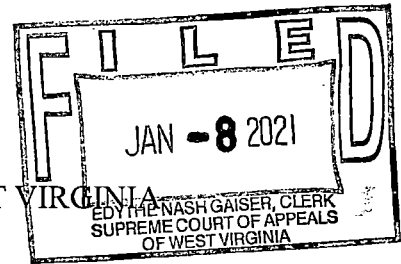


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 20-0945

STATE OF WEST VIRGINIA ex rel.
D. KEITH RANDOLPH, PROSECUTING
ATTORNEY FOR BOONE COUNTY,
WEST VIRGINIA,

Petitioner

FILE COPY

v.

THE HONORABLE WILLIAM S. THOMPSON,
JUDGE OF THE CIRCUIT COURT OF BOONE
COUNTY, and JENNIFER SPENCER,

Respondent

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

Counsel for Respondent, Jennifer Spencer

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Dated: January 8, 2021

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QUESTIONS PRESENTED BY PETITIONER

Does the Constitution of West Virginia, Article III §14 speedy trial rights require that a criminal indictment be dismissed and forever discharged from prosecution when the State of West Virginia was precluded from holding a trial within the time frame set forth in West Virginia Code §62-3-21 because of the state-wide closure of the Courts pursuant to an order issued by the West Virginia Supreme Court on March 16, 2020 because of the COVID-19 pandemic?

- A. Does West Virginia Code §62-3-21 require dismissal of a criminal indictment and forever discharge the defendant from prosecution of those charges for failure to hold trial on the indictment within three regular terms of Court when the State was precluded from bringing said defendant to trial because of a state-wide closure of the Courts by the West Virginia Supreme Court?
- B. Is a term of Court that was cut-short due to the state-wide closure of the Courts by order of the West Virginia Supreme Court a “regular” term of Court as contemplated by West Virginia Code §62-3-21?

SUMMARY OF ARGUMENT

West Virginia Code §62-3-21 (1959) states that “[e]very person charged by presentment or indictment with a felony or misdemeanor and, remanded to a court of competent jurisdiction for trial, shall be forever discharged from prosecution for the offense, if there be three regular terms of such court, after presentment is made or the indictment is found against him without a trial.” Additionally, the aforementioned code section enumerates limited exceptions upon which failure to comply with the speedy trial obligation shall be excused. These exceptions are inapplicable in the matter at hand.

West Virginia Trial Court Rule 2.25 sets forth the annual Regular terms of court for each judicial circuit. In Boone County, said rule defines terms beginning on the third Monday of January, April, and September as Regular terms of court. The Boone County January 2020 term commenced pursuant to W. Va. Tr. Ct. R. 2.25. Following the term of indictment in the case *sub judice*, three Regular terms of court, April 2019, September 2019, and January 2020, passed without completion of trial.

Petitioner asserts that resultant to this Court’s declaration of judicial emergency and temporary court closure, the January 2020 Regular Term of Court does not count as a “Regular” term for purposes of W. Va. Code §62-3-21. Petitioner erroneously proclaims that events transpiring during a term determine whether or not that term is “Regular” for purposes of W. Va. Code §62-3-21 dismissal. Accordingly, Petitioner requests that this Court disregard legislative intent, legal precedent, and instead rely on “unreasonable delay” language contained within the West Virginia Constitution, Article III, §14 – language that Petitioner admittedly characterizes as deliberately silent on what constitutes unreasonable delay and violation of speedy trial rights.

The legislature, in contrast, was not deliberately silent in defining with specificity the State's obligation of speedy trial in the language thoughtfully expounded within WV Code §62-3-21. This Court highlighted that fact in *State v. Lambert*, 175 W. Va. 141, 331 S.E.2d 873 (1985), recognizing §62-3-21 to be a "legislative adoption" of W. Va. Const. art. III, §14. Petitioner's assertion asks this Court to overlook the legislature's intent in adopting the three-term rule into statutory law. Petitioner contends that a state of judicial emergency was not contemplated by the legislature when drafting W. Va. Code §62-3-21. In consequence, Petitioner asks this Court to ignore clear statutory law and write a nonexistent exception into W. Va. Code §62-3-21, a pandemic exception.

Petitioner's assertion also fails to recognize this Court's Resumption of Operations Order staying statutory deadlines set to run on April 18, 2020, until May 29, 2020 and further permitting resumption of jury trials on June 29, 2020. Trial in this matter was not sought by the State within that time frame. Petitioner mistakenly contends that the January 2020 Term of Court was cut short. When in fact, by this Court's order, statutory deadlines relevant to said term were extended by six weeks. The lower court in this matter correctly interpreted W. Va. Code §62-3-21 and related case law, finding it to be the "legislative adoption" of Art. III, §14 of the West Virginia Constitution. As a combined body of statutory and constitutional law, W. Va. Code §62-3-21 and W. Va. Const. art. III, §14 together mandate dismissal with prejudice in petitioner's questions presented.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is not appropriate for oral argument because the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

ARGUMENT

Petitioner claims that the Circuit Court of Boone County exceeded its legitimate powers by dismissing the case at hand pursuant to West Virginia Code §62-3-21 (1959), the “three-term rule.” The aforesaid code section states, “[e]very person charged by presentment or indictment with a felony or misdemeanor and, remanded to a court of competent jurisdiction for trial, shall be forever discharged from prosecution for the offense, if there be three regular terms of such court, after the presentment is made or the indictment is found against him without a trial.”

A one-count indictment was returned against the Respondent in the January 2019 Term of Court. Following the term of indictment, April 2019, September 2019, and January 2020 Terms of Court passed without completion of trial on said indictment. Jury trial began during the April 2019 term, but resulted in Mistrial following a State witness’s outburst on the stand during direct examination in the State’s case in chief. Additionally, prior to taking the stand, said witness improperly discussed with a family member the content of opening statements and testimony of a preceding witness. Jury trial was then set during the September 2019 term, however, the State moved to continue five days prior to commencement. Trial was then set for the January 2020 term, but was continued twice by the circuit court prior to this Court’s March 22, 2020 Order declaring a judicial emergency.

Petitioner does not challenge the passing of three terms of court following that of indictment, but rather asserts that the term commencing in January 2020 did not constitute a “Regular” term of court as understood in W. Va. Code §62-3-21. Petitioner asserts that statutory speedy trial was prohibited by the COVID-19 pandemic, referencing this Court’s judicial emergency declaration issued on March 22, 2020. Petitioner argues that declaration of a judicial emergency during the January 2020 term of court negates that term’s applicability for purposes

of three term dismissal, and that this Court should abandon legislative intent and its own precedent, and instead rely on “unreasonable delay” language contained within the West Virginia Constitution, Article III, §14.

West Virginia Trial Court Rule 2.25 defines Terms of Court for each judicial circuit. “The terms of the circuit courts shall commence and be held each year as provided in this rule.” As relates to the Twenty-Fifth Circuit, W. Va. Tr. Ct. R. 2.25 states, “[f]or the county of Boone, on the third Monday in January, April, and September.” Petitioner argues that the January 2020 Term of Court is in some way an *Irregular* term of court and should not count for purposes of the three-term rule. This argument erroneously misinterprets the meaning of the term *Regular* as contemplated in W. Va. Tr. Ct. R. 2.25, W. Va. Code §62-3-21, and this Court’s understanding of what constitutes a *Regular* term of court as evidenced in numerous opinions, including *Ex parte Anderson*, 81 W. Va. 171, 94 S.E. 31, dating back to 1917.

A *Regular* term of court is simply one calendared as set forth in W. Va. Tr. Ct. R. 2.25 - in the case of Boone County, annually on the third Monday in January, April, and September. This is opposed to a *Special* term of court, scheduled in addition to those established by W. Va. Tr. Ct. R. 2.25. This Court in *Dillon v. Tanner*, 107 W. Va. 550, 149 S.E. 608 (1929), recognized this distinction between *Regular* and *Special*, holding that a *Special* term of court cannot be counted in a defendant’s favor on three term dismissal. However, a *Regular* term of court, even one in which no petit jury has been summoned, must be counted in favor of the defendant, *State ex rel. Farley v. Kramer*, 153 W. Va. 159, 169 S.E.2d 106 (1969)(referencing *Ex parte Anderson*, Syllabus Pt. 1).

Irregularity during a term of court, resultant of war, pandemic, or any other event does not determine whether a term of court is *Regular*. The terms of court deemed *Regular*, and

therefore applicable in matters of three term rule dismissal, are predetermined by W. Va. Tr. Ct. R. 2.25. In the present case, indictment was returned against the Respondent in January 2019. Following that term of indictment, the April 2019, September 2019, and January 2020 Terms of Court, all of which *Regular* terms of court, passed without completion of trial and without delay attributable to the Respondent. Therefore, statutory dismissal based on W. Va. Code §62-3-21 is mandated by law.

The aforesaid code section enumerates clearly defined grounds upon which the State's failure to bring an accused to trial within three terms of court may be excused. None of the delineated justifications apply in the case at bar – insanity, witness enticement or intimidation, illness or accident, motion to continue attributed to defendant, escape, failure to appear, or inability of jury to agree in their verdict. To make clear, Mistrial in this matter was not the result of a *hung jury*. “Inability of the jury to agree in their verdict,” as referenced in W. Va. Code §62-3-21, is not applicable in the case at hand because this jury never received the case – mistrial was granted based on improper conduct of a State's witness, not as a result of a jury's inability to render a verdict following deliberation. The specificity with which the legislature defined the aforementioned exception clearly indicates its intent. That mistrial as a whole does not trigger the exception, but rather, narrowly and specifically by a jury's inability to render unanimous verdict after receiving all evidence and following deliberation – a hung jury.

Petitioner requests that this Court disregard legislative intent, clearly evidenced in the very existence of W. Va. Code §62-3-21 itself. Speedy trial existed as a constitutional right prior to the three-term rule's inception, nonetheless the legislature saw fit to define, with specificity, the time frame within which the State must achieve such, beyond mere “unreasonable delay” as contained within the W. Va. Const. art. III §14. Petitioner concedes that the Constitution is

deliberately silent on what constitutes unreasonable delay and what constitutes violation of speedy trial rights, but nonetheless requests the Court to utilize it in disregard of W. Va. Code §62-3-21. The legislature, however, was not deliberately silent in its drafting of W. Va. Code §62-3-21, including a specific time frame and narrow exceptions. Are we to suppose that the legislature did not take into account constitutional language included in W. Va. Const. art. III §14, when tailoring a three-term dismissal statute? This Court recognized the legislature's intent in *State v. Lambert*, 175 W. Va. 141, 331 S.E.2d 873 (1985), stating that the three-term rule is the "legislative adoption" of constitutional mandated speedy trial. The Petitioner essentially asks this Court to step outside its judicial role, disregard legislative intent, and rewrite W. Va. Code §62-3-21 to include a pandemic exception.

For a moment, assume *arguendo* that applicability of the January 2020 Term of Court, for three-term rule purposes, is impacted by this Court's judicial emergency declaration. Petitioner's argument still fails to recognize that this Court already addressed such issues in the Resumption of Operations Order, issued on May 6, 2020. Said Order states that stayed statutory deadlines set to expire between March 23, 2020 and April 18, 2020 were extended only until May 29, 2020. In addition, jury trials were permitted to commence on June 29, 2020.

Jury trial in this matter was not pursued by the Petitioner between May 6, 2020 (when the Court's Resumption of Operations Order was issued) and May 29, 2020 (when stays on statutory deadlines were lifted). Nor was trial timely requested by Petitioner on or leading up to June 29, 2020 when jury trials were permitted to commence. Therefore, any extension to the statutory speedy trial deadline for which Petitioner believes it is entitled as a result of court closures, expired on May 29, 2020 when this Court's order lifted stays on such. Petitioner's assertion that the January 2020 Term of Court was cut short and therefore does not count mistakenly

disregards the six-week extension to statutory deadlines granted by this Court and expounded in the Resumption of Operations Order.

Petitioner's assertion that state-wide closure of courts precluded it from bringing the Respondent to trial, fails to recognize that mistrial due to conduct of the State's own witness, trial continuance on the part of the State, and failure to seek jury trial within the Court's May 29, 2020 deadline extension are actual causes of the State's failure to timely prosecute within statutory and constitutional requirements. The Boone County January 2020 Term of Court was a Regular term of court and does count for purposes of W. Va. Code §62-3-21 dismissal. Independently or as a combined body of law, W. Va. Code §62-3-21 and W. Va. Const. art. III, §14 mandate that the criminal indictment in this matter be dismissed and forever discharged from prosecution.

CONCLUSION

The text of W. Va Code §62-3-21, a legislative adoption of W. Va. Const. art. III, §14, is clear. The State must bring an accused to trial within three regular terms of court, following that within which indictment is returned. The January 2020 Term of Court was a regular term as defined within W. Va. Tr. Ct. R. 2.25. Terms of court to be counted for three-term dismissal purposes are identified by this rule, not the regular or irregular nature of events occurring during those terms. Inclusive of the three-term rule are exceptions, none of which apply in the case *sub judice*. The January 2020 Term of Court ended on April 17, 2020. By order of this Court, all deadlines set forth in court rule or statute expiring between March 23, 2020 and April 17, 2020 were extended to May 29, 2020 – a new deadline was set. The Petitioner missed this deadline. Trial was not achieved by the Petitioner once court operations resumed and before the extended deadline passed, thus three regular terms of court passed. Nor, during that time period, did Petitioner request trial be set on or about June 29, 2020 when jury trials permissibly could be resumed. The Circuit Court did not exceed its authority by ordering this indictment dismissed and the defendant forever discharged from prosecution. The Respondent respectfully requests that this Court deny Petitioner's Writ of Prohibition.

VERIFICATION

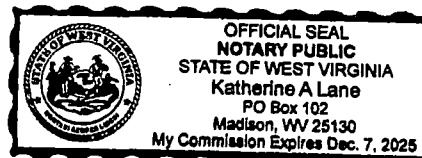
I, Troy D. Adams, on behalf of the Respondent, Jennifer Spencer, being by me first duly sworn according to law, upon his oath, states that the facts and allegations contained therein are true, except insofar as they are therein stated to be upon information and belief, and as to those matters I believe them to be true.



Troy D. Adams (11995)
Chief Public Defender, 25th Judicial Circuit

STATE OF WEST VIRGINIA,

COUNTY OF BOONE, to-wit:



Taken, subscribed and sworn to before me Katherine A. Lane this 8th day
January, 2021.

My commission expires December 7, 2025.

CERTIFICATE OF SERVICE

I, Troy D. Adams, Chief Public Defender, 25th Judicial Circuit, counsel for the Respondent, Jennifer Spencer, do hereby certify that service of the attached RESPONSE TO PETITION FOR WRIT OF PROHIBITION has been made upon the Petitioner and Respondent, The Honorable William S. Thompson, by hand, as follows:

The Honorable William S. Thompson, Judge
25th Judicial Circuit
200 State Street
Madison, WV 25130

Donna Taylor
Prosecuting Attorney for Boone County
200 State Street
Madison, WV 25130

Done this 8th day of January, 2021



Troy D. Adams (11995)
Chief Public Defender, 25th Judicial Circuit
320 Main Street
Madison, WV 25130