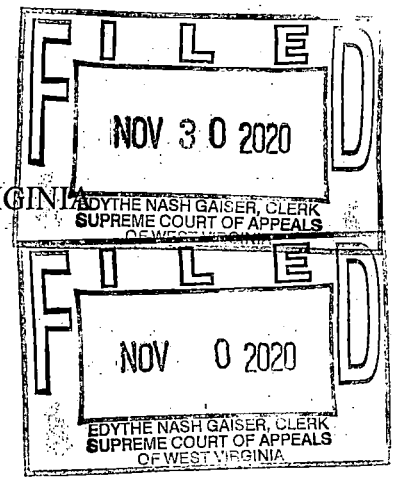

IN THE SUPREME COURT OF APPEALS OF WEST VIRIGINIA

Docket No.
20-0945

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

Petitioner

V.

From the Circuit Court of Boone County
Case No. CC-03-2019-F-30

THE HONORABLE WILLIAM S. THOMPSON,
JUDGE 25th JUDICIAL CIRCUIT
BOONE COUNTY, WEST VIRIGINIA.

Respondent

PETITION FOR WRIT OF PROHIBITION

Counsel for Petitioner, State of West Virginia

Jennifer L. Anderson (WV Bar #8504)
Assistant Prosecuting Attorney in and for Boone County
200 State Street
Madison, WV 25130

Dated: November 25, 2020

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TABLE OF AUTHORITIES

NOW COMES the Petitioner herein, and respectfully Petition this Honorable Court for a Writ of Prohibition, pursuant to Rule 16 of the West Virginia Revised Rules of Appellate Procedure, and to reverse the actions of the Circuit Court of Boone County, West Virginia dismissing with prejudice Boone County criminal indictment State of West Virginia v. Jennifer Spencer, CC-03-2019-F-30, allowing said case to be brought to trial.

QUESTION PRESENTED

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 the dismissal of a criminal indictment and forever discharge the defendant from prosecution of those charges for failure to hold a 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?

STATEMENT OF CASE

The Defendant was arrested on September 29, 2018, charged with the felony offense of "Malicious Wounding." Following preliminary hearing on October 10, 2018, the Defendant's case was bound over to Circuit Court. On January 9, 2020, the defendant's bond was reduced to $10,000 justification of surety or 10% cash and she was subsequently released from incarceration. She remained free on bond during the remaining pendency of these proceedings. A Boone County Grand Jury, in the January 2019 Term of Court, returned a one-count indictment charging the Defendant with the felony offense of "Malicious Assault." Jury trial began in this matter on August 20, 2019, but resulted in Mistrial as the State's eye-witness, the defendant's son, refused to answer any questions, became extremely emotional, and left the witness stand and the courtroom without being dismissed during direct examination in the State's case in chief. Additionally, prior to taking the stand, said witness discussed with a family member the content of opening statements and testimony of a preceding witness.

A second jury trial was scheduled to commence early in the September Term of Court, on October 29, 2019. The State, on October 24, 2019, moved to continue the second scheduled jury trial. In support of its motion, the State requested continuance to permit completion of a final divorce hearing in Boone County Family Court. Prior to this trial, the defendant asserted marital privilege which precluded one of the State's key eye-witnesses from testifying at trial. The defendant and Michael Spencer were still married at the time of the first trial, although they had been separated and estranged for months and he had filed for a divorce. Because of the emotional break-down of the State's witness during the first trial, the testimony of Michael Spencer was essential to the State's case. The State cited, in its motion, a per curiam decision by the West Virginia Supreme Court in *State v. VanHoose*, 227 W. Va. 37, 705 S.E.2d 544 (2010),

in which the Court addressed a similar circumstance and the State had continued that case multiple times awaiting the perfection of the defendant's divorce from the State's witness. Despite the case being continued by the trial court beyond three terms of court, the trial court denied the defendant's motions to dismiss under West Virginia Code §62-3-21, holding that [i]nsofar as Mr. VanHoose could invoke his statutory right to preclude his wife from testifying against him, the state could likewise invoke its right to seek continuances because of the unavailability of a material witness." *State v. VanHoose*, 227 W. Va. 37,33, 705 S.E.2d 544 (2010). After a hearing on the matter, the State's motion to continue was granted on October 29, 2019, over the Defendant's objection.

A Jury trial was then reset for January 7, 2020. On this date, a trial was in progress in the Boone County Circuit Court so this matter was reset by the Court for a hearing on February 5, 2020 at which hearing a jury trial was then set by the Court to begin March 17, 2020. The parties met informally with the Court the week prior to discuss the impending trial in light of the COVID-19 Planning Document issued by the West Virginia Supreme Court on March 12, 2020. Said document instructed the courts that while courts were to remain open, "[j]udges and judicial personnel should refrain from any action that may inflame the public's fears or contradict federal or state guidance on the situation." The document further advised courts to "be flexible and proactive in managing their dockets." However, on March 16th the Court, anticipating the order closing courts and prohibiting jury trials and believing it was the proper course of action due to the pandemic, that a jury trial could not take place on March 17, 2020. The West Virginia Supreme Court issued an Administrative Order on March 16, 2020 in which the Court ordered that "[a]ll civil and criminal trials...that are scheduled during this time shall be continued generally, except where a criminal defendant's speedy trial rights may preclude the continuation

of such trial." The Court's order was effective from March 16, 2020 through April 10, 2020, and resumption of normal operation on that date would have still allowed a trial on this matter without violating the defendant's rights to a speedy trial. Thus, an order was signed on March 25, 2020, wherein the Court, *sua sponte*, continued this matter indefinitely in light of the COVID-19 pandemic. Subsequently, the West Virginia Supreme Court issued an Administrative ORDER declaring a judicial emergency in which the Court made findings that the "current COVID-19 crisis creates an unprecedented public health emergency that requires immediate action to encourage effective social distancing and reduce the need for people to leave their homes to protect the health and safety of the citizens of West Virginia." The Court ordered that "[a]ll jury trial are stayed" between March 23rd and April 11th. The Supreme Court extended the state of judicial emergency twice more until May 15, 2020. Finally, in a document entitled "COVID-19 Resumption of Operation Protocols" issued on May 6, 2020, the Supreme Court instructed that "jury trials may begin June 29, 2020."

On April 20th, 2020, three regular terms of court (not including the January 2019 term in which the defendant was indicted) did pass without trial. West Virginia Trial Court Rule 2.25 defines Terms of Court for the Twenty-Fifth Circuit, which states that the terms of court begin "[f]or the county of Boone, on the third Monday in January, April, and September."

On August 20, 2020, the defendant filed a motion to dismiss the indictment for a violation of her constitutional right to a speedy trial, for failure to bring the matter to trial within three terms of court pursuant to West Virginia Code §62-3-21. A hearing was set by the Court for September 15, 2020 at which time the parties argued the defendant's motion to dismiss. The Court ordered that this indictment be dismissed, with prejudice forever discharging this

defendant from prosecution for these charges. The Court signed the dismissal order on October 29, 2020.

SUMMARY OF ARGUMENT

The Petitioner contends that the Circuit Court of Boone County exceeded its legitimate powers by dismissing and forever discharging from prosecution the indictment in this case pursuant to West Virginia Code §62-3-21 as three *regular* terms of Court did not pass from the time of the defendant's indictment and the time this matter was brought on for trial due to the state of judicial emergency declared by the West Virginia Supreme Court issued on March 23, 2020 staying all proceedings. The Petitioner contends that the Constitution of West Virginia does not state a specific time period for a speedy trial, but says that a trial must be held without unreasonable delay, however, the Court has held that the aforementioned code section is the legislative adoption r declaration of what ordinarily constitutes a speedy trial within the meaning of the West Virginia Constitution, Article III, §14.

The Petitioner contends that this state of emergency precluded a trial within three terms of court by cutting short the 25th Judicial Circuit's January 2020 Term of Court. Because of the unprecedented state of judicial emergency, which resulted in a state-wide closure of the courts, the January 2020 Term of Court was not a regular term of court as contemplated by West Virginia Code §62-3-21 and that jury trials were not permitted to resume until June 29, 2020, which was a date outside the January 2020 Term of Court and was, in fact, in the next term, the April 2020 Term of Court.

The Petitioner further contends that the Court, as demonstrated in the case cited by the State in its motion to continue filed in the September 2019 Term of Court, *State v. VanHoose*, 227 W. Va. 37,33, 705 S.E.2d 544 (2010), which recognizes that continuing a case outside the

three terms of court, over the defendant's objection, is permissible. The state of judicial emergency and state-wide closure of the Courts due to the national pandemic, is unprecedented, and not contemplated by the legislature when drafting West Virginia Code §62-3-21. Further, this type of continuance by the court has not been previously addressed by the West Virginia Supreme Court of Appeals.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for a Rule 20 argument because it involves: (1) issues of first impression; (2) issues of fundamental public importance; and, (3) constitutional questions regarding the validity of a court ruling.

ARGUMENT

West Virginia Code §62-3-21 states: that every person charged with a felony by presentment or indictment shall be forever discharged from prosecution for the offense if there be three regular terms of court following said presentment or indictment without trial. The aforementioned code section, then enumerates grounds upon which the State's failure to try within three terms may be excused-- failure to try caused by the defendant's insanity, witness enticement or intimidation, illness or accident, motion to continue on the part of the accused, escape, failure to appear, or inability of the jury to agree in their verdict. The right to a speedy trial, however, is contained in the West Virginia Constitution, Article III, §14, as well as the United States Constitution, stating that "trial of crimes, and misdemeanors, unless herein otherwise provided shall be by a jury of twelve men, public, without *unreasonable delay*." (emphasis added). The language of the Constitution is deliberately silent on what constitutes an unreasonable delay or what constitutes a violation of a defendant's speedy trial rights. While this Court has held that West Virginia Code §62-3-21 is the "legislative adoption or declaration of

what *ordinarily* constitutes a speedy trial within the meaning of the. . . West Virginia Constitution, Article III, §14." *State v. Lambert*, 175 W. Va. 141, 144, 331 S.E.2d 873 (1985), (emphasis added), this Court has also held that "[t]he duty to accord speedy trials is founded in sane reason and sound law, constitutional and statutory." *State ex. rel. Farley v. Kramer*, 153 W. Va. 159, 170, 169 S.E.2d 106 (1969). The Court continues saying, [b]ut, speed ought not be permitted to work in justice, and lest it should do so, the provisions therefor are qualified in the Constitution by the significant phrase, 'without unreasonable delay..." *State ex. re. Farley*, 175 W. Va. 159 at 170. "A speedy trial is, in general, one had as soon as the prosecution, with reasonable diligence, and prepare for it; a trial according to fixed rules, free from *capricious* and *oppressive* delays, but the time within which it must be had to satisfy the guaranty *depends on the circumstances*. *State ex. re. Farley*, 175 W. Va. 159 at 169 (emphasis added).

While it seems that the plain language of the aforementioned statute, West Virginia Code § 62-3-21, leaves no other interpretation, and clearly indicates its intent that a case not tried within three terms of court shall be dismissed, the language of the constitution, used by the Court in *Farley and Lambert*, and in the Constitution itself, clearly indicated that it is not that cut and dried. The statute mentions "three *regular* terms of court." The Court in *Lambert*, says the statute is a "declaration of what *ordinarily* constitutes a speedy trial." Likewise, the Court in *Farley*, uses the words "reasonable," "capricious and oppressive delays," and "depends on the circumstances." The Constitution itself makes no mention of a specific time, but says "without *unreasonable* delay." The utilization of this language by the Legislature, the Court, and the drafters of the Constitution are obvious indicators that there is room to accommodate certain circumstances—circumstances that are unusual or unprecedented--like the COVID-19 pandemic

and measures in which governments have taken to protect its citizens and slow the spread of this deadly virus.

The defendant, in her motion to dismiss, cites case law from this Court in which the Court held that the circumstances of the cases did not excuse the delay in trying the cases within three terms. The case she mentioned was a 1917 case *Ex parte Anderson*, 81 W. Va. 171, 94 S.E. 31 (1917), which was cited by the *Farley* Court. In *Farley*, the Court discusses circumstances that can and cannot be attributed to the accused citing the *Anderson* case and stating that . "[a] regular term at which no petit jury has been summoned to attend must be counted in favor of the accused." *State ex rel. Farley v. Kramer*, 153 W. Va. 159, 169 S.E. 2d 106 (1969) (the Court citing *Ex parte Anderson*, 81 W. Va. 171, 94 S.E. 31 [1917]). In the *Anderson* case, the Circuit judge dispensed with calling in a petit jury by an order, pursuant to a code section, during one or more of the terms that the defendant was held in jail on an indictment. The *Anderson* Court held that, in relevant part, "[a] person held under indictment, without a trial, for three full and complete regular terms of the court in which he is held to answer, after the term thereof at which the indictment was found, may obtain his discharge from prosecution on the indictment, although the judge of the court had, by an order entered of record, dispensed with juries for such terms" *Ex parte Anderson*, 81 W. Va. 171. However, the Court, in *Anderson*, noted that whilst the judge dispensed with calling in a petit jury, the statute under which he did so did not preclude him from reversing his order and calling a jury in to hear the case.

The facts in the *Anderson* case are different from the present situation as the Court here could not call a petit jury in at any time from March 23, 2020 until June 29, 2020, pursuant to the Administrative Orders issued by this Court. The state of judicial emergency declared by this

Court because of the COVID-19 pandemic is an unprecedented event. Courts in all fifty-five counties were ordered to suspend all but emergency proceedings. Courts were ordered to not hold jury trials. These orders were issued to protect the public from the spread of this deadly virus.

While protecting the Constitutional rights of all criminal defendants is of the upmost priority and should be guarded carefully, it is not unprecedented for the Court to carve out exceptions to individuals' Constitutional rights in order to satisfy a greater need to protect the citizenry. One example is the right against unreasonable searches and seizures found in the United States Constitution and the West Virginia Constitution. There are several exceptions to this right, however, and one notable exception to the warrant requirement is the lockers of school children. In *State v. Joseph T.*, 175 W. Va. 598, 336 S.E.2d 728 (1985) the Court upheld a warrantless search of a student's locker in which marijuana was found. In its opinion, the Court cites a United States Supreme Court case, *New Jersey v. T.L.O.,* 469 U.S. 325, 105 S. Ct. 733 (1985) in which that Court states that the constitutional prohibition against unreasonable searches and seizures applies to searches conducted by public school authorities. However, the Supreme Court of the United States, in *T.L.O.,* recognized that "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." 105 S. Ct. at 743. Thus, the court held that "school officials need not obtain a warrant before searching a student who is under their authority." 105 S. Ct. at 743. *Joseph T.*, 175 W. Va. 598 at 603. The Court went on to explain that "the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law.

Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." The Court found that maintaining order in the schools was important enough to ease the warrant requirements, thus carving out an exception to the students' Constitutional rights to unreasonable searches and seizures.

The defendant in this case was not incarcerated and, thus, not prejudiced by a delay of one additional term of Court. The January 2020 Term of Court was not a regular term of Court as specified in West Virginia Code §62-3-21, as it was cut short by four weeks by the state-wide closure of the courts for all but emergency proceedings. The Court in *Lambert*, says the statute is a "declaration of what *ordinarily* constitutes a speedy trial." The COVID-19 pandemic was not ordinary. In fact, this Court states in its Administrative Order closing all the courts in the State, that this is an unprecedented situation. The delay in trying this case was a product of this Court and the government of this State trying to protect its citizens from the spread of the COVID-19 virus. These circumstances created a delay in bringing this matter to trial was in no way capricious and oppressive, as discussed by the Court in *Farley*. The delay, here, put the interests of public health and safety in the forefront and was in no way unreasonable as required by the Constitution.

CONCLUSION

By failing to take into consideration the language used in the statute, case law, and Constitution; taking into consideration that the January 2020 Term of Court was not a regular term; taking into consideration that the delay was not capricious or oppressive, taking into considerations the unprecedented circumstances of the pandemic situation, during which the Supreme Court ceased all but emergency court proceedings, and ordering this indictment

dismissed and the defendant forever discharged from prosecution for malicious assault, the Circuit Court exceeded its authority.

VERIFICATION

I, Jennifer L. Anderson, on behalf of the Petitioner named in the hereto annexed PETITION FOR WRIT OF PROHIBITION, 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 that insofar as they are therein stated to be upon information and belief, she believes them to be true.

Jennifer L. Anderson (8504)
Assistant Prosecuting Attorney

STATE OF WEST VIRGINIA,

COUNTY OF BOONE, to-wit:

OFFICIAL SEAL - NOTARY PUBLIC
State of West Virginia
JOSARA T. BISHOP
PO Box 363
Van, WV 25206
My Commission Expires 1/21/2021

Taken, subscribed and sworn to before me Josara J. Bishop this 30 day November, 2020

.My commission expires 1/21/2021.

CERTIFICATE OF SERVICE

I, Jennifer L. Anderson, Assistant Prosecuting Attorney, counsel for the Petitioner, do hereby certify that service of the attached PETITION FOR WRIT OF PROHIBITION has been made upon the Respondents, and the Chief Public Defender, by hand, as follows:

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

Troy D. Adams
Chief Public Defender
310 Main Avenue
Madison, WV 25130

Done this 30th day of November, 2020

Jennifer L. Anderson (8504)
Assistant Prosecuting Attorney for Boone County
200 State Street
Madison, WV 25130