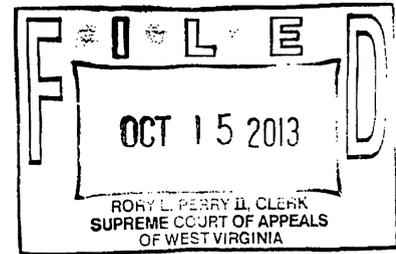


**IN THE WEST VIRGINIA  
SUPREME COURT OF APPEALS**



**STATE OF WEST VIRGINIA Ex rel  
BRYAN D. THOMPSON**  
Petitioner

Vs. Case Number: 13- 1036

**The Honorable Joseph C. Pomponio,  
Judge and Eugene M. Simmons as  
Prosecuting Attorney for Pocahontas  
County, West Virginia**  
Respondents

\*\*\*\*\*

**PETITION FOR WRIT OF PROHIBITION**

\*\*\*\*\*

J. Steven Hunter WVSB # 1826  
Steve Hunter Associates, I.c.  
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**TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF  
APPEALS FOR THE STATE OF WEST VIRGINIA**

**COMES NOW YOUR PETITIONER AND SEEKS A WRIT OF PROHIBITION IN THIS MATTER TO PREVENT THE HONORABLE JOSEPH C. POMPONIO, Jr. JUDGE, OF THE CIRCUIT COURT POCAHONTAS COUNTY AND EUGENE M. SIMMONS, PROSECUTING ATTORNEY FROM PROSECUTING AND HOLDING A TRIAL IN THIS MATTER AND TO DISCHARGE THE PETITIONER FROM CUSTODY AND IN SUPPORT THEREOF SAYS AS FOLLOWS:**

**QUESTION PRESENTED**

**Did the Judge of the Circuit Court of Pocahontas County improperly deny the Petitioner's Motions to Quash and For Specific Performance of a Plea Bargain which would have barred the Prosecuting Attorney from seeking an Indictment on charges dismissed as a result of a Plea Agreement made with his predecessor in office?**

**STATEMENT OF THE CASE**

1. The Petitioner stands indicted for Entry of a Building and Grand Larceny as charged in an indictment of April 2013 term of the Pocahontas Grand Jury signed by Eugene M. Simmons as Prosecuting Attorney for Pocahontas County, West Virginia. Appendix p. 52. The matter has now been set for trial on November 7, 2013. Appendix p 60.
2. The Petitioner had been charged in the Magistrate Court of Pocahontas County with those said charges in case Numbers 11-F-12 and 11-F-13. Appendix p. 45

3. Those Magistrate charges ( which had been bound over to the Circuit Court as a result of a waiver executed by the Petitioner, See Appendix p. 46) were dismissed as part of a plea bargain agreement between the State and the Petitioner and ratified by this court in Case Number 07-F-14 by an Order and Amended Order of the Court in said Case dated July 26, 2012. Appendix pp 40, 41.

4. The written plea bargain dated July 26, 2012 in 07-F-14 was executed and filed. Appendix p 7. This plea was entered after a challenge to the 2007 indictment for denial of speedy trial and after negotiations with the former Prosecuting Attorney to plead in the 2007 matter in return for dismissal of the pending boundover charges from Magistrate Court.

5. Judge Pomponio presided over that plea and agreement. A transcript of the plea hearing is found in the Appendix at pages 21-39. At page 32, page 12, Line 13 of the transcript the court states: "It is Ordered and adjudged the Court accepts the written plea agreement between the State and the Petitioner and has filed the same in the Court Record."

6. The Petitioner waived a presentence report as he had been detained for thirteen (13) months. Appendix p 34, line 15. The court accepted the waiver and sentenced the Mr. Thompson to the State Penitentiary for a term of one to five years, fined him \$1,000.00 and suspended the sentence and placed the Petitioner on probation (for an unspecified term) and required that Mr. Thompson to participate in the

Pocahontas County Day Report Program.<sup>1</sup>

6. As a result of the Plea made in 07-F-14, the Petitioner cannot be restored to a position he was in before the plea agreement. He has been incarcerated for a long period and has been subjected to Home Confinement as a result of his plea on July 26, 2012. Thus, voiding the plea agreement serves him no purpose.

7. The July 26, 2012 Order signed by Judge Pomponio specifically stated: "The pending matters in Pocahontas County, to-wit: 11-F-12 and 11-F-13 having been dismissed upon the States Motion. See Appendix p 40. Likewise he was discharged from further custody on that date.

8. As the court can see from the Circuit Clerks Docket sheet (Appendix pp 1-4) this case has a long and tortured history, be that as it may, Mr. Thompson is entitled to the benefit of the plea agreement. He has violated none of the terms of his and the States agreement.

9. On May 1, 2013, Mr. Thompson by counsel moved to quash the indictment on the grounds that the underlying charges had been dismissed as a result of the Plea Agreement in 07-F-14. Appendix p 57. The State filed a response on May 16, 2013 which basically and erroneously claimed that the prior dismissal was without prejudice since the order was silent. Appendix p 63.

10. A hearing on the said motion was held by Judge Pomponio on June 19,

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<sup>1</sup>He has never been discharged from probation by the court and is now incarcerated for a "violation" of the program. A hearing has been set for November 6, 2013 on the violation. He was placed in custody on September 20, 2013 and has missed critical cancer treatments.

2013. The transcript is found in the Appendix at p 67-73. The court denied the Motion to Quash based on the States argument of the necessity for the words “with prejudice” be in the dismissal Order. Appendix p.72. This was clear error.

11. Counsel filed a renewed Motion to Quash along with a Motion for Specific Performance of the Plea Agreement on July 15, 2013. Appendix p 75. This Motion clearly pointed out to the Court this courts holding in Brooks v Narrick 161, W.Va.415, 243 S.E.2d 841 (W.Va. 1978) and provided a copy of the opinion to the court. “An elementary principle of our criminal law is that when an agreement between a Prosecuting Attorney and a Defendant has been entered by the court, the agreement should ordinarily be upheld if the defendant has fulfilled his part of the plea agreement.”

The court further stated that “the Courts treat such promises as pledges of the public faith.” citing Commonwealth v. St. John 173 Mass.,566,569; 54 N.E.254 and United States v Carter 454 F.2d 426 (Fourth Circuit) cert denied 417 U.S. 933, 94 S. Ct. 2646, 41 L. Ed 2<sup>nd</sup> 237 (1972) and U.S. v Paiva, 294 F. Supp. 742 (D.D.C. 1969).

12. Again the State filed a reply citing the prior erroneous ruling of the Court denying the Petitioners Motion to Quash. See Appendix p 79. Further stating that “... such case law had no binding or persuasive authority in this matter as a result of the fact that the four cases relied upon in the second and third paragraphs of paragraph Number 5 are not from this jurisdiction.” Certainly the United States Supreme Courts denial of Certiorari in Carter should have had some influence with Judge Pomponio but apparently did not as he once again denied the Motion at a July

24, 2013 hearing. See transcript at Appendix pp 82-91.

13. At that hearing, Counsel had asked Judge Pomponio to take the stand to vouch a record of the approval of the Plea Agreement in the 2007 case. Mr Martin<sup>2</sup> again improperly and erroneously argued to the Circuit Court that “with prejudice” are the “...magical words which must attach to any agreement to dismiss charges.” Appendix p 86. Trans p 5, lines 2-5. Counsel pointed to the court that the State’s Counsel had not cited one case supporting his arguments. Appendix p 87. Tran. p 6, lines 11-13.

14. Judge Pomponio once again denied the Motion for Specific Performance but has now gone one step further, thus this application. He stated as follows:

**THE COURT: Okay. The Court is going to deny the motion for specific performance, in this matter, and I find that I previously ruled that the plea agreement did not contain the term, with prejudice, as to these matters, and so, therefore, I'm going to - - that's the ruling of the Court.**

**You know, I think that's something the Supreme Court needs to look at. There doesn't seem to be much case law on it. So you may be right. . . .**

Appendix p 89, Trans. P 8. Lines 1-8

**. . . THE COURT: I'll continue the trial. I'll take it off the trial docket until such time as - - of course, you need to get that filed quickly and move**

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<sup>2</sup>Robert P. Martin is the Assistant Prosecuting Attorney for Pocahontas County and has made all the oral arguments on behalf of the State.

that to the Supreme Court. Okay? . . . Appendix p 89, Trans. P 8.

Lines 13-15

**THE COURT:**        *The Court accepts the waiver and takes this matter off the trial docket and it will not be set until such time as this matter has been resolved by the Supreme Court...*Appendix p 90, Trans. P

9. Lines 4-6

**STATEMENT REGARDING ORAL  
ARGUMENT AND DECISION**

Counsel submits that the facts and legal arguments are adequately presented in the Petition and Appendix, however feels the decisional process would be significantly aided by oral argument.

**ARGUMENT**

The law allowing prohibition in this matter is summarized in *State W. Va. Ex Rel. the Lincoln Journal Inc. v. Husted*, 228 W.Va. 17, 716 S.E.2d 507, 39 Media L. Rep. 1721 (W.Va., 2011) at Syllabus Point 4. “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.** [Emphasis Supplied] Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).” Syllabus Point 2, *State ex rel. Weirton Med. Ctr. v. Mazzone*, 214 W.Va. 146, 587 S.E.2d 122 (2002)

We are at this juncture at the invitation of Judge Pomponio, however Counsel would have sought just this writ as the rulings made by the Circuit Court in that the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; the lower tribunal's order is clearly erroneous as a matter of law and the lower tribunal's orders manifest persistent disregard for both procedural or substantive law.

The Circuit Court has disregarded the clear West Virginia law on this issue as found in *Brooks v Narrick*, 161 W.Va. 415, 243 S.E.2d 841 (W.Va., 1978). The court therein stated citing *State v. Ward* 112 W. Va. 552, 165 S.E. 2d 803 (1932) “An elementary principle of our criminal law is that when an agreement between a Prosecuting Attorney and a Defendant has been entered by the court, the agreement should

ordinarily be upheld if the defendant has fulfilled his part of the plea agreement.”[Emphasis Supplied]

This court further stated that “the Courts treat such promises as pledges of the public faith.” [Emphasis Supplied] citing Commonwealth v. St. John 173 Mass.,566,569; 54 N.E.254 and United States v Carter 454 F.2d 426 (Fourth Circuit) cert denied 417 U.S. 933, 94 S. Ct. 2646, 41 L. Ed 2<sup>nd</sup> 237 (1972 and U.S. v Paiva, 294 F. Supp 742 (D.D.C. 1969)

In looking at a withdrawal of a guilty plea the court in Brooks, infra. said that the court was powerless to restore defendant to his position before the plea bargain was entered due to his term of imprisonment. Citing: Jones v. Commonwealth, 217 Va.248, 227 S.E. 2d 701 (1976)

Mr. Thompson cannot be restored to the time he has spent in Jail nor on home confinement and thus is entitled to specific performance of the plea bargain he made in case number 07-F-14 on July 26, 2012. He has kept his end of the bargain.

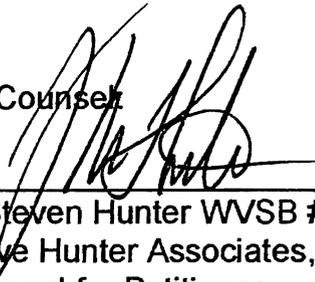
He should not be held on bond for this charge and caused to bear the time, expense and burdens of a trial. He is entitled to his bargain. He should not have to have a trial and then appeal any adverse verdict to address the points raised herein.

### CONCLUSION

Wherefore, the Petitioner seeks a Writ of Prohibition directed to Honorable Joseph C. Pomponio, Judge and Eugene M. Simmons, Prosecuting Attorney to show cause, if any they can, why a Writ of Prohibition should not issue to quash the indictment and discharge your Petitioner from custody forthwith.

Respectfully submitted this the October 9, 2013

By Counsel



J. Steven Hunter WVSB # 1826  
Steve Hunter Associates, I.c.  
Counsel for Petitioner  
209 North Court Street  
Lewisburg, WV 24901  
(304) 645-4622

Bryan D. Thompson

STATE OF WEST VIRGINIA,  
COUNTY OF RANDOLPH, TO-WIT:

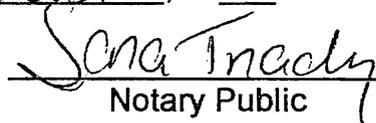
Bryan D. Thompson, being first duly sworn, upon his oath doth depose and say in Randolph County, West Virginia, on this date, that he is the petitioner named in the Petition for Writ of Prohibition appended hereto, and that the facts and allegations therein contained are true to the best of his knowledge, information and belief, and that where they are so stated to be upon belief, he believes them to be true.

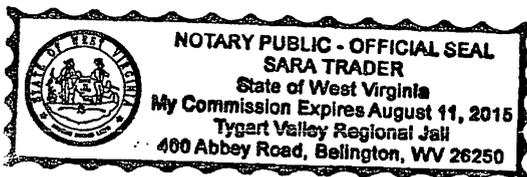
  
Bryan D. Thompson 10/11/13

Taken, subscribed and sworn to before the undersigned Notary Public in and for the county and state aforesaid, on this 11 day October, 2013

My commission expires the 11 day of August, 2015.

(SEAL)

  
Notary Public



CERTIFICATE OF SERVICE

I, J. Steven Hunter, counsel for the Petitioner do hereby certify that a true and exact copy of the foregoing **Application for Writ of Prohibition and Appendix** was served upon the parties by mailing a copy of the same, postage prepaid, or by hand delivery to

Honorable Joseph C. Pomponio,  
Judge        11<sup>th</sup> Judicial Circuit  
Greenbrier County Courthouse  
Lewisburg, WV 24901

Eugene M. Simmons, Esq  
Prosecuting Attorney  
Pocahontas County Courthouse  
Marlinton, WV 24954

on the 15<sup>th</sup> day of October, 2012

  
\_\_\_\_\_  
J. STEVE HUNTER