

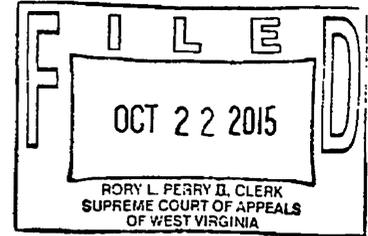
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IN THE SUPREME COURT OF APPEALS

OF WEST VIRGINIA

NO. 15 - 0940



STATE OF WEST VIRGINIA
ex rel. MARK A. SORSAIA,

Petitioner,

v.

THE HONORABLE PHILIP M. STOWERS,
JUDGE OF THE CIRCUIT COURT OF
PUTNAM COUNTY, WEST VIRGINIA,
and CALEB TOPARIS, Defendant Below,

Respondents.

**RESPONDENT'S INTEGRATED RESPONSE TO PETITION
FOR WRIT OF PROHIBITION AND MOTION TO DISMISS**

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**RESPONDENT’S INTEGRATED RESPONSE TO PETITION
FOR WRIT OF PROHIBITION AND MOTION TO DISMISS**

COMES NOW, the Defendant below and Respondent herein, Caleb Toparis, and, in accordance with Rule 16 and Rule 29 of the West Virginia Rules of Appellate Procedure, submits this Integrated Response and moves this Honorable Court for an Order Dismissing the State’s Petition for Writ of Prohibition and in support of said response and motion the Respondent states as follows:

I.

RESPONDENT TOPARIS’ QUESTIONS PRESENTED

1) Whether Petitioner’s Petition for Writ of Prohibition was timely filed and 2) can the Petition for Writ of Prohibition be maintained when it will cause a violation of Respondent’s constitutional speedy trial rights.

II.

STATEMENT OF THE CASE

Counsel for Respondent, Caleb Toparis, submits the following as the factual and procedural basis in this matter:

PROCEDURAL BACKGROUND

On April 24, 2014, Deputy Anthony J. Craig filed a criminal complaint against the Defendant, Caleb Toparis; thereafter, Putnam County Magistrate Linda Hunt issued a warrant for the Defendant's arrest for domestic assault, domestic battery, and unlawful assault, in violation of West Virginia Code §61-2-28(b), §61-2-28(a), and §61-2-9(a), respectively. (A copy of the Criminal Complaint and Arrest Warrant are attached to the Petitioner's Petition for Writ of Prohibition as **Exhibit B**). On April 25, 2014, the Defendant, Caleb Toparis, voluntarily presented to the Logan County Magistrate Court after receiving information that the above warrant had been issued; at that time, the Defendant was arraigned by a Logan County Magistrate.

On May 9, 2014, a preliminary hearing was conducted in the Magistrate Court of Putnam County. Following the preliminary hearing, the Putnam County Magistrate found probable cause to bind the unlawful assault charge over to the Putnam County Grand Jury. Additionally, the Defendant waived his right to be tried on the misdemeanor charges in Magistrate Court to the concurrent jurisdiction of the Circuit Court of Putnam County; however, the Defendant did not waive any speedy trial rights (A copy of the Motion to Transfer to Circuit Court is attached to the Petitioner's Petition for Writ of Prohibition as **Exhibit C**). The three (3) charges, domestic assault, domestic battery, and unlawful assault, were bound over as case 14 – B – 91.

On March 10, 2015, an Order issuing a Summons for the Defendant was issued following the filing of an Information by the Putnam County Prosecuting Attorney on the two (2) misdemeanor charges, domestic assault and domestic battery. The matter was scheduled for a trial in the Circuit Court of Putnam County on June 8, 2015.

On April 23, 2015, the Defendant below and Respondent herein filed a Motion to Dismiss in the Circuit Court of Putnam County (A copy of the Defendant's Motion to Dismiss is attached to the Petitioner's Petition for Writ of Prohibition as **Exhibit E**). Then, on May 1, 2015, a pretrial hearing was conducted. Following the pretrial hearing, the Court denied the Defendant's Motion to Dismiss as it related to "interest of justice;" however, the Court took the Defendant's Motion to Dismiss based upon Constitutional Speed Trial grounds under advisement. Following the hearing on May 1, 2015, and prior to the entry of the Order from the hearing, the Defendant filed a Supplemental Memorandum of Law in Support of Motion to Dismiss on May 8, 2015 (A copy of the Defendant's Supplemental Memorandum of Law is attached to the Petitioner's Petition for Writ of Prohibition as **Exhibit F**).¹

On June 4, 2015, prior to the commencement of the trial on June 8, 2015, the Circuit Court of Putnam County entered an Order dismissing the two misdemeanor charges with prejudice (A copy of the Opinion Order is attached to the Petitioner's Petition for Writ of Prohibition as **Exhibit A**).

Initially, the State of West Virginia, by the Prosecuting Attorney of Putnam County, timely filed a Petition for Appeal on July 1, 2015. Subsequently, Respondent Toparis filed a Motion to

¹It should be noted that the Petitioner herein did *not* file a response to Respondent Toparis' Motion to Dismiss or Supplemental Memorandum of Law in support of Motion to Dismiss; rather, the Petitioner merely argued that the cases cited by Respondent Toparis were distinguishable from the circumstances in the case at hand.

Dismiss. Then, on September 25, 2015, the State of West Virginia, by the Prosecuting Attorney of Putnam County, filed a Motion to Withdraw and Dismiss Petition for Appeal. On that same date, the State of West Virginia, by the Prosecuting Attorney of Putnam County, filed the instant Petition for Writ of Prohibition.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent Toparis agrees with Petitioner in that the matter can be presented and decided adequately in briefs and record on appeal, Respondent Toparis believes that the Court would not benefit from oral argument in accordance with Rule 19 or Rule 20 of the West Virginia Rules Appellate Procedure; rather, Respondent Toparis believes that oral argument is not necessary pursuant to Rule 18(a)(3) of the West Virginia Rules Appellate Procedure.

IV.

SUMMARY OF ARGUMENT

Respondent Toparis submits two (2) arguments in response to Petitioner's Petition for Writ of Prohibition. First, the Petitioner's Petition for Writ of Prohibition was not filed timely and must be dismissed; and Second, the Circuit Court of Putnam County did not err in its Order granting Respondent Toparis' Motion to Dismiss based upon a violation of his constitutional right to a speedy trial in accordance with Article 3, §14 of the Constitution of West Virginia and State ex rel Johnson v. Zakaib, 184 W. Va. 346, 400 S.E.2d 590 (1990)(Syl. Pt. 3)(Citing, State ex rel. Stiltner v. Harshbarger, 170 W.Va. 739, 296 S.E.2d 861 (1982).

Untimeliness of Petition for Writ of Prohibition

The Petitioner initially filed a Petition for Appeal of the Circuit Court's ruling on July 1,

2015 (*See* Docket No. 15–0640). The Petition was filed timely. In turn, Respondent Toparis filed a Motion to Dismiss Petition for Appeal asserting that the State, aside from a Writ of Prohibition, does *not* have a right to appeal wherein the dismissal was based upon a Defendant’s Constitutional right and the State does *not* allege the dismissal of the charge was the result of an indictment/information being “bad or insufficient;” rather, the State appeared to disagree with the lower Court’s ruling. *See*, West Virginia Code §58–5–30 and State ex rel. Parker v. Keadle, 2015 WL 3649611, __ S.E.2d __ (2015).

Seemingly in response to Respondent Toparis’ Motion to Dismiss, the Petitioner filed a Motion to Withdraw and Dismiss appeal on or about September 25, 2015, rather than moving this Court to consider the timely filed appeal as a Petition for Writ of Prohibition. Thus, the Petitioner’s Petition for Writ of Prohibition was not filed until September 25, 2015, the same date the Petitioner moved to withdraw the originally filed appeal, more than 90 days after the Court’s Order was entered – the Order from which the Petitioner now is seeking an extraordinary remedy.

Court’s Order Dismissing Misdemeanors

Next, Respondent Toparis submits that Respondent Stowers did not err in dismissing the misdemeanor information as the State’s failure to bring Respondent Toparis to trial within one (1) year on the misdemeanor charges violated Respondent Toparis’ constitutional speedy trial right for misdemeanors as set forth in *Article 3, Section 14 of the Constitution of West Virginia* and *Amendment VI of the Constitution of the United States* and in State ex rel Johnson v. Zakaib, 184 W. Va. 346, 400 S.E.2d 590 (1990)(Syl. Pt. 3)(*Citing*, State ex rel. Stiltner v. Harshbarger, 170 W. Va. 739, 296 S.E.2d 861 (1982).

Accordingly, even if this Honorable Court does not find the Petition for Writ of Prohibition untimely, the Court must dismiss the Petitioner's Petition for Writ of Prohibition as the granting of the Petition would further violate Respondent Toparis' constitutional speedy trial right. Specifically, Respondent Toparis submits that this Court in State v. Lewis, 188 W. Va. 85, 86, 422 S.E.2d 807, 808 (Syl. Pt. 5)(1992), held:

The State may seek a writ of prohibition in this Court in a criminal case where the trial court has exceeded or acted outside of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction. *In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the defendant's right to a speedy trial. Furthermore, the application for a writ of prohibition must be promptly presented.*

State v. Lewis, 188 W. Va. 85, 86, 422 S.E.2d 807, 808 (Syl. Pt. 5)(1992).

As set forth in State v. Lewis, this Court held that an application for writ of prohibition *must* be promptly presented. In this case, the Petition was not presented for more than 90 days following entry of the Circuit Court's Order. Further, in Lewis, this Court held that the prohibition proceeding *must* not offend a defendant's right to a speedy trial. In the underlying case, the Circuit Court already held that Respondent Toparis' constitutional speedy trial right has been violated; thus, if this Court would entertain and eventually grant the Petitioner's Petition for Writ of Prohibition, the Respondent's constitutional speedy trial right would be further offended.

Accordingly, based upon the foregoing, this Honorable Court *must* dismiss the Petitioner's Petition for Writ of Prohibition.

V.

**MOTION TO DISMISS ARGUMENT
UNTIMELINESS OF PETITION FOR WRIT OF PROHIBITION**

The State of West Virginia by the Prosecuting Attorney of Putnam County is seeking extraordinary relief from the lower Court's Order dismissing the information filed against Respondent Toparis wherein the Court held that the Respondent's constitutional speedy trial right had been violated.

As set forth above, Respondent Toparis initially was charged with domestic assault, domestic battery and unlawful assault in the Magistrate Court of Putnam County. Respondent Toparis filed a Motion to Dismiss and argued same at the pretrial conference on May 1, 2015. Following the pretrial conference, and prior to the Court entering an order, Respondent Toparis filed a Supplemental Memorandum of Law in Support of Motion to Dismiss. On June 4, 2015, the Circuit Court of Putnam County entered an Opinion Order dismissing the misdemeanor information with prejudice. *See*, Petitioner's **Exhibit A**. This Petition for extraordinary relief followed.

Following dismissal of the underlying action by the Circuit Court of Putnam County, the State of West Virginia filed an appeal on or about July 1, 2015. In response, Respondent Toparis filed a Motion to Dismiss asserting that the State had no right to appeal as the appeal of the Court's dismissal was not the result of a "bad or insufficient" indictment/information. *See*, West Virginia Code §58-5-30 and State ex rel. Parker v. Keadle, 2015 WL 3649611, __ S.E.2d __ (2015). Specifically, West Virginia Code §58-5-30 provides, in pertinent part,

Whenever in any criminal case an indictment is held bad or insufficient by the judgment of a circuit court, the state, on the application of the attorney general or the prosecuting attorney, may appeal such judgment to the supreme court of appeals. No such

appeal shall be allowed unless the state presents its petition therefor to the supreme court of appeals within thirty days after the entry of such judgment.

Thereafter, on September 25, 2015, the State filed a Motion to Withdraw and Dismiss its Petition for Appeal that was filed timely on or about July 1, 2015.

In State ex rel. Parker v. Keadle, 2015 WL 3649611, __ S.E.2d __ (2015), this Court made it abundantly clear the State's remedy wherein it is alleged that the Court exceeded or acted outside of its jurisdiction is a Writ of Prohibition. Further, as it relates to a Writ of Prohibition, this Court has held that "[an] application for a writ of prohibition must be promptly presented." State v. Lewis, 188 W. Va. 85, 86, 422 S.E.2d 807, 808 (Syl. Pt. 5)(1992).

In the case at hand, the State timely filed a Petition for Appeal on or about July 1, 2015; however, on September 25, 2015, the State moved to Withdraw and Dismiss the Petition for Appeal. Then, on September 25, 2015, the State filed a Petition for Writ of Prohibition. The State did not move the Court to consider the previously, timely filed appeal as a Petition for Writ of Prohibition, rather it filed a new pleading on September 25, 2015, more than 90 days after entry of the Court's Order.

Accordingly, as the Petition for Writ of Prohibition was not timely filed, it must be dismissed.

**COURT'S ORDER DISMISSING MISDEMEANORS
Constitutional Speedy Trial Right**

In Petitioner's Petition for Writ of Prohibition, it argues that the Court erred in applying State ex rel. Stiltner v. Harshbarger, 170 W.Va. 739, 296 S.E.2d 861 (1982), which requires an accused to be brought to trial within one year of the date a warrant is issued in magistrate court,

wherein the accused voluntarily waives his right to a trial in magistrate court to the concurrent jurisdiction of the circuit court.

In Respondent Toparis' underlying Motion to Dismiss, the Respondent contended that the State of West Virginia was barred from prosecuting the above matter pursuant to Article 3, Section 14 of the Constitution of West Virginia, Amendment VI of the Constitution of the United States, and the principles set forth in State ex rel Johnson v. Zakaib, 184 W. Va. 346, 400 S.E.2d 590 (1990).

Specifically, the Respondent cited, State ex rel Johnson v. Zakaib, 184 W. Va. 346, 400 S.E.2d 590 (1990), wherein this Court set forth the following principles:

“The speedy trial guarantee of *W.Va.Const.*, art. III, § 14 that provides for criminal trials ‘without unreasonable delay’ is applicable to magistrate courts.” State ex rel Johnson v. Zakaib, 184 W. Va. 346, 400 S.E.2d 590 (1990)(Syl. Pt. 3)(Citing, Syllabus Point 1, State ex rel. Stiltner v. Harshbarger, 170 W.Va. 739, 296 S.E.2d 861 (1982).

“Ordinarily, unless good cause for delay exists, criminal trials in magistrate court should be commenced within one hundred and twenty days of the [execution] of a warrant; however, good cause for delaying a trial beyond one hundred and twenty days must be judged by the standards applicable under *W.Va.Code*, 62-3-1 [1975] to postponements in circuit court beyond one term of court and, consistent with our rules for circuit courts, absence of good cause cannot be presumed from a silent record.” State ex rel Johnson v. Zakaib, 184 W. Va. 346, 400 S.E.2d 590 (1990)(Syl. Pt. 4)(Citing, Syllabus Point 2, as modified, State ex rel. Stiltner v. Harshbarger, 170 W.Va. 739, 296 S.E.2d 861 (1982).

“Unless one of the reasons specifically set forth in *W.Va.Code*, 62-3-21 [1959] for postponing criminal trials in circuit court beyond three terms of the circuit court exists, a criminal trial in magistrate court must be commenced within one year of the [execution] of the criminal warrant and lack of good cause for delay beyond one year as defined in *Code*, 62-3-21 [1959] should

be presumed from a silent record.” State ex rel Johnson v. Zakaib, 184 W. Va. 346, 400 S.E.2d 590 (1990)(Syl. Pt. 5)(Citing, Syllabus Point 3, as modified, State ex rel. Stiltner v. Harshbarger, 170 W.Va. 739, 296 S.E.2d 861 (1982).

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 (1959), applies. State ex rel Johnson v. Zakaib, 184 W. Va. 346, 400 S.E.2d 590 (1990)(Syl. Pt. 6).

Respondent Toparis then argued that he did nothing to delay this matter from trial. The Respondent noted that the mere fact the State of West Virginia filed a Criminal Information on the misdemeanor charges did not negate his constitutional right to a speedy trial. Respondent Toparis argued that the State’s filing of a Criminal Information was nothing more than a procedural move seeking additional time in which to bring the Defendant to trial – additional time outside of the one (1) year statute which is not allowed. *See*, State ex rel Johnson v. Zakaib, 184 W. Va. 346, 400 S.E.2d 590 (1990)(Syl. Pt. 6).

Respondent Toparis argued that his situation was analogous to State ex rel Johnson v. Zakaib, 184 W. Va. 346, 400 S.E.2d 590 (1990). However, the Respondent noted that the only difference between his case and that in Johnson was that the Respondent’s misdemeanor charges never were dismissed; rather, the Respondent merely agreed to waive the misdemeanors along with the felony charge to the Circuit Court of Putnam County – a court of concurrent jurisdiction. Then, approximately eleven (11) months into the pending criminal charge, the State filed a new information against the Defendant, yet the underlying misdemeanors never were dismissed or adjudicated. Specifically, at his arraignment on these charges in the Circuit Court of Putnam

County, Respondent Toparis noted that the assistant prosecuting attorney advised the Court that the Respondent was still on bond from the underlying charges; thus indicating that the underlying charges never had been dismissed.

The mere fact that the matter was bound over did not cause the underlying misdemeanor charges to be dismissed. If, however, there was a need for the filing of an information in the Circuit Court of Putnam County, to re-charge the Respondent, it still did not trigger additional time in which to bring the Respondent to trial, thus putting the Respondent squarely in the position as set forth in Johnson. See, State ex rel Johnson v. Zakaib, 184 W. Va. 346, 400 S.E.2d 590 (1990).

Additionally, in a Supplemental Memorandum in Support of Motion to Dismiss, Respondent Toparis cited the factual situation in State ex rel Johnson v. Zakaib, 184 W. Va. 346, 400 S.E.2d 590 (1990). In Johnson, the defendant brought an original proceeding in prohibition seeking to prevent his prosecution in the Circuit Court of Kanawha County. Specifically, Defendant Johnson was arrested in November, 1988; released on bond; and presented for a trial in Magistrate Court in January, 1989. The State's witnesses did not appear and the Court dismissed the charges. More than a year later, in February, 1990, Defendant Johnson was indicted by the Kanawha County grand jury for the misdemeanor charges that previously were dismissed along with an additional felony charge. See, State ex rel Johnson v. Zakaib, 184 W. Va. at 348, 400 S.E.2d at 592 (1990)(See also fn 2 of Johnson). In granting Defendant Johnson's writ of prohibition, the Supreme Court of Appeals of West Virginia stated,

Here there is no question that the time period for trial in magistrate court under Stiltner has expired. Under Webb, the State would not be able to revive the charge by bringing a new

indictment. We do not deem it significant in this case that the original charge was by warrant in magistrate court. Under Burdette and W.Va.Code, 50-5-7, the magistrate undoubtedly had jurisdiction. We emphasize that both Stiltner and Webb recognized the exceptions contained in W.Va.Code, 62-3-21, which would toll the running of the appropriate time period. Here, there is no claim made that any of these exceptions would preclude application of the speedy trial rule.

See, State ex rel Johnson v. Zakaib, 184 W. Va. at 351, 400 S.E.2d at 595 (1990).

Respondent Toparis submitted that his situation was analogous to Defendant Johnson's situation. As this Court noted, the time for bringing Defendant Johnson to trial had expired – it was more than one (1) year from his arrest before the State attempted to bring Defendant Johnson to trial in the Circuit Court of Kanawha County after filing a new indictment. Further, this Court noted, it was not of significance that the original case was filed in magistrate court – meaning, any misdemeanor should be brought to trial within one (1) year of the initial arrest, regardless of whether it was filed in Magistrate Court or in the Circuit Court. This should be clear from the circumstances in Johnson in that Defendant Johnson, like Respondent Toparis, originally was charged in Magistrate Court and then was sought to be charged in the Circuit Court. However, this Court, in prohibiting the prosecution of Defendant Johnson, noted that the State was attempting to bring Defendant Johnson to trial more than one year after the original arrest warrant was issued.

In further support that this Court was referencing the misdemeanor charge to be tried within one year instead of misdemeanor charges only in Magistrate Court (Magistrate v. Circuit venue), Respondent Toparis noted that this Court historically has recognized concurrent jurisdiction between Magistrate Courts and Circuit Courts over misdemeanor actions. *See,*

W.Va.Code, 50-5-7 (1976)(giving exclusive jurisdiction to a magistrate court once the defendant is charged by warrant in that court with an offense within its jurisdiction); See also, State v. Romaca, 167 W.Va. 119, 278 S.E.2d 891 (1981); State ex rel. Tate v. Bailey, 166 W.Va. 397, 274 S.E.2d 519 (1981)(Wherein the Supreme Court recognizes the concurrent jurisdiction of the Circuit and Magistrate Courts). Thus, the violation of a defendant's constitutional right to a speedy trial in Magistrate Court would be the same violation in Circuit Court – it would be nonsensical to have two differing speedy trial standards for misdemeanors, one for Magistrate Court misdemeanors and one for Circuit Court misdemeanors.

Respondent Toparis submits that the State can point to no legal authority, statutory or otherwise, that supports the proposition that because the Respondent voluntarily consented to have misdemeanor charges transferred to the concurrent jurisdiction of the Circuit Court of Putnam County, that he gave up his constitutional right to a speedy trial whether or not he consented to have the matter tried in magistrate court or circuit court. Specifically, this Court in Johnson noted that the only reasoning for allowing a misdemeanor trial to extend beyond the year is contained in West Virginia Code §62-3-21. See, State ex rel Johnson v. Zakaib, 184 W. Va. 346, 400 S.E.2d 590 (1990)(Syl. Pt. 5).

Accordingly, as the Petitioner cannot show that the Respondent caused any of the reasons for delay as set forth in West Virginia Code §62-3-21; as the circuit court has concurrent jurisdiction with magistrate court over misdemeanor cases; and as Respondent Stowers did not err in the application of State ex rel Johnson v. Zakaib, 184 W. Va. 346, 400 S.E.2d 590 (1990) and State ex rel. Stiltner v. Harshbarger, 170 W.Va. 739, 296 S.E.2d 861 (1982), to Respondent Toparis' underlying case, Respondent Toparis moves this Honorable Court for an order

dismissing the above styled matter as Respondent Stowers' Order finding that Respondent Toparis' constitutional speedy trial right was violated in accordance with Article 3, Section 14 of the Constitution of West Virginia, Amendment VI of the Constitution of the United States, and with the principles set forth in State ex rel Johnson v. Zakaib, 184 W. Va. 346, 400 S.E.2d 590 (1990) and State ex rel. Stiltner v. Harshbarger, 170 W.Va. 739, 296 S.E.2d 861 (1982) was correct and was in accord with precedent.

V.

CONCLUSION

ACCORDINGLY, Respondent Toparis moves this Honorable Court for an Order dismissing the Petitioner's Petition for Writ of Prohibition as it was not timely filed; further, Respondent Stowers did not err in granting the dismissal of the underlying action; and the granting of the petition would result in further violation of Respondent Toparis' constitutional speedy trial rights and therefore must be dismissed.

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-By Counsel-



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CERTIFICATE OF SERVICE

I, Robert B Kuenzel, do hereby certify that a copy of the foregoing **MOTION TO DISMISS** was served on counsel of record on the 22nd day of October, 2015, by depositing a true copy of same in the United States Mail, postage prepaid, or via facsimile, or via hand delivery, or via electronic transmission, addressed follows:

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