the court as gathered from all parts of the decree. Effect is to be given to that which is clearly implied as well as to that which is expressed.

Here, the Trial Court/Judge Ronald Wilson found Respondent Pethel's sentence unacceptable under the law and modified/reduced it pursuant to Rule 35 over 20 years after the fact. And the Trial Court/Judge Ronald Wilson well knew that this was a Rule 35(a) motion. Appendix, Hearing Transcript, at 74 where defense counsel specifies that it is a Rule 35(a) motion.

The Trial Court/Judge Ronald Wilson's intention is clear or clearly implied, unequivocal, and apparent: to find that the sentence was illegal and to reduce it.

(3) Substantively, the Trial Court/Judge Ronald Wilson's ruling was legally correct and not clearly erroneous as a matter of law: the sentence was illegal because it was based on constitutionally impermissible factors

Under federal law, a sentence based on a constitutionally impermissible factor is an illegal sentence.

The Fourth Circuit Court of Appeals determined:

"[T]he type of 'illegal' sentence which a defendant can successfully challenge despite an appeal waiver involves fundamental issues, including claims that a district court exceeded its authority, premised its sentence on a constitutionally impermissible factor such as race, or violated the post-plea right to counsel." Copeland, 707 F.3d at 530 (alterations and internal quotation marks omitted); see *United States v. Thornsbury*, 670 F.3d 532, 537-40 (4th Cir. 2012) (discussing narrow class of unwaivable sentencing claims).

United States v. Jones, 674 Fed. Appx. 318, 320, 2017 U.S. App. LEXIS 357 (2017).

See also United States v. Johnson, 259 Fed. Appx. 611 (4th Cir. 2007), reading:

This challenge to the legality of the sentence is an exception to Johnson's appeal waiver. See *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992) (allowing review despite waiver for claim that [**3] sentence exceeded statutory maximum or was based on constitutionally impermissible factor).

The Eighth Circuit Court of Appeals determined: "Nor would it prevent a challenge under 28 U.S.C. § 2255 to an "illegal sentence," such as a sentence imposed in excess of the maximum penalty provided by statute or based upon a constitutionally impermissible factor such as race." *United States v. Michelsen*, 141 F.3d 867, n.3, (8th Cir., April 13, 1998), superseded by statute on other grounds. (See also *United States v. Medina*, 2006 U.S. Dist. LEXIS 87936, p. *27, (E.D. Pa., Dec. 5, 2006), citing *United States v. Michelsen*, cited *supra*. See also *Lafferty v. United States*, 2007 U.S. Dist. LEXIS 29538, p. **7-8 (April 20, 2007), citing *United States v. Michelsen*, cited *supra*.)

The Ninth Circuit Court of Appeals determined that "An illegal sentence includes a sentence in excess of the permissible statutory penalty or in violation of the Constitution." *United States v. Brizan*, 709 F.3d 864 (9th Cir., Mar 5, 2013)(citing *United States v. Fowler*, 794 F.2d 1446, 1449 (9th Cir. 1986)).

The United States District Court for the Western District of North Carolina determined:

The Defendant asserts that the Magistrate Judge imposed an illegal sentence upon him, and as such, he may appeal his sentence notwithstanding the terms of the appeal waiver. In making this argument, however, the Defendant misapprehends the Fourth Circuit's definition of "illegal sentence" [*9] as that term of art has been employed by the appellate court in the context of appeal waivers. The Defendant cites in his brief to *United States v. Thornsbury*, 670 F.3d 532 (4th Cir. 2012), [Doc. 7 at 7], which reads in pertinent part as follows:

We have indeed used the term "illegal" to describe sentences the appeal of which survive an appellate waiver, but we have done so only where the sentence is alleged to have been beyond the authority of the district court to impose. In contrast, sentences "imposed in violation of law" [as designated in 18 U.S.C. § 3742] include not only "illegal" sentences, as just described, but also any sentence that has been touched by a legal error. In other words, not

every appeal alleging a legal error in sentencing challenges that sentence as "illegal," as we have used the term in our precedent. Were we to hold otherwise, it is difficult to conceive of a limiting principle that would prevent the "illegal" sentence exception from swallowing the rule that appellate waivers are normally given effect, since nearly every appeal of a sentence involves a claim of legal error. Such a holding would also be contrary to precedent. See, e.g., *General*, 278 F.3d at 399-400 (enforcing waiver and dismissing challenge to sentences based on numerous errors); *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992) (enforcing [*10] waiver and dismissing appeal resting on complaints of "an improper application of the guidelines and a violation of a procedural rule").

We instead view challenges to a sentence as "illegal" as those involving much more fundamental issues — such as challenges claiming a district court exceeded its authority, claiming that a sentence was based on a constitutionally impermissible factor such as race, or claiming a post-plea violation of the right to counsel. See *Marin*, 961 F.2d at 496 (noting the first two possibilities); *Attar*, 38 F.3d at 732-33 (noting the last possibility).

Thornsbury, 670 F.3d at 539 (some internal citations omitted).

In his argument, Defendant conflates the concept of an "illegal sentence" with a sentence that was "imposed in violation of the law." Defendant's sentence neither exceeded a statutory maximum nor implicate any constitutionally impermissible factor such as race. As such, it was not an "illegal sentence", and thus the appellate waiver bars this appeal.

United States v. Crisp, 2015 U.S. Dist. LEXIS 179176, pp. **8-10 (W.D., N.C., May 7, 2015).

Finally, this Court has suggested that a sentence based on an impermissible factor is an illegal sentence. See State's Petition for Writ of Prohibition, at p. 7, quoting *State vs Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982), for its rule that "sentences imposed by the trial court, if within statutory limits and if not based on some impermissible factor, are not subject to appellate review."

(i) Silence is a constitutionally impermissible factor.

At his sentencing hearing, Respondent Pethtel exercised his right to remain silent rather

than to allocate and speak on his own behalf in mitigation to the Court. December 5, 2000 Sentencing Transcript, at 7.

The Trial Court/Judge Fred Risovich, determined:

The Court: Mr. Pethtel, I have reviewed your whole presentence investigation, considered the offenses, had the duty to sit through and watch the tapes that you made of the victims. I've sat here and listened to you refer to a young woman who was yet an adult as a little bitch that you pimp out of your own mouth, saw the type of individual you are, dealing with you throughout this Indictment, considered the version in the presentence investigation as well as your version of the crimes. I've considered the fact that you've shown no remorse whatsoever and made no statement on your behalf. ...

Id. at 11 (emphasis added), Appendix 493.

The Trial Court/ Judge Fred Risovich went on in his reasoning, talking out his ruling, and then sentenced Mr. Pethtel to maximum, consecutive sentences on all charges.

The Trial Court/Judge Fred Risovich unequivocally and intentionally considered BOTH Respondent Pethtel's lack of remorse and that he had made no statement on his own behalf in sentencing him. The Trial Court/Judge Fred Risovich held Respondent Pethtel's silence against him in sentencing him. This cannot be disputed. The record is absolutely clear.

Accordingly, the State's cases are distinguishable. On pages 19 and 20 of the State's brief, the State cites a litany of this Court's prior decisions determining that lack of remorse can be considered in sentencing a defendant. Importantly, none of these cases say that a circuit court may also consider the defendant's SILENCE when fashioning a sentence. And also, the State has not shown that in any of these cases that the State itself through its probation officer advised the defendant to actually remain silent at sentencing, in contrast to Respondent Pethtel's case, where the Trial Court/Judge Fred Risovich specifically found and determined that the sentencing "judge learned during the hearing that his probation officer had given the Petitioner his opinion that the Petitioner should not make any statement concerning the sexual crimes. It was the probation

officer's opinion that it would be better that he did not give the Petitioner's version of the sex crimes." Appendix, at 60. Thus, the State through its probation officer was at least partially responsible for Respondent Pethtel's silence and failure to express remorse, which the Trial Court/Judge Fred Risovich then held against him in the harshest way possible in sentencing him to maximum, consecutive sentences.

Further, this Court essentially ruled that circuit courts cannot hold a defendant's silence against him in sentencing him. *See State v. Jones*, 216 W. Va. 666, 610 S.E.2d 1 (2004), reading:

Finally, the Imlay court noted that in an earlier case it cited with approval the rule of law that HN13 "while the sentencing judge may take into account his belief that the defendant was not candid [***18] with the court this is to be distinguished from the rule that a sentence may not be augmented because a defendant refuses to confess or invokes his privilege against self-incrimination." 249 Mont. at 88-89, 813 P.2d at 984 (quoting *In the Matter of Jones*, 176 Mont. 412, 578 P.2d 1150 (1978) (citations omitted)). We believe the instant case is one in which the trial judge simply took into account Appellant's lack of candor.

Additionally, under federal law, a sentence based on a defendant's silence is based on an constitutionally impermissible factor and is illegal.

In *Deberry v. Schriro*, CV-04-0858-PCT-SMM (JI), 2007 U.S. Dist. LEXIS 98839, (U.S. Dist. Ct. Ariz., Sept. 28, 2007), at **2-4, the victim was initially the petitioner defendant's drug contact/supplier. As the two became acquainted, the victim became romantically interested in the petitioner and stalked the petitioner. *Deberry*, at **2-4. This led to a confrontation where the petitioner killed the victim. *Id.*

The defendant was indicted for murder and pled to manslaughter, with sentencing left to the discretion of the court. *Id.*, at *4. Manslaughter carried a minimum 7 year sentence to a maximum 21 year sentence. *Id.* at *5. At sentencing, the court considered the aggravating factor that the defendant showed lack of remorse based on evidence that the defendant continued to believe the killing was justified and sentenced him to 16 years. *Id.* at **15-16.

The defendant sought review with the Arizona Supreme Court arguing that lack of remorse was not a proper aggravating factor under the Fifth Amendment, but the Supreme Court denied review. *Id.*, at *18. The defendant sought review by the Arizona Supreme Court thereafter, as well, to no avail.

The defendant filed for federal habeas corpus relief. The United States District Court for Arizona ruled:

The essence of Petitioner's [*45] claim is that his right to remain silent was violated at sentencing; that he was penalized for refusing to express remorse for the death of the victim. The Arizona Court of Appeals rejected this claim based on a distinction between pleading defendants and defendants maintaining their innocence at trial. In doing so, the state court distinguished *State v. Tinajero*, 188 Ariz. 350, 935 P.2d 928 (App. 1997). (Exhibit U, Mem. Dec. 12/26/02 at 15-16.)

In *Tinajero*, the defendant maintained his innocence at trial and through sentencing. The trial judge considered the defendant's maintenance of his claim of innocence to show a lack of remorse, and relied upon it as an aggravating factor. The Arizona Court of Appeals held that "[w]hen a convicted person maintains his innocence through sentencing, as *Tinajero* did here, his failure to acknowledge guilt 'is irrelevant to a sentencing determination' and 'offends the Fifth Amendment privilege against self-incrimination.'" *Tinajero*, 188 Ariz. at 357, 935 P.2d at 935.

Undoubtedly, the Arizona Court of Appeals rightly distinguished the holding in *Tinajero*. Here, Petitioner had not maintained his innocence, but had openly admitted the homicide. In doing [*46] so, however, the Arizona Court of Appeals concluded that Petitioner's guilty plea deprived him of Fifth Amendment protection, and thus the state court acted "contrary to" the "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), in *Mitchell v. United States*, 526 U.S. 314, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999).

In *Mitchell*, the United States Supreme Court considered the right to remain silent at sentencing following a guilty plea. That case involved a federal criminal defendant who pled guilty to drug charges, but refused to testify at sentencing to rebut the government's evidence about drug quantity. The trial court had ruled that the defendant had no right to remain silent following her guilty plea, and relied on her refusal to testify in determining her sentence. The court noted that "[a]ny effort by the State to compel [the defendant] to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment." *Id.* at 326 (quoting *Estelle v. Smith*, 451 U.S. 454, 463, 101 S. Ct. 1866, 68 L. Ed. 2d 359

(1981)). Thus, the clear holding of *Mitchell* is that a defendant's Fifth Amendment rights against self-incrimination survive a guilty plea and continue to apply at [*47] sentencing.

The Arizona Court of Appeals acted contrary to *Mitchell* when it held that no Fifth Amendment concerns were raised because Petitioner had pled guilty.

Id., at *44-45.

Ultimately, the federal court determined that the Arizona Court's decision was contrary to clearly established Supreme Court law when it rejected the petitioner's Fifth Amendment claim on the basis that his guilty plea precluded any right to remain silent. Nonetheless, the petitioner was not entitled to relief on this claim because he has failed to establish that his sentence was based upon his silence, and because he waived his right to remain silent on the issue of remorse by voluntarily testifying about his remorse. *Id.*, at *65.

In Respondent Pethel's case, the Trial Court/Judge Fred Risovich considered his silence in imposing maximum, consecutive sentences. Accordingly, the respondent's silence was so important to the Trial Court/Judge Fred Risovich in imposing maximum, consecutive sentences that the Trial Court/Judge Fred Risovich found it necessary to state this silence on the record as a reason for imposing maximum, consecutive sentences. In doing so, the Trial Court/Judge Fred Risovich violated the respondent's United States and State constitutional rights to remain silent.

(ii) Judicial bias is a constitutionally impermissible factor

Under federal law, a sentence based on a judge's bias is based on an constitutionally impermissible factor and is illegal.

In *Cameron v. Rewerts*, 841 Fed. Appx. 864, 865 (6th Cir., Jan. 14, 2021), the Sixth Circuit Court of Appeals cited the United States Supreme Court rule of law that "The Due Process Clause requires a fair trial before a non-biased judge", as determined in *Bracy v. Gramley*, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997).

In *United States v. Navarro-Flores*, 628 F.2d 1178, 1182 (April 11, 1980), the Ninth Circuit Court of Appeals ruled that “A hearing by a biased judge does not comport with the fundamental concept of due process of law.”

In *Carnell v. United States*, Civil No. 23-cv-3198-JPG; Criminal No 18-cr-40066-JPG, 2024 U.S. Dist. LEXIS 22630, pp. **5-6, (S.D. Ill., Feb. 8, 2024), the United States District Court for the Southern District of Illinois determined:

It is true that due process requires an unbiased judge in [*6] a criminal proceeding, including at a sentencing where judges have substantial discretion. *Shannon v. United States*, 39 F.4th 868, 883 (7th Cir. 2022) (citing *Bracy v. Gramley*, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997)). Due process can also be violated when, even without actual judicial bias, "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Rippo v. Baker*, 580 U.S. 285, 287, 137 S. Ct. 905, 197 L. Ed. 2d 167 (2017) (per curiam; emphasis added; internal quotations omitted).

In *Kearns v. Orr*, Case No. 93-2377-KHV, 1994 U.S. Dist. LEXIS 5870, n.8, (D. Kan., April 20, 1994), the United States District Court for Kansas cited *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807 (1994), (Justice Scalia concurrence) for the rule that use of a patently biased judge may cause criminal sentence to be deprivation of life, liberty, or property without due process.

In *Slade v. Bingham*, NO. 2:11-cv-99-KS-MTP, 2013 U.S. Dist. LEXIS 186003 (Dec. 27, 2013), the United States District Court for the Southern District of Mississippi determined:

Indeed, a biased judge may implicate a defendant's constitutional due process rights and, therefore, entitle a defendant to habeas relief. See *Public Citizen, Inc. v. Bomer*, 274 F.3d 212, 217 (5th Cir. 2001) ("Trial before an unbiased judge is essential to due process") (quoting *Johnson v. Mississippi*, 403 U.S. 212, 216, 91 S. Ct. 1778, 29 L. Ed. 2d 423 (1971)). The issue is "whether there was an appearance of impropriety which rose to the level of a 'fundamental defect' resulting in 'a complete miscarriage of justice.'" *U.S. v. Couch*, 896 F.2d 78, 81 (5th Cir. 1990).

The appearance of justice is important in our criminal system. "Nevertheless 'only

in the most extreme cases' does the Due Process Clause require disqualification of a judge." Id. (quoting *Aetna Life Ins. v. Lavoie*, 475 U.S. 813, 821, 825-26, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986)). Reviewing courts must begin their analysis by presuming "the honesty and integrity of those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975). An "extreme case" requires a showing that a judge had a "direct, personal, substantial, pecuniary interest in reaching a conclusion against" a defendant in his case. *Aetna Life Ins.*, 475 U.S. at 821-22.

In Respondent Pethtel's case, the Trial Court/Judge Ronald Wilson essentially found that Judge Fred Risovich was biased against Respondent Pethtel. See Appendix, at 60-62. The Trial Court/Judge Ronald Wilson determined that:

- defense counsel's argument was wasted on the Judge Risovich
- Judge Risovich was critical of Ohio County Prosecutor's Office because it had dismissed previous charges against Respondent Pethtel
- Judge Risovich did not appear to truly understand the responsibility of an elected official.
- Judge Risovich may have conducted his own investigation and decided that Respondent Pethtel was guilty of prior criminal charges and should have been prosecuted. Judges are not permitted to do so and this may have affected Judge Risovich's impartiality at trial.
- It violates the Code of Judicial Conduct for the judge to believe the judge has any obligation or duty to help the prosecutor control crime.
- It violates the Code of Judicial Conduct when a judge is not patient, dignified, and courteous to litigants.
- Judge Risovich felt that he had a duty to control crime by imposing the maximum sentence on Respondent Pethtel.
- A judge does not have the right to attack another human being by making

personal remarks about a defendant's character.

- Judge Risovich harshly told Respondent Pethtel the reasons for the maximum sentence.
- Judge Risovich attempted to control crime in the future, which he was not permitted to do.
- Judge Risovich believed that he had the responsibility to prevent crime when he said that "We can't change people like you, but what we can do is separate you from society."
- Respondent Pethtel's sentence was worse than sentences imposed on murderers.
- "A criminal defendant who has committed serious crimes retains basic human dignity in our judicial system and should be treated as a human being in sentencing by a judge focusing on rehabilitation and addressing the root causes of his behavior rather than solely punishing him through a life sentence. This is especially true at this time in our history when so many people are addicted to controlled substances and commit crimes caused by their addiction."

Appendix, at 60-62.

(iii) The State cannot meet its burden of proof

The State has not proven that the Trial Court/Judge Risovich's violation of Respondent Pethtel's constitutional rights did not contribute to his maximum, consecutive sentences. Such is fatal to the State's petition. *See e.g. State v. Bruffey*, Syl. Pt. 7, 231 W. Va. 502, 745 S.E.2d 540 (2013)(citing Syllabus Point 3, *State v. Frazier*, 229 W. Va. 724, 735 S.E.2d 727 (2012)) - "In a criminal case, the burden is upon the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Given the unequivocal statements made at the sentencing hearing, the State cannot meet its burden and the sentence is therefore illegal.

Accordingly, a "violation of a Constitutional right constitutes reversible error unless that

error is harmless beyond a reasonable doubt” and “In a criminal case, the burden is upon the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *State v. Bruffey*, Syl. Pt. 7, 231 W.Va. 502, 551, 745 S.E.2d 540 (2013) (citing *State vs Mechling*, 219 W.Va. at 371, 633 S.E.2d at 316); *State v. Frazier*, Syl. Pt. 3, 229 W.Va. 724, 735 S.E.2d 727 (2012); *State v. Jenkins*, Syl. pt. 4, 195 W.Va. 620, 466 S.E.2d 471 (1995) - “Errors involving deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction.”). And receiving the benefit of the violation of Respondent Pethtel’s constitutional rights, the State must bear the burden, but cannot do so.

(D) The State has not shown that the Trial Court/Judge Ronald Wilson’s Order is an oft repeated error or manifests persistent disregard for either procedural or substantive law.

The State has not cited any West Virginia case where the Rule 35 jurisdictional-timing requirements were at issue over whether a sentence was illegal or rendered in an illegal manner. Thus, there is no oft repeated error or persistent disregard for procedural or substantive law in Respondent Pethtel’s case.

(E) The State has not shown that the Trial Court/Judge Ronald Wilson’s Order raises new and important problems or issues of law of first impression.

The State has not shown that the Trial Court/Judge Ronald Wilson’s order raised a new and important problem/issue of first impression.

(F) The State has not shown that the Trial Court/Judge Ronald Wilson’s Order deprived the State of the right to prosecute the case or to have deprived it of a valid conviction.

The State has not shown that the Trial Court/Judge Ronald Wilson’s Order deprived the State of the right to prosecute the case or to have deprived it of a valid conviction. Indeed, Respondent Pethtel was convicted of numerous offenses, has served approximately 26 years in

prison, and his convictions still stand and were not vacated by the Trial Court/Judge Ronald Wilson's ruling.

(VI) CONCLUSION

Therefore, the Court should deny the State's petition for writ of prohibition and affirm the Trial Court/Judge Ronald Wilson's decision awarding Criminal Rule 35(a) relief.

WHEREFORE, the respondent, Shawn Pethtel prays that the Court affirm the Trial Court/Judge Ronald Wilson's decision awarding Criminal Rule 35(a) relief.

Respectfully submitted,

Shawn Pethtel,

Respondent,

By:



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(VII) CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify that on this 5th day of March, 2025, I served

**THE RESPONDENT, SHAWN PETHTEL'S SUMMARY RESPONSE IN OPPOSITION
TO PETITION FOR WRIT OF PROHIBITION** on the following through the e-filing system:

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