

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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STATE OF WEST VIRGINIA,

Respondent herein;

v.

CARLI RENAE REED,

Defendant Below;

Petitioner herein.

Case No. 24-341
Criminal Action No. 23-F-74 (Taylor County)
The Honorable Shawn D. Nines

BRIEF OF PETITIONER CARLI RENAE REED

Counsel for Petitioner

Hunter B. Mullens, WV Bar No. 7620
C. Brian Matko., WV State Bar No. 7995
Matthew L. Ervin, WV State Bar No. 13197
MULLENS & MULLENS, PLLC
9 North Main Street
PO Box 95
Philippi, WV 26416
Telephone: (304) 457-9000
Facsimile: (304) 457-9002
hmullens@mullensandmullens.com
bmato@mullensandmullens.com
mervin@mullensandmullens.com

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ASSIGNMENTS OF ERROR

- 1. The trial court erred in failing to give Ms. Reed credit for time served on home incarceration post-conviction. The terms of her home incarceration were penal in nature, and failure to provide her with credit against her sentence violated the Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution.**
- 2. The trial court erred in failing to give Ms. Reed credit for time served on home incarceration pre-conviction. The terms of her home incarceration were penal in nature, and failure to provide her with credit against her sentence violated the Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution.**
- 3. The trial court erred in failing to give due consideration to Ms. Reed's right to rehabilitation. The trial court further erred by using an impermissible factor when determining her sentence, specifically referring to the fact that Ms. Reed was convicted of second-degree murder when that conviction was overturned due to errors made by the trial court.**

STATEMENT OF THE CASE

This case has previously been before the West Virginia Supreme Court of Appeals. *See State of West Virginia v. Carli Renae Reed, Case No. 21-0227 (memorandum opinion)*. This appeal involves the trial court's failure to credit Ms. Reed for time spent on home incarceration both pre-conviction and post-conviction. In addition, the trial court, used impermissible factors in sentencing Ms. Reed and further failed to consider alternative sentencing when the uncontroverted testimony was that Ms. Reed would not pose a risk to re-offend and that the West Virginia correctional system did not provide the type of treatment needed by Ms. Reed.

On August 15, 2019, Carli R. Reed was arrested and subsequently charged with the first-degree murder for the death of her husband, Marcus Fagons. On September 24, 2020, after a seven (7) day trial, Petitioner, was convicted of second-degree murder. At trial, Ms. Reed raised the alternative defenses of Battered Woman's Syndrome and accident. At the time of her arrest, Ms.

Reed was twenty-three (23) years old, a graduate of West Virginia University and an employee of the Federal Bureau of Investigation. She had been married to Mr. Fagons for approximately three (3) years. During their three (3) year marriage, Ms. Reed suffered numerous instances of physical, verbal, emotional and sexual abuse at the hands of Mr. Fagons to such an extent that she exhibited traits and characteristics consistent with battered woman's syndrome.

Ms. Reed appealed her conviction to the West Virginia Supreme Court of Appeals, and her conviction was overturned on the grounds that the trial court failed to provide a jury instruction on the defense theory of accident.¹ The case was remanded back to Barbour County, West Virginia for a new trial. Ms. Reed, who had been incarcerated since August 15, 2019, was granted bail and, in addition to a bond in the amount of Nine Hundred Thousand Dollars (\$900,000.00), Ms. Reed was also placed on home incarceration. [App. Vol. 1, pgs. 1-5.]

Due to the local publicity surrounding the case, the State of West Virginia and the Defendant agreed to transfer the case to Taylor County, West Virginia. [App. Vol. 1, pgs. 28-33.] On September 26, 2023, Ms. Reed entered an Alford Plea to one (1) count of voluntary manslaughter. The trial court accepted Ms. Reed's plea. [App. Vol. 1, pgs. 34-53.] The trial court further ordered Ms. Reed to remain on home incarceration until the sentencing hearing. The Court scheduled the sentencing hearing on March 28, 2024. At the hearing, Ms. Reed moved to have her time spent on home incarceration credited to her sentence and for an alternative sentence. The trial court denied both motions, and sentenced Ms. Reed to fifteen (15) years. [App. Vol. 1, pgs. 133-136.]

¹ In addition, Justice Hutchinson authored a concurring opinion in which he further opined that the trial court should allow Mr. Fagons' previous romantic partner to testify about the physical, emotional, verbal and sexual abuse she suffered from Mr. Fagons.

Statement of Facts

Ms. Reed met Mr. Fagons while they attended Philip Barbour High School in Barbour County, West Virginia. Ms. Reed was sixteen (16) years old and Mr. Fagons was nineteen (19) or twenty (20), and a second-year senior, at the time they met. Ms. Reed began to tutor Mr. Fagons, and a sexual relationship began shortly thereafter. After discovering that Mr. Fagons had impregnated another girl, Ms. Reed ended the relationship. [App. Vol. 2, pgs. 231-232.]

Ms. Reed and Mr. Fagons reconnected in January, 2016, and began dating shortly thereafter. [App. Vol. 2, pg. 244.] They moved in together in May, 2016 and, Ms. Reed, who had saved a significant amount of money, began to use that money to pay rent, utilities, Mr. Fagons' court fines and Mr. Fagons' outstanding child support. [App. Vol. 2, pgs. 247-249;] Ms. Reed quickly ran out of the money she had saved, and could no longer afford to live in their apartment. As such, they moved into an apartment on a farm owned by Ms. Reed's grandparents for which they were not charged rent. [App. Vol. 2, pgs. 250-251.] Prior to moving into the farm apartment, Ms. Reed and Mr. Fagons got married. [App. Vol. 2, pg. 251.]

During the course of their marriage, Mr. Fagons began to abuse Ms. Reed on a regular basis. Mr. Fagons established a routine for abusing Ms. Reed. It would start when he would get mad about something as insignificant as Ms. Reed forgetting to lock a door. Mr. Fagons would physically abuse Ms. Reed and many times would rape her. If Ms. Reed attempted to fight back, Mr. Fagons would call Ms. Reed's mother and tell her that Carli was being crazy again. Ms. Reed began to believe that her mother was on Mr. Fagons' side and that her mother thought she was crazy.

On August 15, 2019, after arriving at work at the FBI, Ms. Reed began to receive calls from Mr. Fagons asking her to call his work and tell his supervisors that there was a family emergency and that he needed to come home. Mr. Fagons asked her to make the calls because he was assigned to the "tower," and didn't like working there. Mr. Fagons was also concerned at work because he was the subject of a sexual harassment complaint. Ms. Reed and Mr. Fagons continued to text each other throughout the morning and into Ms. Reed's lunch break. Ms. Reed became so upset that she decided to leave work. After leaving work, Ms. Reed called Mr. Fagons to tell him that she left work because if she didn't call him, she would likely suffer consequences. The consequences she would suffer would include a beating and possibly rape. After speaking to Ms. Reed, Mr. Fagons decided to leave work as well. [App. Vol. 2, pgs. 214-219.]

When Mr. Fagons got home, Mr. Fagons and Ms. Reed went into the bedroom and they talked about getting a divorce. Mr. Fagons seemed to be in favor of getting a divorce until he learned that Ms. Reed would not continue to pay for a car for him to use, his insurance or any of his other bills. Mr. Fagons became angry, stated that he did not want to talk about the divorce anymore and wanted to take a nap. Mr. Fagons asked Ms. Reed to lay down with him, she refused and went into the living room. [App. Vol. 2, pgs. 221-223.]

After a period of time, Ms. Reed returned to the bedroom, and Mr. Fagons stated that he wanted to go forward with the divorce. Ms. Reed, who had previously been treated for suicidal ideations and was having suicidal thoughts on that day, decided to kill herself. [App. Vol. 2, pgs. 223; 226.] Ms. Reed reached over and grabbed Mr. Fagons' gun which he kept on the nightstand. Ms. Reed grabbed the holster of the gun with her left hand and withdrew the gun from the holster with her right hand. As she was pulling the gun out of the holster, Ms. Reed shut her eyes, the gun went off and Mr. Fagons was struck in the head. [App. Vol. 2, pg. 226.]

Ms. Reed was disoriented after the gun went off, and walked out into the living room. After noticing that Mr. Fagons was silent, Ms. Reed returned to the bedroom to check on him. While checking on Mr. Fagons, Ms. Reed saw Mr. Fagons' phone and noticed that he had been texting another girl. Ms. Reed bent down to pick up the phone, shook Mr. Fagons and then saw that blood was coming out of Mr. Fagons ear. Ms. Reed did not know what to do, realized her mother, Stephanie Reed, would know what to do, and left to get her mother who lived about five (5) minutes away. [App. Vol. 2, pgs. 226-228.]

Procedural History

On September 24, 2020, after a seven (7) day trial, Ms. Reed was convicted of second-degree murder. Ms. Reed appealed her conviction to the West Virginia Supreme Court of Appeals, in which she asserted a number of assignments of error including: 1) failure of the trial court to provide a jury instruction on the defense of accident; 2) the jury instruction on the defense of battered woman's syndrome was erroneous; 3) the trial court's denial of Petitioner's motion *in limine* to preclude the introduction of certain body camera footage; 4) the trial court's granting of the State's Motion to Bifurcate the trial; 5) the trial court's denial of Petitioner's Notice of Intent to Use and Motion to Admit Rule 404(b) evidence in which Petitioner sought to introduce evidence of Mr. Fagons' abuse of previous romantic partners; 6) the trial court's finding that the State failed to "open the door" to allow evidence of Mr. Fagons' past abuse of romantic partners; 7) the State violated the Petitioner's right to due process by failing to provide transcripts from previous hearings in a timely manner; and 8) the Petitioner's right to due process was violated by the trial court entering Orders after the Petitioner's Notice of Intent to Appeal was filed. On October 17, 2022, the West Virginia Supreme Court of Appeals entered its decision in which it overturned the Petitioner's conviction and sentence on the basis that the trial court committed reversible error in

failing to provide a jury instruction on the defense theory of accident. *See State of West Virginia v. Carli Renae Reed, Case No. 21-0227 (memorandum opinion)*. Pursuant to the Court's decision, the case was remanded to the Circuit Court of Barbour County, West Virginia for a new trial.

On November 16, 2022, the Petitioner filed a Motion to Admit the Petitioner to Bail, which was opposed by the State of West Virginia. On December 20, 2022, the trial court entered an Order granting the Petitioner's motion to be admitted to bail, and set her bond at nine hundred thousand dollars (\$900,000.00) cash or surety. In addition, if the Petitioner was able to post bond, she would be subject to the trial court's standard terms and conditions of bond set forth in the Arraignment Order, dated June 16, 2020, be placed under the supervision of the 19th Judicial Circuit Probation Office, and be placed on home confinement with electronic monitoring. [App. Vol. 1, pgs. 1-5.]

On December 22, 2022, the Petitioner was able to post bond. [App. Vol. 1, pg. 25.] Upon release, Ms. Reed reported to the Barbour County Sheriff's Office. While at the Sheriff's office, Ms. Reed received her home electronic monitoring device and was required to agree to and sign the Rules and Regulations of Probation/Bond Supervision, Loss of Firearms Privilege Notification, and the Home Incarceration Electronic Monitoring Program Agreement². [App. Vol. 1, pgs. 11-23.]

Under the terms of her home confinement, Ms. Reed was required to live with her parents at their residence in Barbour County, West Virginia. If she went outside, she could only be six (6) feet from the front porch. She was only allowed to leave to the residence to meet with her attorneys and to travel to medical appointments. Ms. Reed was also allowed to attend one (1) religious

² On December 22, 2022, the Barbour County Home Confinement Officer was Sarah Parks. Mrs. Parks passed away in February, 2023 and was replaced as Home Confinement Officer by Deputy Gunnar Kennedy. Deputy Kennedy required Ms. Reed to agree to and sign additional documents that set conditions on home incarceration.

service, which was a Sunday morning service, per week.³ [App. Vol. 1, pg. 142.] Under the usual terms and condition of home incarceration in Barbour County, West Virginia, a defendant is allowed a five (5) hour period every Wednesday in which to run errands and purchase groceries or any other necessities. In Ms. Reed's case, she was not allowed to have this five (5) hour period in which she could leave the residence.

On April 26, 2023, the State of West Virginia, thorough its special prosecutor, and Ms. Reed entered into a stipulation to move the case from Barbour County, West Virginia to Taylor County, West Virginia, which was approved by the Court on August 7, 2023.⁴ [App. Vol. 1, pgs. 28-33.]

On September 26, 2023, Ms. Reed entered into a Plea Agreement with the State of West Virginia in which she agreed to enter an *Alford Plea* to one (1) count of voluntary manslaughter. [App. Vol. 1, pgs. 34-53.] On September 26, 2023, the trial court accepted the plea agreement, and adjudicated Ms. Reed guilty and ordered that Ms. Reed be convicted of one (1) count of voluntary manslaughter. The trial court further order the Barbour County Probation Office to complete a pre-sentence investigation report, which was completed on November 6, 2023⁵. [App. Vol. 1, pgs. 54-57.]

The trial court held the sentencing hearing on March 28, 2024. At the hearing, Ms. Reed moved to be credited for time spent on home incarceration and further moved for an alternative sentence of home incarceration. [App. Vol. 1, pgs. 71-130] With regard to her motion for

³ Ms. Reed attended Faith Way Baptist Church in Barbour County. Faith Way has at least four (4) services per week.

⁴ The original prosecutor assigned to this matter, Thomas Hoxie, was appointed to the 19th Judicial Circuit to replace retired Judge Alan Moats. Andrew Phillips was appointed to replace Judge Hoxie as the Prosecuting Attorney for Barbour County, West Virginia. Mr. Phillips was deemed to have a conflict and Michael Parker, the Prosecuting Attorney for Randolph County, West Virginia, was appointed as special prosecutor. [App. Vol. 1, pgs. 26-27.]

⁵ On May 29, 2024, the trial court entered an Amended Conviction Order. The Amended Conviction Order did not alter Ms. Reed's sentence or any of the issues present in this appeal. [App. Vol. 1, pgs. 58-61.]

alternative sentence, Ms. Reed presented evidence through Dr. David Clayman, the head of the West Virginia Dangerous Risk Assessment Advisory Board, that she did not pose a risk to commit another violent criminal act and that the West Virginia correctional system could not provide the type of treatment needed by Ms. Reed. The trial court denied Ms. Reed's motion for alternative sentence, and sentenced Ms. Reed to fifteen (15) years. The trial court further denied Ms. Reed's motion to give her credit for time served on home incarceration, both pre-conviction and post-conviction. [App. Vol. 1, pgs. 133-136.]. Ms. Reed filed written objections to the trial court's sentence and to the trial court's denial of her motion for alternative sentence and motion for credit for time served on home incarceration. In addition, Ms. Reed filed objections to the Sentencing Order entered on May 30, 2024. [App. Vol. 2, pgs. 546-559.].

SUMMARY OF ARGUMENT

The trial court made substantial errors in its sentencing of Ms. Reed. The errors made by the court have resulted in Ms. Reed serving an extended sentence and being punished in excess of the sentence allowed for the crime for which she was convicted. In addition, the trial court erred by failing to consider certain rights available to defendants when sentenced and further relied upon an impermissible factor when sentencing Ms. Reed.

The trial court abused its discretion in failing to credit Ms. Reed for time spent on home incarceration post-conviction. The West Virginia Supreme Court of Appeals has consistently held that the requirements of home incarceration set forth in the Home Incarceration Act, specifically W.Va. Code § 62-11B-5 are penal in nature. Ms. Reed, after entering an Alford Plea to one (1) count of voluntary manslaughter, was ordered to remain on home incarceration for approximately six (6) months, before she was sentenced. The restrictions imposed upon Ms. Reed during that approximately six (6) month period met, and in some instances exceeded, the restrictions set forth

in W.Va. Code § 62-11B-5. As such, her time spend on post-conviction home incarceration must be considered penal in nature, and Ms. Reed should be given credit for her time served on post-conviction home incarceration.

The trial court further abused its discretion in failing to give Ms. Reed credit for time spent on home incarceration prior to her conviction. During her pre-trial home incarceration, Ms. Reed was subject to all of the restrictions required by W.Va. Code § 62-11B-5. In some instances, the restrictions to which Ms. Reed was subject were in excess of those set forth in W.Va. Code § 62-11B-5. As the West Virginia Supreme Court of Appeals has held that home incarceration that is subject to the restrictions required by W.Va. Code § 62-11B-5 is penal in nature, it must follow that Ms. Reed's pre-conviction home incarceration was penal in nature as well. The fact that Ms. Reed was not deemed an "offender" under W.Va. Code § 62-11B-3(3), is a distinction without a difference. Ms. Reed's liberties were restricted just as much pre-conviction, as they were post-conviction. As such, she should receive credit for time served on pre-conviction home incarceration.

The trial court also abused its discretion in failing to consider rehabilitation in its sentencing of Ms. Reed. During the sentencing hearing, Ms. Reed presented unopposed testimony that she was not a risk to reoffend. Additionally, Ms. Reed presented unopposed testimony that the West Virginia Division of Corrections and Rehabilitation could not provide the services required by Ms. Reed if she was incarcerated. In failing to consider such unopposed testimony the trial court failed to consider Ms. Reed's right to rehabilitation.

In addition, the trial court used an impermissible factor in sentencing Ms. Reed to fifteen (15) years. As one of the justifications for the sentence of fifteen (15) years, the trial court referenced that Ms. Reed has previously been convicted of second-degree murder. That conviction

was overturned, and the fact that she was previously convicted should have no bearing on her sentence.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner submits that oral argument is necessary upon this appeal under Rule 19 of the West Virginia Rules of Appellate Procedure as this appeal involves issues involving assignments of error in the application of settled law and an unsustainable exercise of discretion by the trial court where the law governing that discretion is settled. In addition, the issues presented in this appeal involve narrow issues of law.

ARGUMENT

- I. Ms. Reed was entitled to credit for the time she served on home incarceration post-conviction. The trial court's failure to give her credit against the sentence imposed was a violation of the Double Jeopardy Clause and the Equal Protection Clause of the West Virginia Constitution.**

At the March 28, 2024 sentencing hearing in this matter, Ms. Reed moved the trial court for credit for time served on post-conviction home incarceration. The trial court denied Ms. Reed's motion and stated that Ms. Reed had been warned at the previous hearing, where her plea agreement was accepted by the trial court, that she may not receive credit for time served on home incarceration. [App. Vol. 1, pgs. 135; 178-179.] However, even though the trial court warned Ms. Reed that she may not receive credit for post-conviction home incarceration, under West Virginia law, the trial court was required to give credit. The trial court's failure to do so, violated Ms. Reed's constitutional right against Double Jeopardy and the Equal Protection Clause of the West Virginia Constitution.

With regard to sentencing orders, the West Virginia Supreme Court of Appeals reviews such sentencing orders under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands. Syl. Pt. 1, in part, *State v. Lucas*, 201 W.Va. 271, 496 S.E. 2d 221 (1997).

A. The period of time spent by Ms. Reed on home incarceration post-conviction was penal in nature.

Post-conviction home incarceration is governed by W.Va. Code §§ 62-11B-1 *et. seq.*, known as the “Home Incarceration Act.” The West Virginia Home Incarceration Act, applies to any adult offenders and to juveniles who have committed a delinquent act that would be a crime if committed by an adult. *See* W.Va. Code § 62-11B-2. The Act defines an “offender” as “any adult convicted of a crime punishable by imprisonment or detention in a county jail or state penitentiary; or a juvenile convicted of a delinquent act that would be a crime punishable by imprisonment or incarceration in a state penitentiary or county jail, if committed by an adult. *See* W.Va. Code § 62-11B-3(3).

Under the Home Incarceration Act, post-conviction home incarceration can be a condition of bail. *See* W.Va. Code § 62-11B-4(a) which provides “[a]s a condition of probation or bail or as an alternative sentence to another form of incarceration for any criminal violation of this code over which a circuit court has jurisdiction, a circuit court may order an offender confined to the offender's home for a period of home confinement.” Further, W.Va. Code § 62-11B-4(b) provides that where home confinement is ordered, the period of home confinement may be continuous or intermittent, as the circuit court orders. However, the aggregate time actually spent in home confinement may not exceed the term of imprisonment or incarceration prescribed by this code for

the offense committed by the offender. *State v. Hughes*, 197 W. Va. 518, 526 476 S.E.2d 189, 197 (1996)

The West Virginia Supreme Court of Appeals has made a number of statements emphasizing the penal nature of home incarceration under W.Va. Code §§ 62-11B-1 *et. seq.* In discussing the West Virginia Home Incarceration Act, the West Virginia Supreme Court of Appeals has stated that the act only applies to post-conviction situations and is penal in nature. *See* Syl. Pt. 3, *State v. Hughes*, 197 W. Va. 518, 476 S.E.2d 189 (1996) stating:

“[d]ue to the penal nature of the Home Confinement Act, West Virginia Code §§ 62-11B-1 to -12 (1993), when a circuit court, in its discretion, orders an offender confined to his home as a condition of bail, the offender must be an adult convicted of a crime punishable by imprisonment or detention in a county jail or state penitentiary or a juvenile adjudicated guilty of a delinquent act that would be a crime punishable by imprisonment or incarceration in the state penitentiary or county jail, if committed by an adult.”

In *State v. Long*, 192 W.Va. 109, 111, 450 S.E. 2d 806, 808 (1994), this Court, in discussing the Home Incarceration Act, and in noting the penal nature stated: “[w]hen the legislature initially adopted the home confinement statute, it said that it was “. . . another form of incarceration . . .” W.Va. Code § 62-11B-4(a), and the entire statutory scheme indicates that home confinement is designed to place substantial restrictions on the offender. A violation of these restrictions results in the offender being subject to incarceration under the penalties prescribed for the crime. W.Va. Code §62-11B-9(b). Additionally, this Court has stated the penal nature of home incarceration is recognized under W.Va. Code § 62-11B-9(b)⁶, as it provides credit for time spent in home confinement towards the

⁶ W.Va. Code § 62-11B-9(b) provides:

If, at any time during the period of home incarceration, there is reasonable cause to believe that a participant sentenced to home incarceration by the circuit court has violated the terms and conditions of the court’s order of

imposition of any sentence following a violation of home confinement. *State v. McGuire*, 207 W.Va. 459, 463, 533 S.E. 2d 685, 689 (2000). The Court has further held that the penal intent of the Home Incarceration Act is reflected by the substantial restrictions enumerated in W.Va. Code § 62-11B-5 that are placed on the offender. *State v. Hughes*, 197 W. Va. at 528, 476 S.E.2d at 199.

B. The terms of Ms. Reed's home incarceration met all the restrictions of W.Va. Code § 62-11B-5.

W.Va. Code § 62-11B-5 provides:

An order for home incarceration of an offender under section four [§ 62-11B-4] of this article is to include, but not be limited to, the following:

- (1) A requirement that the offender be confined to the offender's home at all times except when the offender is:
 - (A) Working at employment approved by the circuit court or magistrate, or traveling to or from approved employment;
 - (B) Unemployed and seeking employment approved for the offender by the circuit court or magistrate;
 - (C) Undergoing medical, psychiatric, mental health treatment, counseling or other treatment programs approved for the offender by the circuit court or magistrate;
 - (D) Attending an educational institution or a program approved for the offender by the circuit court or magistrate;
 - (E) Attending a regularly scheduled religious service at a place of worship;
 - (F) Participating in a community work release or community service program approved for the offender by the circuit court, in circuit court cases; or
 - (G) Engaging in other activities specifically approved for the offender by the circuit court or magistrate.

home incarceration and the participant's participation was imposed as an alternative sentence to another form of incarceration, the participant is subject to the same procedures involving confinement and revocation as would a probationer charged with a violation of the order of home incarceration. Any participant under an order of home incarceration is subject to the same penalty or penalties, upon the circuit court's finding of a violation of the order of home incarceration, as he or she could have received at the initial disposition hearing: Provided, That the participant shall receive credit towards any sentence imposed after a finding of violation for the time spent in home incarceration.

- (2) Notice to the offender of the penalties which may be imposed if the circuit court or magistrate subsequently finds the offender to have violated the terms and conditions in the order of home incarceration.
- (3) A requirement that the offender abide by a schedule, prepared by the probation officer in circuit court cases, or by the supervisor or sheriff in magistrate court cases, specifically setting forth the times when the offender may be absent from the offender's home and the locations the offender is allowed to be during the scheduled absences.
- (4) A requirement that the offender is not to commit another crime during the period of home incarceration ordered by the circuit court or magistrate.
- (5) A requirement that the offender obtain approval from the probation officer or supervisor or sheriff before the offender changes residence or the schedule described in subdivision (3) of this section.
- (6) A requirement that the offender maintain:
 - (A) A working telephone in the offender's home;
 - (B) If ordered by the circuit court or as ordered by the magistrate, an electronic monitoring device in the offender's home, or on the offender's person, or both; and
 - (C) Electric service in the offender's home if use of a monitoring device is ordered by the circuit court or any time home incarceration is ordered by the magistrate.
- (7) A requirement that the offender pay a home incarceration fee set by the circuit court or magistrate. If a magistrate orders home incarceration for an offender, the magistrate shall follow a fee schedule established by the supervising circuit judge in setting the home incarceration fee. The magistrate or circuit judge shall consider the person's ability to pay in determining the imposition and amount of the fee;
- (8) A requirement that the offender pay a fee authorized by the provisions of section four [§ 62-11C-4], article eleven-c of this chapter: Provided, That the magistrate or circuit judge considers the person's ability to pay in determining the imposition and amount of the fee; and
- (9) A requirement that the offender abide by other conditions set by the circuit court or by the magistrate.

In this instance, after accepting the plea deal and adjudicating Ms. Reed guilty of one (1) count of voluntary manslaughter, the trial court did not enter a separate order setting

forth the terms of Ms. Reed's post-conviction home incarceration, but ordered that Ms. Reed was to remain on bond, under the same conditions as her pre-conviction home incarceration, until sentencing.⁷ However, the restrictions placed upon Ms. Reed prior to conviction included all restrictions set forth in W.Va. Code § 62-11B-5, and, in some instances, exceeded the restrictions required by W.Va. Code § 62-11B-5.

When Ms. Reed was admitted to bail, in addition to the bond required by Ms. Reed, Ms. Reed was placed on home incarceration. The trial court, in its order admitting Ms. Reed to bail, provided that if Ms. Reed was able to post bail, she would be subject to the standard terms and conditions of bond set forth in the June 16, 2020 Arraignment Order. In addition, Ms. Reed would be placed on Home Confinement with Electronic Monitoring. [App. Vol. 1, pgs. 1-5.]

Ms. Reed was able to post bond, and in addition to the terms set forth in the Arraignment Order, Ms. Reed was required to agree to and execute a number of other documents that contained the terms and conditions of her home incarceration. Those documents included Rules and Regulations of Home Confinement⁸, Rules and Regulations of Probation/Bond Supervision, Loss of Firearms Privilege Notification and Home Incarceration Electronic Monitoring Program⁹. Ms. Reed was also sent a letter from the

⁷ The Court's Order was made orally at the September 26, 2023 plea hearing, and was reduced to writing in the Court's Conviction Order entered on November 20, 2023. [App. Vol. 1, pgs. 54-57.]

⁸ Initially, the Barbour County Home Incarceration Officer was Sarah Parks. Mrs. Parks passed away during the period of time in which Ms. Reed was on home incarceration. Deputy Gunnar Kennedy replaced Mrs. Parks as the Barbour County Home Incarceration Officer.

⁹ It should be noted that the Home Incarceration Electronic Monitoring Program documents, in setting forth the rules of electronic monitoring, state that Ms. Reed may only go where permitted by the court in accordance with the Home Incarceration Act. [App. Vol. 1, pg. 20.]

home incarceration officer that set further requirements on Ms. Reed's home incarceration. [App. Vol. 1, pgs. 11-23.]

Taken together, the Arraignment Order and all other rules and regulations for the Barbour County Home Incarceration Program to which Ms. Reed was required to follow met all of the requirements and restrictions of W.Va. Code § 62-11B-5. While not specifically addressed in any order of the Court, Ms. Reed was made aware that she was restricted to her parents' residence at all times, except she was allowed to go to medical appointments and to her attorneys' office. With regard to religious services, Ms. Reed attends Faith Way Baptist Church in Barbour County, and during the time of her home incarceration, Faith Way held multiple services each week. The trial court did not allow Ms. Reed to attend all services, but limited her to one Sunday morning service. Additionally, the trial court did not approve Ms. Reed to work outside of her parents' residence.¹⁰ [App. Vol. 1, pg. 142.] Under the usual terms of home incarceration in Barbour County, the defendant is permitted a weekly five (5) hour period of time in which to run errands, get groceries, etc. [App. Vol. 1, pgs. 11 and 23.] Ms. Reed was not provided this weekly period of time, and was required to remain at her parents' residence at all times, except for those reasons listed above. Also, initially, Ms. Reed was not allowed to leave her house to check in with the probation office, but checked in via telephone/text as directed. However, after Deputy Gunnar Kennedy became the Barbour County Home Incarceration Officer, he required Ms. Reed to come to Philippi, WV to report weekly.

¹⁰ However, Ms. Reed was eventually able to obtain employment in which she did not have to leave the residence.

However, she was not granted free time as usually allowed in Barbour County while on home incarceration.

As stated above, Ms. Reed was subject to all of the requirements W.Va. Code § 62-11B-5 during her home incarceration. The Arraignment Order, taken together with all of the other documents Ms. Reed was required to sign before she could be placed on home incarceration included all of the requirements of W.Va. Code § 62-11B-5.

The requirements of W.Va. Code § 62-11B-5 were met as follows:

1. W.Va. Code § 62-11B-5(1)-The restrictions included in W.Va. Code § 62-11B-5(1) were not set out in any order, but were orally relayed to Ms. Reed by the Court and by the Home Incarceration Officer. They were also included in the Home Incarceration Electronic Monitoring Program documents, specifically nos. 18 through 22 and 32, [App. Vol. 1, pgs. 18-22.], Rules and Regulations for Home Confinement, specifically Rule Nos. 1 and 8, [App. Vol. 1, pg. 11.], the Home Confinement Cheat Sheet/Rules, specifically Rule No. 2, [App. Vol. 1, pg. 23.] and Rules and Regulations of Probation/Bond Supervision, specifically Rule No. 19, [App. Vol. 1, pg. 16.];
2. W.Va. Code § 62-11B-5(2)-This restriction was included in the letter sent by Deputy Gunnar Kennedy [App. Vol. 1, pgs. 12-13.] and in the Home Incarceration Electronic Monitoring Program documents, specifically no. 29, [App. Vol. 1, pg. 21.];
3. W.Va. Code § 62-11B-5(3)-This restriction was included in the Home Incarceration Electronic Monitoring Program, specifically Rule Nos. 15 and 18 through 22, [App. Vol. 1, pgs. 20-21.], Rules and Regulations for Home Confinement Nos. 1, 3, 5, 6

and 8, [App. Vol. 1, pg. 11.] the letter from Deputy Gunnar Kennedy, [App. Vol. 1, pgs. 12-13.] and the Home Confinement Cheat Sheet/Rules, specifically Rule Nos. 2, 5 and 6, [App. Vol. 1, pgs. 23.];

4. W.Va. Code § 62-11B-5(4)- This restriction was included in the Arraignment Order, [App. Vol. 1, pgs. 6-10.], Rules and Regulations of Probation/Bond Supervision, specifically Rule No. 1, [App. Vol. 1, pg. 14.] and in the Home Incarceration Electronic Monitoring Program documents, specifically Rule No. 26, [App. Vol. 1, pgs. 21.];
5. W.Va. Code § 62-11B-5(5)- This restriction was included Rules and Regulations of Probation/Bond Supervision, specifically Rule No. 15, [App. Vol. 1, pg. 15.];
6. W.Va. Code § 62-11B-5(6)(a) through W.Va. Code § 62-11B-5(6)(c)-The restriction in W.Va. Code § 62-11B-5(6)(a) is included in Rules and Regulations of Probation/Bond Supervision, specifically Rule No. 9, [App. Vol. 1, pg. 15.] and in the Home Incarceration Electronic Monitoring Program documents, specifically Rule No. 5. [App. Vol. 1, pg. 18.]. The restriction in W.Va. Code § 62-11B-5(6)(b) is included in the Arraignment Order and Home Incarceration Electronic Monitoring Program documents, specifically Rule Nos. 5 through 10. [App. Vol. 1, pgs. 18-19.]; W.Va. Code § 62-11B-5(6)(c) requires that the order contain a provision mandating that the residence at which the defendant is residing during home incarceration has electric service. There were no provision in any document related to Ms. Reed's home incarceration that required electric service. However, it was known that Ms. Reed would be staying at her parents' residence during her home incarceration, and that the residence had electric service.;

7. W.Va. Code § 62-11B-5(7)- The restriction in W.Va. Code § 62-11B-5(7) can be found in the Rules and Regulations for Home Confinement, specifically Rule No. 7, [App. Vol. 1, pg. 11.], the Rules and Regulations of Probation/Bond Supervision, specifically Rule No. 18, [App. Vol. 1, pg. 16.] and Home Incarceration Electronic Monitoring Program documents, specifically Rule Nos. 2, 3 and 4. [App. Vol. 1, pg. 18.];
8. W.Va. Code § 62-11B-5(8)- The restriction in W.Va. Code § 62-11B-5(8) can be found in the Rules and Regulations for Home Confinement, specifically Rule No. 7, [App. Vol. 1, pg. 11.], the Rules and Regulations of Probation/Bond Supervision, specifically Rule No. 18, [App. Vol. 1, pg. 16.] and Home Incarceration Electronic Monitoring Program documents, specifically Rule Nos. 2, 3 and 4. [App. Vol. 1, pg. 18.];
9. W.Va. Code § 62-11B-5(9)- The restriction in W.Va. Code § 62-11B-5(9) can be found in the letter from Deputy Gunnar Kennedy. [App. Vol. 1, pg. 11.] There were no other clauses contained in the documents signed by Ms. Reed that specifically stated that she agreed to abide by other conditions set by the Court. However, the documents she was required to sign before she was admitted to bail were form documents used in every bond or home incarceration matter. Those documents contained numerous other restriction which a defendant would be required to follow that, if they failed to follows, they would be removed from the home incarceration program.

The West Virginia Supreme Court of Appeals, in discussing the issue of an offender placed on home confinement as a condition of post-conviction bail has stated:

[p]ursuant to the provisions of the Home Incarceration Act, West Virginia Code §§ 62-11B-1 to -12 (1997 & Supp. 1999), when an offender is placed on home incarceration as a condition of post-conviction bail, if the terms and conditions imposed upon the offender are set forth fully in the home incarceration order and encompass, at a minimum, the mandatory, statutory requirements enunciated in West Virginia Code § 62-11B-5, then the offender is entitled to receive credit toward any sentence imposed for time spent on home incarceration, whether or not the offender violates the terms and conditions of home incarceration and whether or not the order specifically references the Home Incarceration Act.

See State v. Jedediah C., 240 W.Va. 534, 538, 814 S.E. 2d 197, 201 (2018) *citing State v. McGuire*, 207 W.Va. 459, 533 S.E. 2d 685 (2000). The Court, in *McGuire*, further stated that certain criteria must be met before a determination that home incarceration was imposed by the trial court under the Home Incarceration Act. First, the person upon whom home incarceration was imposed must an offender as defined by the Home Incarceration Act. Second, the Order that imposes the home incarceration must set forth fully and completely the mandatory requirements of W.Va. Code § 62-11B-5. *See State v. McGuire*, 207 W.Va. at 464, 533 S.E. 2d at 690.

In this case, post-conviction, Ms. Reed is an offender, as defined under the Home Incarceration Act, as she had been found guilty of one (1) count of voluntary manslaughter. Additionally, as demonstrated above, even though the restrictions required by W.Va. Code § 62-11B-5, were not contained in a single order, Ms. Reed was subject to those restrictions, and many more, while on home incarceration. The failure of the trial court to include all of its restrictions in a single order is immaterial as to the effect the trial court's actions had on Ms. Reed. Under the home incarceration procedures of Barbour County, all restrictions required under W.Va. Code § 62-11B-5 were imposed on Ms. Reed. As such, under this Court's ruling in *State v. McGuire*, Ms. Reed would be entitled to be credited for time served on home confinement.

C. Failure to give Ms. Reed credit for time spent on home incarceration post-conviction would be a violation of the Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution.

Subsequent to this Court's decision in *State v. McGuire*, the West Virginia Legislature passed W.Va. Code § 62-11B-11(b). W.Va. Code § 62-11B-11(b) provides:

(b) Upon conviction of a person, the circuit court, magistrate court or municipal court may, in its discretion, grant credit for time spent on home incarceration as a condition of bail toward any sentence imposed, if the person is found to have complied with the terms of bail.

However, as discussed above, this Court has found on a number of occasions that home incarceration under the Home Incarceration Act is penal in nature. *See State v. McGuire*, 207 W.Va. at 463, 533 S.E. 2d at 689, and *State v. Hughes*, 197 W. Va. at 528, 476 S.E.2d at 199. In addition, the Legislature has stated, when it adopted the home incarceration act, that home incarceration is another form of incarceration. *See State v. Long*, 192 W.Va. at 111, 450 S.E. 2d at 808. The Legislature's adoption of W.Va. Code § 62-11B-11(b) does not negate the penal nature of the Home Incarceration Act, and any individual who is subject to the restrictions set forth in W.Va. Code 62-11B-5 is entitled to receive credit against any sentence imposed.

The West Virginia Supreme Court of Appeals has long held that the Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution require that credit for time spent in jail, either pre-trial or post-trial shall be credited on an indeterminate sentence where the underlying offense is bailable. *See* Syl. Pt. 1, *Martin v. Leverette*, 161 W.Va. 547, 244 S.E. 2d 39 (1978). This Court later extended the protections set forth in *Martin, supra*, equally to determinative sentences explaining:

[c]onstitutional protections are implicated because a person who is unable to make bail will be incarcerated before trial. If such person is not given credit for the jail

time, a longer period of incarceration will occur than for the person who commits the same offense but is released on pretrial bail.

State ex rel. Roach v. Dietrick, 185 W.Va. 23, 25, 404 S.E.2d 415, 417 (1991).

In *Conner v. Griffith*, 160 W.Va. 680, 238 S.E. 2d 529 (1977), the West Virginia Supreme Court had the opportunity to review a matter in which the Mr. Connor had been convicted of grand larceny and sentenced for one (1) to ten (10) years. After two (2) years, Mr. Connor was placed on parole. His parole was revoked and he was returned to prison to serve the remainder of his sentence without credit for the time he spent on parole. Mr. Connor filed a petition for *habeas corpus* arguing that he should receive credit against his sentence for time spent on parole, and that failure to give him credit violated the Double Jeopardy Clause of the West Virginia Constitution.

In granting Mr. Connor's petition, this Court held that the Double Jeopardy Clause of the West Virginia Constitution, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense. Syl. Pt. 1, *Conner v. Griffith*, 160 W.Va. 680, 238 S.E. 2d 529 (1977). The Court further held the failure to credit on the underlying sentence the time served on parole prior to the revocation of parole constitutes a multiple punishment for the same offense, and is a violation of the Double Jeopardy Clause of the *West Virginia Constitution*, Article III, Section 5. Syl. Pt. 2, *Conner v. Griffith*, 160 W.Va. 680, 238 S.E. 2d 529 (1977).

In support of its holding in *Conner, supra*, this Court looked at the nature of parole and commented that a person place on parole in West Virginia has substantial restraints placed upon his freedom. In addition to the statutory conditions imposed, the Director of the Division of Corrections has promulgated eleven (11) other restrictions to be placed upon parolees. The Court

noted that a breach of these administrative regulations promulgated by the Director of the Division of Corrections can lead to the revocation of parole. *Conner v. Griffith*, 160 W.Va. at 686, 238 S.E. 2d at 532. The Court further noted that time spent serving a sentence does not depend on the manner or location in which it is served, and the fact that some confinements are less restrictive than others should have no bearing in computing time served. In forfeiting time served while on parole, it has the effect of increasing the time of the underlying sentence, and it must be deemed a multiple punishment for the same offense, which would be a violation of the Double Jeopardy Clause. *Conner v. Griffith*, 160 W.Va. at 689, 238 S.E. 2d at 534.

In this case, the conditions placed upon Ms. Reed were in excess of those conditions placed upon a person who is on parole, and as this Court has already found that the restrictions placed upon an offender under W.Va. Code § 62-11B-5 are penal in nature, the failure to give Ms. Reed credit for time served on home incarceration would, under the analysis set forth in *Conner*, violate Ms. Reed's rights under the Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution. While post-conviction home incarceration and parole are substantially different, the fact remains that both place significant restrictions upon an individual's liberty. Since Ms. Reed was sentenced to the maximum allowed for voluntary manslaughter, failing to provide credit for her time spent on post-conviction home incarceration has the effect of extending her sentence which is precluded by the Double Jeopardy Clause of the West Virginia Constitution. As such, Ms. Reed should be given credit for time served on home incarceration post-conviction.

II. The home incarceration to which Ms. Reed was subject pre-conviction, was penal in nature. As such, the time spent on pre-conviction home incarceration should be credited against the sentence imposed.

On December 20, 2022, the trial court entered its order granting Ms. Reed's motion to be admitted to bail. As a condition of her bail, the trial court required a bond in the amount of nine

hundred thousand dollars (\$900,000.00). In addition, the Court placed Ms. Reed on home incarceration as a condition of bail. Ms. Reed was able to post bond, and on December 22, 2022 was released from the Lakin Correctional Center and Jail to restrictive home incarceration at her parent's house. After being released, Ms. Reed remained on pre-conviction home incarceration until September 26, 2023, when her plea agreement was accepted by the trial court. In total, Ms. Reed was subjected to two hundred seventy-eight (278) days in highly restrictive home incarceration.

During the period of time during which Ms. Reed was on home incarceration, she complied with all requirements and conditions of her home incarceration. She did not miss any scheduled appointments, did not fail any drug screens while on home incarceration or fail to follow any direction by the Court or the home confinement officer or the Barbour County Probation Department. [App. Vol. 1, pg. 132.] Additionally, the trial court, on more than one occasion remarked on Ms. Reed's exemplary compliance with the terms of her home incarceration.

During her sentencing hearing, Ms. Reed moved to be granted credit for time spent on pre-conviction home-incarceration. The trial court denied the motion.

With respect to the standard of review of sentencing orders, the West Virginia Supreme Court of Appeals has held that "[t]he Supreme Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." *State v. Jedediah C.*, 240 W.Va. at 536, 814 S.E. 2d at 199 *citing* Syl. Pt. 1, *State v. Lucas*, 201 W.Va. 271, 496 S.E. 2d 221 (1997).

In *State v. Hughes*, the West Virginia Supreme Court of Appeals had the opportunity to discuss the difference between pre-conviction home incarceration and post-conviction home-

incarceration pursuant to the Home Incarceration Act. This Court found that the Home Incarceration Act 'only applies to "offenders," which are defined in the Act as "any adult *convicted of a crime* punishable by imprisonment or detention in a county jail or state penitentiary; or a juvenile convicted of a delinquent act that would be a crime punishable by imprisonment or incarceration in the state penitentiary or county jail, if committed by an adult.' However, as discussed above, this Court has stated that it is well settled under both the Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution, Article III, Sections 10 and 17, that time spent incarcerated, either pre-trial or post-trial, shall be credited to the sentence. *See Martin v. Leverette*, 161 W.Va. at 551, 244 S.E. 2d at 42. The Court has also stated that a defendant has a constitutional right, under the Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution, to credit for time served in jail before conviction against a term of incarceration imposed after conviction. Syl. Pt. 6, *State v. McClain*, 211 W.Va. 61, 561 S.E. 2d 783 (2002). As discussed above, this Court has repeatedly stated that home incarceration pursuant to the restrictions in W.Va. Code §62-11B-5 is penal in nature. *See State v. Hughes*, 197 W. Va. at 528, 476 S.E.2d at 199, *State v. Long*, 192 W.Va. at 111, 450 S.E. 2d at 808 (1994), and *State v. McGuire*, 207 W.Va. at 463, 533 S.E. 2d at 689.

Ms. Reed demonstrated above how the restrictions of her post-conviction home incarcerations met, and sometimes exceeded, the restrictions required by W.Va. Code § 62-11B-5. Since all of the restrictions required by W.Va. Code § 62-11B-5 were placed upon Ms. Reed during her pre-conviction home incarceration, her pre-conviction home incarceration must be considered penal as well. Ms. Reed's pre-conviction home incarceration was effectively the same as home incarceration after a conviction under the Home Incarceration Act. Ms. Reed's personal freedoms have been highly restricted since she was placed on home incarceration. In fact, the

restrictions placed upon Ms. Reed are much more severe than on a person who is out on parole, and as argued above, under *Conner v. Griffith, supra*, a person who is out on parole, violates the terms of their parole and has their parole revoked, is entitled to credit against their sentence for that period of time while on parole. Due to the penal nature of home incarceration subject to the restrictions required under W.Va. Code § 62-11B-5, failure to grant Ms. Reed credit for time spent on such restrictive home incarceration would violate her rights under both the Double Jeopardy Clause and the Equal Protection Clause of the West Virginia Constitution.

III. The trial court erred in failing to consider Ms. Reed's right to rehabilitation during sentencing. In addition, the trial court used an impermissible factor in determining Ms. Reed's sentence.

On March 28, 2024, the trial court sentenced Ms. Reed to fifteen (15) years as a result of her Alford plea to one (1) count of voluntary manslaughter. However, when deciding the sentence imposed, the trial court failed to take into consideration Ms. Reed's right to rehabilitation and specifically that the West Virginia correctional system cannot provide the services needed by Ms. Reed. In addition, the trial court relied upon an impermissible factor in determining Ms. Reed's sentence. [App. Vol. 1, pgs. 133-136.] Based upon the trial court's failure to consider Ms. Reed's right to rehabilitation and its use of an impermissible factor in determining Ms. Reed's sentence, the sentencing order should be vacated.

A. The trial court failed to take into consideration Ms. Reed's right to rehabilitation when determining Ms. Reed's sentence.

During her sentencing hearing, Ms. Reed moved the trial court to sentence her to an alternative sentence of home confinement. Ms. Reed argued, in support of her motion, that the West Virginia Correctional system could not provide her with any additional services, and that the

rehabilitation she required would be best served for her to be placed on home incarceration¹¹, which the trial court denied. [App. Vol. 1, pgs. 71-82.]

The Supreme Court of Appeals reviews sentencing orders, including orders or restitution made in connection with a defendant's sentencing, under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands. *See Syl. Pt. 1, State v. Wasson*, 236 W.Va. 238, 778 S.E. 2d 687 (2015). Sentences imposed by the trial court, if within statutory limits and if not based upon some impermissible factor, are not subject to appellate review. *See Syl. Pt. 4, State v. Goodnight*, 169 W.Va. 366, 287 S.E. 2d 504 (1982) and *Syl. Pt. 3, State v. Georgius*, 225 W.Va. 716, 696 S.E. 2d 18 (2010).

At the March 28, 2024 sentencing hearing, Dr. David Clayman provided testimony on behalf of Ms. Reed. Dr. Clayman is the chairman of the West Virginia Dangerousness Assessment Advisory Board, and is an expert in the fields of clinical and forensic psychology. [App. Vol. 1, pgs. 143-146.]

Prior to testifying at the sentencing hearing, Dr. Clayman¹² interviewed Ms. Reed and subjected her to a number of tests. [App. Vol. 1, pg. 152.] Based upon his examination of Ms. Reed, during the sentencing hearing, Dr. Clayman testified that Ms. Reed was a low risk to re-offend. [App. Vol. 1, pgs. 148; 174.] Dr. Clayman further testified that he had compared the results of Ms. Reed's testing from 2020, which was prior to the first trial, and in 2024 prior to her sentencing hearing. In all markers, especially those related to acute stress, they are now in the normal range, and further that she had no disciplinary issues while she was previously imprisoned.

¹¹ Prior to her sentencing hearing, Ms. Reed had been attending therapy sessions with Sandar Corbett, and was making progress.

¹² Dr. Clayman testified during Ms. Reed's first trial as well. Prior to the trial, Dr. Clayman met with and conducted the same tests on Ms. Reed that he conducted prior to the sentencing hearing.

[App. Vol. 1, pgs. 152-153; 154-157.]. With regard to Ms. Reed's record while incarcerated, Dr. Clayman testified that it was the cleanest he had ever seen. [App. Vol. 1, pgs. 152-153; 156-157.].

Dr. Clayman further testified that there is nothing the West Virginia correctional system can do to help Ms. Reed. During the hearing, the following exchange took place:

Mr. Mullens: Is there anything that the prison system can do to make Carli a better member of society? As she's pled an Alford plea to voluntary manslaughter, so she's coming back into society. Is there anything the prison system can do for her since she complies with the rules - - she was there for three years, four months and seven days and complied with all the rules is she going to get any help or make her a better person in society in prison.

Dr. Clayman: Based upon my review of the record, she has expended all the things that were available, unless she would have an acute problem, if she found out some news from the outside and got depressed, she would be seen, but not because -- most of the people who are coming -- we have counselors, case managers, psychiatrists, psychologists, all working for the prison system at every facility, and the ones we see on medical are ones that have diagnosable, treatable mental health disorders that may impact the way in which they deal with others in the prison system. They may be withdrawn. They may get angry. I'm not going to go into some of the really bad ones that we have, but the ones that act out that are put in seg, which is segregation, because they can't be in the general population. All of those people come on our record, and we have very, very established standards of what we're able to do. And I will tell you, the people in prison right now get

seen more frequently and better in many cases than people in the general population.

She's not on any of our lists, none, and because she's not on a list, there's not treatment there. Treatment there is the people who present with acute problems that we need to try to help to keep them safe in the system and to keep the system safe from them. They do get some going back into the community stuff, psychoeducation, it's not psychotherapy. There's nothing that she doesn't know that (unintelligible) her therapist doesn't know.

From a mental health standpoint, she's not on meds, and she's not acting out, and, thus -- and she doesn't have a defined problem like being a sex offender, a child sex abuser. All those things are off the table, so there's nothing left there, mental health-wise, unless she gets depressed or angry or acts out. [App. Vol. 1, pgs. 158-159.]

Dr. Clayman testified that she would not get any therapy while in prison, and then the therapy would not be weekly. Ms. Reed would need to request the therapy as, since she had no disciplinary issues while in prison, she would not be flagged for needing services. [App. Vol. 1, pgs. 159-160.] Further, it was his recommendation that Ms. Reed needed to be involved in weekly therapy for at least six (6) months and preferably one (1) year. [App. Vol. 1, pgs. 165-168.] Dr. Clayman agreed that he would monitor Ms. Reed's progress if she was granted home confinement. [App. Vol. 1, pg. 169.] Based upon the above, it was Dr. Clayman's opinion that Ms. Reed should be placed upon home confinement so she would be able to continue weekly therapy sessions. [App. Vol. 1, pgs. 174-175.]

The State of West Virginia did not question Dr. Clayman or provide any witnesses to rebut his testimony.

Under W.Va. Code §§ 62-11B-1 *et seq.*, the Court may impose home confinement in any matter except for offenses that require mandatory incarceration. W.Va. Code § 61-2-4 does not require that a person found guilty of voluntary manslaughter be incarcerated in the penitentiary. Further, inmates incarcerated in West Virginia state prisons have a right to rehabilitation established by W. Va. Code §§ 62-13-1 and 62-13-4¹³ (Cum. Supp. 1980), and enforceable through the substantive due process mandate of article 3, section 10 of the West Virginia Constitution. *Cooper v. Gwinn*, 171 W.Va. 245, 298 S.E.2d 781, 789 (1981). In making a determination about sentencing, a court should consider the issue of rehabilitation. *See State v. Redman*, 213 W. Va. 175, 180, 578 S.E.2d 369, 374 (2003).

Dr. Clayman found that Ms. Reed was a low risk to re-offend. Further, it was his opinion that Ms. Reed needed weekly therapy sessions that she would not receive while she was incarcerated. Additionally, Ms. Reed diligently followed all conditions placed upon her during her pre-conviction home confinement. She did not miss any scheduled appointments, did not fail any drug screens while on home confinement or fail to follow any direction by the court, the home confinement officer or the Barbour County Probation Department. Further, Ms. Reed's records from the time she spent at Central Regional Jail and Lakin Correctional Facility demonstrate that she was a model prisoner, had no institutional write-ups, completed a number of programs while incarcerated and assigned the job of teacher's assistant while at Lakin where she assisting other inmates in education classes.

In this case, the trial court did not consider the issue of rehabilitation when sentencing Ms.

¹³ W.Va. Code §§ 62-13-1 and 62-13-4 have been repealed by the West Virginia Legislature. However, the right to rehabilitation for inmates incarcerated in West Virginia can now be found at W.Va. Code §§ 15A-3-1 *et seq.*

Reed. Under the circumstances of this matter, Ms. Reed's further incarceration does not serve to further her rehabilitation, does not deter any future crime and serves no useful purpose. Based upon the above, it would be a waste of the State of West Virginia's resources for Ms. Reed to continue to be imprisoned. Ms. Reed has no previous criminal record¹⁴, she has been found by every expert who has interviewed her to be at little to no risk to re-offend and, further, Ms. Reed has shown that she can comply with the terms of home confinement. Confining Ms. Reed to the penitentiary would be a waste of resources, especially considering the fact that Ms. Reed has access to the financial resources to pay for her home confinement. The trial court's failure to consider rehabilitation in this matter was an abuse of its discretion.

B. The trial court used an impermissible factor in determining Ms. Reed's sentence.

On May 30, 2024, the trial court entered its Sentencing Order in this matter in which the trial court sentenced Ms. Reed to a definite term of fifteen (15) years in the state penitentiary. In Section 6 of the Sentencing Order the trial court sets forth its rationale for the sentence imposed. In paragraph 2 of Section 6, the trial court stated:

“[g]iven the posture of this case, having been remanded for a new trial after a jury verdict to Second Degree Murder, the Court believes that the Defendant already received substantial consideration in the current plea agreement which significantly reduced her possible sentence.” [App. Vol. 1, pg. 135.]

In West Virginia the sentence for a conviction of voluntary manslaughter is set forth in W.Va.

Code § 61-2-4. That section provides:

Voluntary manslaughter shall be punished by a definite term of imprisonment in the penitentiary which is not less than three nor more than fifteen years. A person imprisoned pursuant to the provisions of this section is not eligible for parole prior to having served a minimum of three years of his or her sentence or the minimum

¹⁴ Except for one parking ticket while attending West Virginia University.

period required by the provisions of section thirteen [§ 62-12-13], article twelve, chapter sixty-two, whichever is greater.

However, sentences imposed by the trial court, if within statutory limits and if not based upon some impermissible factor, are not subject to appellate review. *See Syl. Pt. 4, State v. Goodnight*, 169 W.Va. 366, 287 S.E. 2d 504 (1982) and *Syl. Pt. 3, State v. Georgius*, 225 W.Va. 716, 696 S.E. 2d 18 (2010).

In considering sentencing, this Court has stated "[a] trial court has wide discretion in the sources and types of evidence used in determining the kind and extent of punishment to be imposed. And a sentencing court is not restricted by the federal constitution to the information received in open court." *State ex rel. Dunlap v. McBride*, 225 W. Va. 192, 202, 691 S.E.2d 183, 193 (2010). However, in this instance, the trial court used an impermissible factor in determining the sentence for Ms. Reed. In describing what constitutes an impermissible factor, the West Virginia Supreme Court has stated that impermissible factors include race, sex, national origin, creed, religion, and socioeconomic status. Furthermore, Rule 32(b) of the West Virginia Rules of Criminal Procedure provides requirements as to what information must be contained in a PSI report. The rule, in relevant part, provides that the report must contain "information about the defendant's history and characteristics, including information concerning *the defendant's court and criminal record*." W. Va. R. Crim. Proc., R. 32(b)(4) (emphasis added). *See State v. Norman*, No. 21-0374, 2022 W. Va. LEXIS 507, 2022 WL 3931414 (W. Va. Aug. 31, 2022) (memorandum decision).

While the trial court did not rely on any impermissible factor identified in *State v. Norman*, *supra*, the trial court did take into consideration the fact that Ms. Reed had been

convicted of second-degree murder in the first trial. However, that conviction was overturned by this Court due to errors made during the first trial. Including errors which had the potential to greatly affect the outcome of the first trial, specifically, as described in Justice Hutchinson's concurring opinion, the failure to allow Mr. Fagons' previous romantic partners to testify about the rampant abuse suffered at the hands of Mr. Fagons. *See State of West Virginia v. Carli Renae Reed, Case No. 21-0227 (memorandum opinion)*. It was improper to consider, as a factor in the length of Ms. Reed's sentence, her overturned conviction of second-degree murder, and the sentencing order should be vacated.

CONCLUSION

WHEREFORE, the Petitioner, Carli R. Reed, by and through her counsel, Hunter B. Mullens, C. Brian Matko, and Matthew L. Ervin of Mullens & Mullens, PLLC, respectfully pray that the Supreme Court of Appeals of West Virginia find that the Circuit Court of Taylor County, West Virginia committed error during the sentencing phase of the underlying matter, vacate the sentence imposed against Ms. Reed, remand the matter back to the trial court for sentencing, release the Petitioner from incarceration and any such further relief as justice requires.

CARLI RENAE REED

Petitioner, By Counsel

/s/ Hunter B. Mullens

Hunter B. Mullens, WV Bar No. 7620

C. Brian Matko, WV Bar No. 7995

Matthew L. Ervin, WV Bar No. 13197

MULLENS & MULLENS, PLLC

PO Box 95, Philippi, WV 26416

Telephone: (304) 457-9000

Facsimile: (304) 457-9002

hmullens@mullensandmullens.com

bmatko@mullensandmullens.com

mervin@mullensandmullens.com