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No. \_\_\_\_\_

21-0090

(Cabell County 19-F-350)



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

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STATE OF WEST VIRGINIA, EX REL, HAROLD RADFORD PORTER

Petitioner

v.

HONORABLE PAUL T. FARRELL, JUDGE OF THE CIRCUIT COURT OF  
CABELL COUNTY

Respondent

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**WRIT OF PROHIBITION FOR THE PETITIONER**

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February 8, 2021

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## QUESTION PRESENTED

Whether the circuit court can create the first ever exception to the “three-term” speedy trial rule due to Covid even though trials occurred in Cabell County and throughout the State of West Virginia during all three terms of court?

## STATEMENT OF THE CASE

Despite never requesting a continuance of his felony case, Petitioner has languished in jail for three full terms, fifteen months, without a trial. The State agrees that three full terms have passed and that none of the exceptions to the three-term speedy trial rule at W.Va. Code § 62-3-21 apply. (Appx. 9-10) Nevertheless, the State argues the three-term violation is excused due to Covid-19 via a “good cause” exception, even though good cause has never been applied to the three-term rule.

Petitioner was indicted in October of 2019, arrested and incarcerated in early November 2019. (Appx. 1-2) In Cabell County, his first full term began on January 6, 2020. W.Va. Tr. C.t Rule 2.06. Petitioner did not receive a trial during this term and none of the §62-3-21 exceptions applied. (Appx. 8-15) The second term of his indictment began May, 4 2020. *Id.* As of July 31, 2020, Petitioner had not received a trial, so he filed a motion requesting a speedy trial. (Appx. 16-17) Also during this term, Petitioner did not receive a trial and none of the §62-3-21 exceptions applied. (Appx. 8-15) Petitioner’s third term began on September 8, 2020. W.Va. Tr. C.t Rule 2.06. Again, Petitioner did not receive a trial during this term and none of the §62-3-21 exceptions applied. On November 17, 2020, the court set

Petitioner's trial for March 1, 2021, well outside the three-terms. (Appx. 3). Petitioner did not consent to go beyond the three terms. (Appx. 7-15).

On January 6, 2021, two days after the fourth term began, Petitioner filed his *Motion to Dismiss for Failure to Provide Speedy Trial* under W.Va. Code § 62-3-21. (Appx. 4-6). The matter was set for hearing on January 26<sup>th</sup>, 2021. The State failed to file a written response. (Appx. 2, 4). At the hearing, the State did not contest that three full terms had passed and that none of the exceptions to the three-term rule applied. (Appx. 9-10). Instead, the State argued *Lewis v. Henry* for the proposition that good cause for "difficulties beyond the control of Court or litigants...can constitute good cause for a continuance." 400 S.E.2d 567, 571 (W.Va. 1990)(Appx. 9-11). What the State failed to tell the Court is that *Lewis v. Henry* is a one-term case and that this Court has never found good cause as an exception to the three-term rule. Only the exceptions found at W.Va. Code § 62-3-21 can excuse a failure to provide a trial within three terms and this Court has never held otherwise. The circuit court agreed with the State and denied the motion due to Covid. (Appx. 12-13) An order denying the motion was entered January 26, 2021 from which Petitioner files this writ. (Appx. 7)

Trial is currently set for March 1, 2020.

## SUMMARY OF ARGUMENT

**This case about construing unambiguous statutes per their plain language.** “It is not for this Court arbitrarily to read into a statute that which it does not say.” Syl. Pt. 11, in part, *Brooke B. v. Ray*, 230 W.Va. 355, 738 S.E.2d 21 (2013). **This case is also about a criminal defendant’s right to a speedy trial.** This right’s denial can “seriously interfere with the defendant’s liberty, whether he is free on bond or not, and that may disrupt his employment, drain his financial resources, curtail his association, subject him to public obloquy, and create anxiety in him, his family and his friends.” The facts concerning this issue are not disputed. Petitioner’s incarceration spans fifteen months without a trial. Three full terms have passed since Petitioner’s indictment. None of the factors listed in W.Va. Code § 62-3-21 are present to excuse the three-term violation. The sole issue for the Court is whether an approximate three-month trial suspension, by this Court’s order, judicially creates West Virginia’s first ever exception to W.Va. Code § 62-3-21. The circuit court created this extraordinary exception even though trials occurred in Cabell County West Virginia during every term of Petitioner’s indictment/incarceration. It also created this exception without the State presenting any evidence of how the Covid restrictions caused this constitutional violation and after the State admitted it had “done nothing” on the case until ten months after the Indictment.

The only remedy for a three-term violation is dismissal of the indictment with prejudice. *State v. Lacy*, W.Va., 232 S.E.2d 521 (1977). Petitioner asks this

court to apply the three terms statute's unambiguous, plain meaning and to dismiss this indictment.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioner respectfully requests that this Court enter an expedited briefing schedule so that a decision regarding this petition can be reached as soon as possible.

Petitioner states that oral argument is unnecessary. The dispositive factual issues raised by this petition have already been authoritatively decided, that the relevant legal arguments will be adequately presented in the documents filed with the Court, and that oral argument would not be necessary to aid the decisional process. Consequently, Petitioners believe that oral argument is unnecessary. Rev. R. App. P. 18(a). If the Court determines that oral argument would assist with the proper resolution of the question presented, however, Petitioners will participate to assist the Court in expeditiously resolving the question presented.

### **ARGUMENT**

#### **I. West Virginia's Three-Term Speedy Trial Statute Was Clearly Violated And The Court Should Not Create An Exception To The Rule, Especially Because The State Cannot Prove That Covid Prevented It From Trial**

West Virginia codifies its right to a speedy trial at W.Va. Code § 62-3-1 ("one-term rule") and § 62-3-21 ("three-term" rule). The former provides the



right to trial in the same term as indictment unless “good cause” excuses the failure. West Virginia jurisprudence provides a myriad of reasons that may constitute good cause in regard to the one-term rule. The latter, three-term, statute is much different. Good cause does not apply to the three-term rule.<sup>1</sup> The only exceptions to the three-term statute are:

1) the defendant’s insanity; 2) a witness for the state being enticed or kept away, or prevented from attending by sickness or inevitable accident; 3) continuance upon motion of the accused; 4) accused’s failure to appear by escaping from jail or appear according to his own recognizance; and, 5) inability of the jury to agree on a verdict.

W.Va. Code § 62-3-21. This three-term rule provides the “statutory method of guaranteeing the constitutional right to a speedy trial found in Article III, § 14 of the West Virginia Constitution, as well as a legislative declaration of what is a reasonable and proper delay in bringing an accused to trial. [Citation omitted].” *State v. Adkins*, 388 S.E.2d 316, 318 (W.Va. 1989); *State ex rel. Webb v. Wilson*, 182 W.Va. 538, 390 S.E.2d 9 (1990). Further, “[t]he right to a trial ‘without unreasonable delay’ is basic in the administration of criminal justice and is guaranteed by both the state and federal constitutions.” *State ex. rel. Stines v. Locke*, 220 S.E.2d 443, 446 (W.Va. 1975).

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<sup>1</sup> “The possible reasons justifying good cause for a continuance under W. Va. Code, 62-3-1, are broader than the causes listed in W. Va. Code 62-3-21 as valid reasons for not counting a particular term. As a consequence, the causes justifying continuances listed in the three-term rule, W. Va. Code, 62-3-21, may be applied in a one-term rule situation, but the general good cause standard in W. Va. Code, 62-3-1, may not be applied in a W. Va. Code, 62-3-21 situation.” Syl. Pt. 4, *Good v. Handlan*, 342 S.E.2d 111 (W.Va. 1986)



The State does not argue, nor did the lower court rule, that any of the above statutory exceptions apply. Instead, the State argues that good cause applies to excuse its failure to try Petitioner within three terms for “difficulties beyond the control of Court or litigants.” (Appx. 10) The State makes this request even though good cause has never been applied to the three-term dismissal rule in its over seventy-year history. The State’s confusion arises from its failure to properly construe the case it mentioned at the motion to dismiss hearing. Although it did not file a written response to Petitioner’s motion to dismiss, the State cited *Lewis v. Henry*, 400 S.E.2d 567 (W.Va. 1990) at the hearing. (Appx. 9-11). What the State did not inform the court is that *Lewis* is a *per curiam*, **one-term** case which applies “good cause” as the one-term statute provides. Indeed, the case’s analysis begins with “Mr. Lewis’ primary argument is that he was deprived of his right to a speedy trial under W.Va. Code 62-3-1, commonly known as the one-term rule.” *Id.* at 569. The State quotes *Lewis* for “difficulties beyond the control of the Court or litigants” and attempts to apply this to Covid. However, *Lewis* explicitly only applies to the one term rule. By adopting the State’s rationale, the circuit court has re-written the three-term statute. By judicially altering the statute, the circuit court violated Petitioner’s constitutional right to a speedy trial.

**A. *Covid did not cause the three-term violation, the State’s failure to uphold its duty did***

Covid did not prevent the State from trying Petitioner because trials occurred in all three terms of 2020. Further, this Court’s orders only suspended trials

for an approximate three-month period spanning portions of two terms. The duty to provide Defendants with a trial within the constraints of the “three-term” rule rests solely with the prosecution. *State ex. rel. Stines v. Locke*, 220 S.E.2d 443, 446 (W.Va. 1975). The State’s “obligation to act is mandatory.” *Id.* at 447. In the case at bar, the prosecution failed to uphold this duty. The current prosecutor of the case did not enter the case until September of 2020. (Appx. 9). He candidly admits that from Petitioner’s indictment and incarceration in November of 2019 until September of 2020, ten months, “[n]othing had been done before I got on the case...” (Appx. 10). Petitioner tried to move the case forward during that ten-month period although it was not required. “In order to raise the ‘three-term rule,’ it is not necessary to show the Defendants made a demand for speedy trial.” *State ex. rel. Rogers v. Casey*, 273 S.E.2d 256 (W.Va. 1980); *State v. Lacy*, 232 S.E.2d 519 (W.Va. 1977). Despite not having this duty, nine months after his incarceration, Petitioner filed a motion for speedy trial to remind the prosecution of its duty. (Appx. 16-17). Nothing changed.

Covid certainly presented challenges in the legal field during 2020, but the State cannot, and did not, provide any argument how Covid actually caused the three-term violation. Trials were held throughout the year in Cabell County West Virginia. (Appx. 11-12). Trials were held in all three terms of court in Cabell County in 2020<sup>2</sup>. The trial court’s reasoning at the hearing to deny the motion was ‘based

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<sup>2</sup> Although they were not put on the record in the written motion, Petitioner was at a disadvantage at the motion to dismiss hearing because the prosecution did not file a written response and therefore Petitioner did not know what its reasoning for opposing the motion until the hearing began. Petitioner asks the Court to take judicial notice that trials were held in all three terms of court in

on the unexpected, unpredicted and uncontrollable Covid things, plus Cabell County was shut down for two weeks during Christmas because of Covid.” (Appx. 12). Yet the prosecution never presented any evidence of how Covid prevented trial. It admitted it did nothing on the case for ten months. It also did not provide any reasoning of how the two-week courthouse shutdown caused the three-term rule violation. Covid is being used as an excuse but the State has not provided any causation as to how Covid prevented a trial.

Although no one was certain of the exact shutdown during the hearing, this Court’s orders suspended jury trials from March 22, 2020 until June 29, 2020. See *Administrative Order Re: Judicial Emergency Declared*, dated March 22, 2020; *Administrative Order Re: Resumptio of operations*, dated May 6, 2020. This encompassed portions of two of the first three terms of Petitioner’s incarceration. It is only ninety-nine days. The State had two hundred sixty-six other days to try Petitioner. The same prosecutor’s office conducted trials during all three terms. Covid is simply being used as an excuse and the State has not provided any explanation for why or how Covid excuses the “three-term” rule.

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2020. “It is discretionary with appellate courts to permit judicial notice where the matter was not first brought before the trial judge.” Franklin D. Cleckley, Vol. 1, Handbook on Evidence for West Virginia Lawyers, § 2-1(E)(2) (4<sup>th</sup> ed. 2000). *State v Ronald Witherel*, Case No:17-F-501, jury trial ended on February 24, 2020. *State v. Chase Hardin*, Case No: 19-F-164, ended on August 17, 2020. *State v. Brandon Drayton*, Case No: 20-F-12, began and ended on September 9, 2020. *State v. Quentin Sheffield*, Case No: 19-F-107, ended on October 6, 2020. These trials were well known in the legal community of Cabell county, the prosecution and circuit court were aware of these trials and therefore judicial notice should be taken, especially because without a written response to its motion, Petitioner did not know the prosecution’s defense.

## II. THE REQUIRED ELEMENTS FOR A WRIT OF PROHIBITION ARE SATISFIED

The standard of reviewing the circuit court's order refusing petitioner's request for relief through an extraordinary writ of prohibition is *de novo*. See Syl. Pt. 1, *State ex rel. Callahan v. Santucci*, 210 W. Va. 483, 557 S.E.2d 890 (2001). Additionally, this Court has held:

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.

Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 483 S.E.2d 12 (1996).

In regard to the first element, a direct appeal will not help him in any way. Should he be found guilty, he will be incarcerated for at least another year before his appeal is heard. In regard to the second element, he will be damaged if the court does not hear this writ. His property business is crumbling, his finances are being drained and the anxiety of waiting over fifteen months for trial has taken its toll on Petitioner. The trial court's ruling is a clear error of law because W.Va. Code 62-3-21 is not being construed as written. The State admits none of the factors listed

in the three-term rule are satisfied and the evidence shows Covid did not delay his trial. The circuit court stated that this is an issue of first impression. (Appx. 12) Petitioner disagrees. If the Covid suspension had consumed an entire term, or if the State presented evidence that Covid prevented a trial, it could be an excuse. But the undisputed records in this case shows that trials occurred throughout 2020 in every term of court and that this case is simply one of the prosecutions not upholding its duty to try a defendant within one year. Based upon this, the court should accept the writ and discharge Petitioner from prosecution.

### CONCLUSION

The State admits that three full terms passed after Petitioner's indictment and that none of W.Va. Code § 62-3-21's exceptions apply. However, it asks the lower court to re-write the statute to include a "good cause" standard which is only found in the one-term rule. The State, nor the circuit court, ever identified how Covid caused the trial delay and only applied it as a blanket exception. Petitioner asks this Court to apply the three-term rule's unambiguous language, as written, and to discharge Petitioner from prosecution with prejudice.

HAROLD RADFORD PORTER

By counsel:



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## VERIFICATION

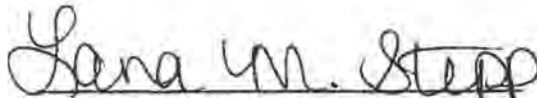
STATE OF WEST VIRGINIA  
COUNTY OF CABELL, to-wit:

I, Harold Radford Porter, being first duly sworn upon oat, state that I have read the foregoing *Writ of Prohibition for the Petitioner* along with the attached *Appendix to Writ Prohibition for the Petitioners* and that the facts and allegations therein contained are true and correct to the best of my belief and knowledge.

  
HAROLD RADFORD PORTER

Taken, sworn to, and subscribed before me this 8 day of February 2021.

My Commission expires: 4-24-2023

  
NOTARY PUBLIC





IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

CASE NO. \_\_\_\_\_

CABELL COUNTY CIRCUIT COURT CASE NO. 19-F-350

STATE OF WEST VIRGINIA, EX REL, HAROLD RADFORD PORTER

Petitioner

v.

HONORABLE PAUL T. FARRELL, JUDGE OF THE CIRCUIT COURT OF  
CABELL COUNTY

Respondent

CERTIFICATE OF SERVICE

I, Richard W. Weston, certify that I have served *Writ of Prohibition for the*  
*Petitioner* upon the Respondent, by hand delivery, addressed to the following:

West Virginia Attorney General  
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Honorable Paul T. Farrell  
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Dated this 8<sup>th</sup> day of February, 2021.



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