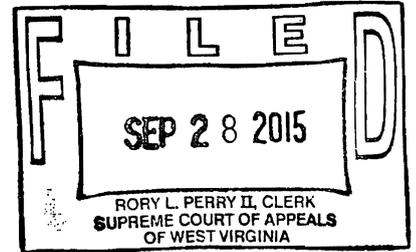


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

STATE OF WEST VIRGINIA EX REL. MARK A. SORSAIA,  
PUTNAM COUNTY PROSECUTING ATTORNEY

Petitioner



v.

Case No.

HONORABLE PHILLIP M. STOWERS,  
CIRCUIT JUDGE FOR THE TWENTY-NINTH JUDICIAL CIRCUIT,  
PUTNAM COUNTY

Respondent

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**WRIT OF PROHIBITION**

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## **QUESTION PRESENTED**

The issue in this case is: Did Respondent err in applying State ex rel. Stiltner v. Harshbarger, 296 S.E.2d 861, which requires the accused to be brought to trial within one year of the date the warrant is issued in magistrate court if the Defendant voluntarily waived his rights to have the misdemeanors tried in magistrate court and allowed them to be transferred to the jurisdiction of the circuit court?

## **STATEMENT OF THE CASE**

A warrant for Caleb Toparis (hereinafter referred to as "defendant") was issued by Putnam County Magistrate Linda Hunt on April 24, 2015 for the felony offense of Unlawful Assault and the misdemeanor offenses of Domestic Assault and Domestic Battery. (See Appendix Exhibit B) Defendant presented to the Logan County magistrate court on April 25, 2015 upon learning of said warrant. A preliminary hearing was held in the Putnam County Magistrate Court on May 9, 2014, where the felony of Unlawful Assault was bound over to the grand jury. Also at the preliminary hearing, Defendant executed a motion to transfer the remaining misdemeanors included in the warrant to the jurisdiction of the Circuit Court of Putnam County. (See Appendix Exhibit C)

Months later, defense counsel filed a motion with the circuit court to conduct a deposition with the alleged victim, A'Lee Miller, to see if she wanted to pursue charges against defendant. A hearing was held before Circuit Court Judge Joseph Reeder on July 18, 2014. The State of West Virginia (hereinafter referred to as "Petitioner") objected to the defendant's motion arguing that it was premature since no indictment or information had been filed on the case. The court denied the motion. (See Appendix Exhibit D) Approximately one month later and despite a no contact order in place between he and the alleged victim, Defendant had A'Lee Miller signed an affidavit prepared by defense counsel indicating that she did not wish to pursue the criminal matter against Defendant. Defense counsel provided a copy of the affidavit to Petitioner. (See Appendix Exhibit I)

On February 27, 2015, the Petitioner filed an Information in the Circuit Court of Putnam County charging Defendant with the misdemeanor offenses of Domestic

Assault and Domestic Battery. (See Appendix Exhibit G) The parties appeared for a status hearing on March 27, 2015 and a pretrial motions hearing on May 1, 2015. (See Appendix Exhibit H)

At the pretrial, Defendant moved for the dismissal of the information on the grounds that his speedy trial rights were violated in that he was not tried on the misdemeanors within one year of the date the warrant was issued, pursuant to State ex rel. Stiltner v. Harshbarger, 296 S.E. 2d 816, 863. (See Appendix Exhibits E,F, H) Petitioner argued that although the Defendant was charged in the information with misdemeanors, Stiltner was distinguishable because it applied only to warrants for misdemeanors that remain in magistrate courts. In this case, Defendant voluntarily waived the jurisdiction of the misdemeanors over to the circuit court along with the felony boundover. (See Appendix Exhibit C) At that time, the Honorable Phillip M. Stowers (hereinafter referred to as "Respondent") took that motion under advisement.

Defendant's second portion of his Motion to Dismiss was based on Petitioner's failure to "pursue justice," because Petitioner insisted on going forward with the prosecution of the case after the defendant submitted the alleged victim's affidavit. That motion was summarily dismissed at the pretrial hearing by Respondent. Defendant's third ground for dismissal was that Petitioner would violate the Confrontation Clause if it were to proceed to trial without the alleged victim. Petitioner objected to that motion as the issue was unripe at the pretrial hearing. That portion of the motion was also dismissed at that time by Respondent, with leave to renew the objection if, in fact, the alleged victim failed to appear at trial. The trial was set for June 8, 2015.

Respondent granted Defendant's motion to dismiss the information, and dismissed the case with prejudice on June 4, 2015. (See Appendix Exhibit A) In a written order, Respondent ruled that Petitioner violated the defendant's speedy trial rights and prohibited Petitioner from further trying the case on the merits. Petitioner is seeking this Honorable Court to reverse the Respondent's ruling and to remand the case back to the circuit court for further proceedings.

## SUMMARY OF ARGUMENT

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, the Supreme Court examines (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. Although all five factors need not be satisfied, the Court indicates that it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight. See State ex rel. Callahan v. Santucci, 210 W. Va. 483, 557 S.E.2d 890 (2001).

The issue in this case is: Did Respondent err in applying State ex rel. Stiltner v. Harshbarger, 296 S.E.2d 861, which requires the accused to be brought to trial within one year of the date the warrant is issued in magistrate court if the Defendant voluntarily waived his rights to have the misdemeanors tried in magistrate court and allowed them to be transferred to the jurisdiction of the circuit court?

This case requires review by this Court because it could have a widespread effect on misdemeanor counts that are included in grand jury indictments of felony cases or misdemeanors that are filed in the original jurisdiction of the circuit courts. Even though the prosecution may abide by the statute of limitations by filing an

information or by taking the misdemeanors before a grand jury within one year of the criminal event, Respondent's ruling would dictate that the case be tried within one year of the issuance of the arrest warrant in magistrate court despite the voluntary waiver a defendant executes to transfer jurisdiction from the magistrate to the circuit court.

**STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Because the facts and legal arguments can be adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument, oral argument under Rev. R.A.P. 18(a)(3) is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

## ARGUMENT

### A. STANDARD OF REVIEW

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, the Supreme Court examines (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; 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. See State ex rel. Callahan v. Santucci, 210 W. Va. 483, 557 S.E.2d 890 (2001).

In this particular case, Petitioner argues that it has no other means to obtain the desired relief because direct appeal is not an option for Petitioner unless it can be shown that the information (being synonymous with an indictment) filed in this case cannot be considered "bad or insufficient" within its four corners. Because of its dismissal for the constitutional violation of defendant's speedy trial, this Court has previously held that a State's right to appeal an adverse judgment in a criminal matter for an indictment to be "bad or insufficient" cannot be enlarged to encompass a situation in which the trial court ruled that the prosecution failed to prosecute indictments within

the three-term rule, which is the constitutional test for speedy trial in circuit court. See State v. Adkins, 388 S.E. 316, 182 W.Va. 443 (1989).

Under the second prong of Adkins, *supra*, Petitioner indicates that it has no other option than to file a writ of prohibition since Respondent dismissed the information and the case with prejudice. Since the dismissal was based on a constitutional ground and not on a manifest defect in the information itself, direct appeal on this issue is not available to Petitioner.

To fulfill the third prong of Adkins, *supra*, Petitioner will argue and identify with more specificity further in this argument section. However, Petitioner argues that Respondent clearly erred by applying precedent reserved for the speedy trial rights for a misdemeanor tried in magistrate court rather than acknowledging that the misdemeanors in this particular case had been knowingly waived to circuit court and speedy trial rules in circuit court now applied.

The fourth prong, whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law, is satisfied because the precedent set by the dismissal of this information could have a widespread effect on misdemeanor counts that are included in grand jury indictments of felony cases or misdemeanors that are filed in the original jurisdiction of the circuit courts. Even though the prosecution may abide by the statute of limitations by filing an information or by taking the misdemeanors before a grand jury within one year of the criminal event, Respondent's ruling would demand that the case be tried within one year

of the issuance of the arrest warrant in magistrate court despite the voluntary waiver a defendant executes to transfer jurisdiction from the magistrate to the circuit court.

And lastly, does the lower tribunal's order raise new and important problems or issues of law of first impression? This seems to be a case of first impression since there is no case law that specifically addresses this particular situation of a circuit court dismissing an information because a defendant was not tried within the speedy trial time assigned to misdemeanors in magistrate court.

B. DEFENDANT KNOWINGLY WAIVED MISDEMEANORS TO THE  
JURISDICTION OF THE CIRCUIT COURT

According to Rule 7(a) of the West Virginia Rules of Criminal Procedure, any misdemeanor may be prosecuted by indictment or information. An information may be filed without leave of court. Rule 7 governs indictments and informations interchangeably, in that the procedures are the same in arguing challenges to an indictment as well as to an information. In this case, an information was filed in Circuit Court to allow for original jurisdiction over the misdemeanor in this case.

On May 9, 2014, the Defendant executed a Motion to Transfer to Circuit Court after he had a preliminary hearing. (See Appendix Exhibit C) In the language of the motion in which both Defendant and his counsel signed, Defendant acknowledged with his signature that he waived his right to trial on the accompanying misdemeanors of Domestic Assault and Domestic Battery. The waiver also stated:

“ . . . the defendant having expressed his . . . desire to waive the right to a magistrate court trial and instead wishing to have his . . . misdemeanor case go

directly to the circuit court for hearing and resolution, the defendant hereby moves that his . . . case be heard in the circuit court rather than in magistrate court.”

The magistrate further signed the bottom of the form which effectuated a transfer to the circuit court, not a dismissal.

In United States v. Olano, 507 U.S. 725, 113 S.Ct. 1770, 1778, 123 L.Ed.2d 508 (1993), the Supreme Court also made specific distinction between “waiver” of a right and “forfeiture” of that right. “Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right . . . Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake . . . See id at 733-34, 113 S. Ct. 1770, 1777, 123 L. Ed. 2d 508.

This Court held in In State v. Day, 225 W. Va. 794, 800, 696 S.E.2d 310, 316 (2010) that “[w]hen there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined.” See also Syl. Pt. 8, in part, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995). Syl. Pt. 1, State v. White, 223 W.Va. 527, 528, 678 S.E.2d 33, 34 (2009). Indeed, ‘to establish waiver there must be evidence demonstrating that a party has intentionally relinquished a known right.’ See Potesta v. U.S. Fidelity & Guar. Co., 202 W.Va. 308, 315, 504 S.E.2d 135, 142 (1998).

A defendant charged in a magistrate court with a misdemeanor offense within the jurisdiction of that court has a right to a trial on the merits in that court. *W.Va.Code*, 50-5-7 (1976). However, the Court in *State v. Walters*, 186 W. Va. 169, 170, 411 S.E.2d 688, 689 (1991) held that under *W.Va.Code*, 50-4-6, a defendant may expressly waive his or her right to a trial in the magistrate court, and it has been held that if the magistrate court consents to relinquishing its jurisdiction, the case may be transferred to the circuit court, which has concurrent jurisdiction. See also *State ex rel. Burdette v. Scott*, 163 W.Va. 705, 710 n. 5, 259 S.E.2d 626, 630 n. 5 (1979), *State ex rel. Tate v. Bailey*, 166 W.Va. 397, 274 S.E.2d 519 (1981). See generally *W.Va.Mag.Ct.R.Crim.P.* 5(b) (recognizing waiver by defendant of trial in magistrate court).

The mere fact that the misdemeanors were filed directly with the circuit court by way of information does not automatically transfer the case back down to magistrate court for disposition. And so the argument remains that once the case is transferred to the jurisdiction of the circuit court, defendant cannot demand the speedy trial rules reserved for magistrate court should control in this case. The court indicated in *State v. Ross*, No. 12-0441, 2013 WL 2462166, at \*4 (W. Va. June 7, 2013),

“Even though *W.Va.Code* [§ ] 50–5–7 (1976), gives exclusive jurisdiction to a magistrate court once the defendant is charged by warrant in that court with an offense within its jurisdiction, this does not mean that the circuit court has no initial jurisdiction over misdemeanor offenses. Concurrent jurisdiction still exists under Article VIII, Section 6 of the *West Virginia Constitution*, and *Code* [§ ] 51–2–2 (1978).” See also syllabus Point 3, *State ex rel. Burdette v. Scott*, 163 W.Va.

705, 259 S.E.2d 626 (1979), Syl. Pt. 2, State ex rel. Johnson v. Zakaib, 184 W.Va. 346, 400 S.E.2d 590 (1990).

In Ross, *supra*, the State argued that petitioner did waive the misdemeanors to circuit court, expressly, by including the misdemeanor charges on his waiver of preliminary hearing, as was previously ruled by the circuit court. In addition, in magistrate court on December 6, 2010, at the preliminary hearing, petitioner, with counsel present, waived the preliminary hearing. According to the record, the State made a motion to transfer the misdemeanors to circuit court along with the two felony counts. Petitioner made no objection to the State's motion. The State contended that when the magistrate was waiving its jurisdiction over the misdemeanors to circuit court, petitioner sat on his rights and thereby waived his right to have the misdemeanors tried in magistrate court. This Court agreed and held that the circuit court had jurisdiction over counts five and six of the indictment, in addition to the other counts set forth in the indictment. *See id.*

The defendant in the case at bar went one step further than the defendant in Ross because rather than the State making the motion to transfer the misdemeanors to circuit court, the form this defendant signed signifies that the motion is made by the defendant. In fact, the signature lines for the form indicate that it is upon the motion of the defense that the misdemeanors be transferred to circuit and there is a separate section on the form in which the State indicates it does not object to the motion to transfer to circuit court.

It is impossible to argue that defendant did not give a knowing waiver of his right to try his misdemeanors in magistrate court when he signed the waiver in the presence of his counsel. Also, defendant was put on effective notice in the very style of the motion that the misdemeanors were being transferred to the jurisdiction of the circuit court. At that point, all motions would be argued before the circuit court. Defendant proved his knowledge of the circuit court's jurisdiction when he filed the Motion to Issue Subpoena and had the subsequent hearing in circuit court on that motion in July 2014, prior to the charges being filed by way of information in circuit court in February 2015.

Defendant and Respondent relied heavily on State ex rel. Johnson v. Zakaib, 184 W. Va. 346, 351, 400 S.E.2d 590, 595 (1990) in making the decision to dismiss the defendant's case with prejudice due to speedy trial violations. However, State ex rel. Johnson is decided upon the fact that the State *dismissed* the case and filed another warrant to prosecute the defendant in circuit court .

In State ex rel. Burdette v. Scott, 163 W.Va. 705, 259 S.E.2d 626 (1979), this Court held that once the State elects to bring a misdemeanor charge in magistrate court, a defendant has the right to have his case tried there under W.Va.Code, 50-5-7.3. In Burdette, the defendant was arrested and charged in magistrate court with a misdemeanor offense. After he requested a jury trial in magistrate court, the prosecutor dismissed the charges. Subsequently, the prosecutor presented the case to the grand jury, which indicted the defendant on the same misdemeanor charge. Relying on the earlier case of Harshbarger v. Phipps, 117 W.Va. 134, 184 S.E. 557 (1936), the Court held in Syllabus Point 2 of Burdette that W.Va.Code, 50-5-7 (1976) requires that if a defendant is charged by warrant in the magistrate court with an offense over which that

court has jurisdiction, he is entitled to a trial on the merits in the magistrate court. The reason that rule is distinguishable to the facts in the case *sub judice* is because this defendant waived his right to have the magistrate retain jurisdiction in his case.

The defendant himself and with the advice of his counsel voluntarily waived his right to try these matters in magistrate court and to subject himself to the jurisdiction of the magistrate court.

The Court has previously held where a misdemeanor warrant in a magistrate court is dismissed, further prosecution for the same offense by a new warrant or by an indictment after one year from execution of the original warrant is barred unless the record shows that one or more of the exceptions contained in W.Va.Code, 62-3-21, applies. See *State ex rel. Johnson v. Zakaib*, 184 W. Va. 346, 351, 400 S.E.2d 590, 595 (1990). The distinguishing factor here lies in the procedure. The misdemeanors in this case were not dismissed upon motion of the State, they were transferred to the jurisdiction of the circuit court upon motion of the defendant. The State cannot be accused of forum shopping when the defendant made a knowing, voluntary waiver of his rights to try those misdemeanors in magistrate court.

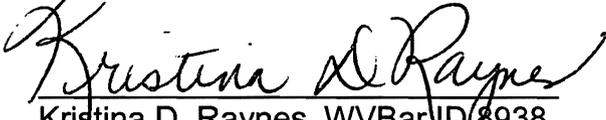
## CONCLUSION

It has been well decided that a case that begins in magistrate court shall remain in magistrate court unless a transfer to circuit court is warranted. In this case, the misdemeanors eventually charged in the information in circuit court were not only waived to circuit court, they were waived upon the Defendant's motion advised by counsel. It is disingenuous to argue that a case that is knowingly waived from magistrate court jurisdiction to that of the circuit court should be able to argue the benefits of the speedy trial rule that applies in magistrate court. Additionally, the widespread effect of this ruling could permit chaos procedurally if in the future a criminal defendant was indicted with both felonies and misdemeanors. Should the prosecution adhere to the statute of limitations in indicting the misdemeanors within one year but past the one hundred twenty (120) days after the issuance of the arrest warrant, it will jeopardize not only the effect of prosecuting by joinder all of the offenses defendants commit, but also the possibility of not relaying a full and complete picture of the case if misdemeanors are dismissed out of the case.

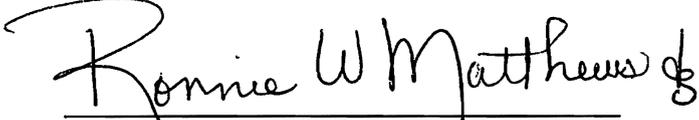
Defendant executed a motion to transfer the misdemeanors along with the felony to circuit court. At that time he availed himself of the jurisdiction of circuit court. The speedy trial rule that applies in circuit court should therefore apply to Defendant. Allowing Defendant now to reap the benefit of the speedy trial rules as they apply to magistrate court obviates the need for any defendant in the future to waive his cases to circuit court. In fact, it obviates the effect of the waiver itself. If the defendant wanted the benefit of applying the speedy trial rules of magistrate court, he had the opportunity to request that his misdemeanors remain in magistrate court.

**VERIFICATION**

State of West Virginia, Putnam County, to-wit: Mark A. Sorsaia (by and through Assistant Prosecuting Attorney, Kristina D. Raynes) the petitioner named in the foregoing Writ of Prohibition, being duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be on information, and that, so far as they are therein stated to be on information, she believes them to be true.

  
\_\_\_\_\_  
Kristina D. Raynes, WVBar ID 8938  
On behalf of  
Petitioner Mark A. Sorsaia  
Putnam County Prosecuting Attorney

Taken, sworn to and subscribed before me this 24<sup>th</sup> day of September, 2015.

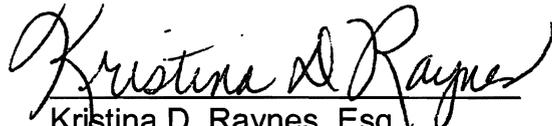
  
\_\_\_\_\_  
Clerk

**CERTIFICATE OF SERVICE**

I hereby certify that on this 25<sup>th</sup> day of September, 2015, true and accurate copies of the foregoing Writ of Prohibition were deposited in the U.S. Mail contained in a postage-paid envelope, addressed to counsel for all other parties to this writ as follows:

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