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

**Docket No. 24-473**

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**State of West Virginia ex rel.**
**Sonté C. Butler**

**Petitioner,**

**v.**

**Shawn Straughn, Superintendent,**
**Northern Regional Jail,**

**Respondent.**

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# BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

**Page**

Introduction....1

Question Presented....1

Statement of the Case....2

Summary of the Argument....5

Statement Regarding Oral Argument and Decision....5

Argument....5

Petitioner's petition for a writ of habeas corpus in the original jurisdiction of this Court is moot because he is no longer confined as a preindictment detainee but as an indicted, pretrial detainee. Regardless, the State complied with West Virginia Code § 62-2-12 and Petitioner "was indicted before the end of the second term of the court, at which he is held to answer."

A. Petitioner is under indictment and, therefore, not eligible for discharge from imprisonment under West Virginia Code § 62-2-12, which applies to preindictment detainees....5

B. At the time that Petitioner filed his petition for a writ of habeas corpus with this Court, he was a preindictment detainee confined during the first "term of the court, at which he [was] held to answer" and, therefore, not eligible for discharge from imprisonment under the terms of West Virginia Code § 62-2-12....7

Conclusion....11

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*Glover v. Commonwealth*,
10 S.E. 420 (Va. 1889).....9, 10

*State ex rel. Ostrander v. Wilt*,
164 W. Va. 184, 262 S.E.2d 420 (1980).....8

*State ex rel. Shifflet v. Rudloff*,
213 W. Va. 404, 582 S.E.2d 851 (2003).....6

*State ex rel. Spadafore v. Fox*,
155 W. Va. 674, 186 S.E.2d 833 (1972).....9

*State v. Combs*,
247 W. Va. 1, 875 S.E.2d 139 (2022).....9

*State v. Fender*,
165 W. Va. 440, 268 S.E.2d 120 (1980).....9

*State v. Jessie*,
225 W. Va. 21, 689 S.E.2d 21 (2009).....5, 6

*State v. White*,
No. 13-0935, 2014 WL 4347130 (W. Va. Supreme Court, Aug. 29, 2014)
(memorandum decision) .....6

**Statutes**

Virginia Code 1860 c. 207, § 13.....10

Virginia Code 1887, § 4001.....9

West Virginia Code § 60A-4-401(a).....5

West Virginia Code § 62-1-8.....2, 7, 10

West Virginia Code § 62-2-12.....1, 3, 4, 5, 6, 7, 8, 9, 10, 11

West Virginia Code § 62-3-21.....5

**Rules**

West Virginia Rule of Appellate Procedure 16 .....1

## TABLE OF AUTHORITIES
(*continued*)

**Page(s)**

West Virginia Rule of Appellate Procedure 18 .....5

West Virginia Trial Court Rule 2.01.....2

## INTRODUCTION

Petitioner Sonté C. Butler, a self-represented litigant, filed a petition for a writ of habeas corpus in the original jurisdiction of this Court on July 29, 2024.[1] His petition seeks his discharge from imprisonment pursuant to West Virginia Code § 62-2-12 on the ground that the State failed to indict him before "the end of the second term of the court, at which he is held to answer." Petitioner has since been indicted, and his petition is, therefore, moot because West Virginia Code § 62-2-12 does not apply to post-indictment incarceration. Even so, the circuit court correctly analyzed this issue when Petitioner put the same question to it, and the statute's plain reading establishes that Petitioner is not and never has been entitled to the relief he seeks.

## QUESTION PRESENTED

Petitioner does not pose a question, but instead presents his petition as a "motion for discharge of imprisonment pursuant to West Virginia Code [§] 62-2-12." Pet. 6. The pertinent question is: Must this Court order a preindictment detainee released from confinement under the terms of West Virginia Code § 62-2-12 when the detainee, having waived the period for his preliminary hearing, is held to answer on a probable cause finding on February 20, 2024 (in the January 2024 term of the circuit court), but remains jailed and unindicted when Petitioner challenges his confinement on July 29, 2024 (in the following—the May 2024—term of the circuit court)? The answer is no; West Virginia Code § 62-2-12 does not, and never did, compel Petitioner's release.

[1] Respondent is filing an appendix to accompany this response, as permitted by West Virginia Rule of Appellate Procedure 16(g).

## STATEMENT OF THE CASE

Petitioner's criminal charges are under the jurisdiction of the First Judicial Circuit Court of Ohio County, where the terms of court open on the second Monday of January, May, and September. W. Va. Trial Ct. R. 2.01. The events, relative to that circuit court's timeline, occurred as follows.

*The May 2023 Term of Court (Opened May 8, 2023)*

On August 15, 2023, a West Virginia State Police trooper completed a criminal complaint charging that he found Petitioner in possession of approximately 21 grams of crack cocaine, 13 grams of Fentanyl, 31 grams of methamphetamine, four grams of Percocet, and $1,540 in cash during a routine traffic stop. Resp't's App. 6. Petitioner was promptly presented to the magistrate court on August 16, 2023, and informed that he was charged with four counts of "possession with intent to deliver," that his bail was set at a $10,000 cash-only bond, and that he was entitled to a preliminary hearing. Resp't's App. 10-13. Petitioner was remanded to the custody of the regional jail at that time. Resp't's App. 13.

The magistrate court scheduled Petitioner's preliminary hearing for August 24, 2023. Resp't's App. 14. It issued the appropriate notices, subpoena, and transport order for the hearing. Resp't's App. 2. Petitioner, however (with the assistance of his counsel), waived his right to have the hearing conducted within ten days (*see* W. Va. Code § 62-1-8), noting that a plea offer was under consideration. Resp't's App. 15. In a notice dated August 31, 2023, Petitioner was notified that his preliminary hearing would be conducted on October 30, 2023. Resp't's App. 16.

*The September 2023 Term of Court (Opened September 11, 2023)*

The magistrate court again issued the appropriate notices, subpoena, and transport order for Petitioner's preliminary hearing. Resp't's App. 2. On October 30, 2023, Petitioner moved for a continuance of the preliminary hearing scheduled for that day, on the ground of "parties working

towards resolution." Resp't's App. 17. The magistrate court granted Petitioner's motion. Resp't's App. 17.

The magistrate court conducted a bond modification hearing on December 11, 2023, for which Petitioner was present. Resp't's App. 18. The magistrate court denied bond modification. Resp't's App. 2. There is no indication that Petitioner conveyed any reluctance about the rescheduling of the preliminary hearing—or that he mentioned the preliminary hearing at all—when he appeared. Later, on January 5, 2024, the magistrate court provided Petitioner with a notice to appear at his preliminary hearing scheduled for February 20, 2024. Resp't's App. 19.

*The January 2024 Term of Court (Opened January 8, 2024)*

The magistrate court again issued the appropriate notices, subpoena, and transport order for Petitioner's preliminary hearing. Resp't's App. 3. The hearing was conducted as scheduled on February 20, 2024. Resp't's App. 20-21. On that date, the magistrate court found probable cause on all four charges listed in the criminal complaint. Resp't's App. 22-25. Petitioner's charges were, accordingly, bound over to the Circuit Court of Ohio County on February 20, 2024. Resp't's App. 4. Petitioner remained in the custody of the Northern Regional Jail and was not indicted in the January 2024 term of court.

*The May 2024 Term of Court (Opened May 13, 2024)*

Petitioner, by counsel, filed, on May 21, 2024, a motion for a bond hearing, noting that his indigence precluded his ability to make bail, and, consequently, he would be confined for more than a year when the grand jury next convened. Resp't's App. 26. Nine days later, Petitioner filed a motion for discharge from imprisonment, citing West Virginia Code § 62-2-12. Resp't's App. 29. The circuit court conducted a hearing on the bond modification motion on May 29, 2024, Resp't's App. 32, and entered an order modifying Petitioner's bond to $10,000 for each of the four

felonies on which probable cause was found, Resp't's App. 33-34. The circuit court noted in its order that Petitioner, a convicted felon, was under supervised release for federal charges at the time he was arrested on the charges underlying this criminal action. Resp't's App. 33. It also noted that the State "provided an explanation as to why no indictment has been forthcoming." Resp't's App. 33. A later pleading shows that the explanation provided to the court was that the West Virginia State Police Crime Lab had not analyzed items seized from Petitioner during the traffic stop, though analysis was pending. Resp't's App. 37.

Approximately one week later, the circuit court entered an order denying Petitioner's motion for discharge of imprisonment. Resp't's App. 35-36. The court explained that West Virginia Code § 62-2-12 was not triggered until Petitioner's charges were bound over to the circuit court. Resp't's App. 36. A few hours after the circuit court entered this order, and without realizing the circuit court had entered its order, the State filed its "Motion to Dismiss in Response to Motion for Discharge," asking the circuit court to dismiss Petitioner's charges without prejudice. Resp't's App. 37-38. The circuit court's docket sheet reflects that the circuit court considered the State's motion moot, Resp't's App. 5, but there does not appear to be a corresponding document in the circuit clerk's file.

Petitioner, without the aid of counsel, filed his original jurisdiction petition for a writ of habeas corpus with this Court on July 29, 2024. Pet. 1. The Court directed the State to respond on or before September 25, 2024.

Petitioner remained in the custody of the Northern Regional Jail and was not indicted in the May 2024 term of court.

*The September 2024 Term of Court (Opened September 9, 2024)*

Petitioner was indicted on four counts of possession with intent to deliver in violation of West Virginia Code § 60A-4-401(a) on September 10, 2024. Resp't's App. 5, 39-41.

## SUMMARY OF ARGUMENT

Petitioner's petition for a writ of habeas corpus in the original jurisdiction of this Court is moot because he is no longer confined as a preindictment detainee and is, in fact, under indictment on four counts of felony possession with intent to distribute narcotics. Mootness aside, Petitioner "was indicted before the end of the second term of the court, at which he is held to answer," and, thus, West Virginia Code § 62-2-12 was not violated.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rule of Appellate Procedure 18(a)(3) and (4), oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the record. A writ should not be granted in this action.

## ARGUMENT

**Petitioner's petition for a writ of habeas corpus in the original jurisdiction of this Court is moot because he is no longer confined as a preindictment detainee but as an indicted, pretrial detainee. Regardless, the State complied with West Virginia Code § 62-2-12 and Petitioner "was indicted before the end of the second term of the court, at which he is held to answer."**

### A. Petitioner is under indictment and, therefore, not eligible for discharge from imprisonment under West Virginia Code § 62-2-12, which applies to preindictment detainees.

Petitioner is seeking relief described in a specific statute and the issue, consequently, is narrow.[2] He calls for discharge from imprisonment under West Virginia's rarely-interpreted "two-

[2] To be plain, this is not a "speedy trial" issue, either statutory or constitutional. *See* W. Va. Code § 62-3-21. It concerns preindictment *confinement*, but not pre-accusatory, post-accusatory, or even preindictment *delay*. *See* syl. pts. 8-11, *State v. Jessie*, 225 W. Va. 21, 689 S.E.2d 21 (2009). A

(continued. . .)

term" rule, which provides that "[a] person in jail, on a criminal charge, shall be discharged from imprisonment if he be not indicted before the end of the second term of the court, at which he is held to answer," except under specific enumerated exceptions that do not apply here. *See* W. Va. Code § 62-2-12. But Petitioner does not qualify for the relief he seeks because he is no longer incarcerated awaiting indictment. Instead, he is incarcerated on the basis of his September 10, 2024, indictment, and this indictment changes the landscape. *See State ex rel. Shifflet v. Rudloff*, 213 W. Va. 404, 409 n.2, 582 S.E.2d 851, 856 n.2 (2003) ("[W]e recognize that our holding" that the criminal defendant was subject to an inexcusable delay of indictment "may have little practical value for [the defendant], as he may now be incarcerated on the basis of the . . . indictment.")

In *Shiflett*, the Court granted the requested writ of habeas corpus on the ground that he was illegally held without indictment, but acknowledged that the petitioner likely would not benefit from the writ. *Id.* The Court has since solidified its commitment to the principle described in *Shifflet*. One of the few, if not only, clear-cut interpretations of West Virginia Code § 62-2-12 instructs this: "[T]hat a violation of the two-term rule does not prohibit further prosecution *or incarceration on a subsequent indictment*, conviction, and sentence" and where a "petitioner seeks to address this issue on direct appeal after he has . . . been indicted, . . . any error with regard to this issue is moot." *State v. White*, No. 13-0935, 2014 WL 4347130, at *2 (W. Va. Supreme Court, Aug. 29, 2014) (memorandum decision) (emphasis added). This is the situation in which Petitioner

constitutional claim for preindictment delay would require Petitioner to "introduce substantial evidence of actual prejudice which proves he was meaningfully impaired in his ability to defend against the state's charges to such an extent that the disposition of the criminal proceeding was or will be likely affected." Syl. pt. 11, *id.* Nowhere in his petition for a writ of habeas corpus does Petitioner even hint that he has suffered actual prejudice hampering his ability to defend himself. His narrow, sole argument is that West Virginia Code § 62-2-12 unambiguously requires his release. Pet. 8. He is wrong.

finds himself. His petition for a writ of habeas corpus is moot because he is no longer subject to preindictment confinement, but instead is incarcerated on the subsequent indictment awaiting trial. The petition for a writ of habeas corpus should accordingly be dismissed as moot.

**B. At the time that Petitioner filed his petition for a writ of habeas corpus with this Court, he was a preindictment detainee confined during the first "term of the court, at which he [was] held to answer" and, therefore, not eligible for discharge from imprisonment under the terms of West Virginia Code § 62-2-12.**

Petitioner filed his petition for a writ of habeas corpus with this Court during the circuit court's May 2024 term of court—the fourth term that he was detained, but only the first full term after which the magistrate court judge found probable cause or, in the words of the statute, the first full term after the magistrate court endeavored to "*hold him to answer in the court having jurisdiction to try criminal cases*." W. Va. Code § 62-1-8 (emphasis added). This statutory language explaining the preliminary hearing requirement is vitally important to the consideration of the question now before the Court, because the Court is asked to decide whether Petitioner was illegally held without indictment past "*the second term of the court, at which he is held to answer*." W. Va. Code § 62-2-12 (emphasis added).

Per the express language of West Virginia Code § 62-1-8, Petitioner could not have been "held to answer" until either he waived preliminary examination (he did not) or the magistrate court judge found, "from the evidence that there [was] probable cause to believe that an offense has been committed and that defendant has committed it." Petitioner, thus, was not "held to answer" until his criminal charges were bound over on February 20, 2024, a date falling in the January 2024 term of court, which is the term immediately preceding the term of court (May 2024) in which he filed his original jurisdiction petition for a writ of habeas corpus.

Before Petitioner filed his petition invoking the original jurisdiction of this Court, he asked the circuit court to do the very thing he is now asking this Court to do. The circuit court recognized

then that Petitioner was not "held to answer" at the time of his arrest, and that the "two-term countdown" did not begin until jurisdiction transferred to the circuit court. Resp't's App. 36. The circuit court recognized something equally important in its brief analysis: The magistrate court's preliminary hearing was delayed through no fault of the State. Resp't's App. 35. Not only did Petitioner waive the time limitation in which the magistrate court was required to conduct the preliminary hearing, but he also moved the magistrate court to continue the later-scheduled preliminary hearing. Resp't's App. 15, 17, 35. The State did not request this continuance; Petitioner himself waived the timing and then requested the continuance that delayed his preliminary hearing. Any delay was Petitioner's doing.

Pragmatically, there is no reason to look to the time preceding the probable cause determination, because there is no signal in West Virginia Code § 62-2-12 that the Court should concern itself with the events before Petitioner was "held to answer." But to the extent the Court finds the passage of time a concern, the criminal defendant's own delay must always be considered. *See, e.g.*, *State ex rel. Ostrander v. Wilt*, 164 W. Va. 184, 187, 262 S.E.2d 420, 422 (1980) ("Basically, the court should assess three factors" when determining whether there was delay in conducting a preliminary hearing, including "the length of and reason for the delay," the defendant's "assertion of his right," and "the prejudice to the defendant."). In *Ostrander*, the Court found that the petitioner facing probationary revocation was not "denied his right to a preliminary hearing 'as promptly as convenient after arrest'" where any delay "was largely attributable to the actions of the petitioner and his attorney." *Id*. at 188, 262 S.E.2d at 422.

In this case, the State could not have started the clock ticking any sooner than it did, because the commencement of "the term at which [Petitioner] was held to answer" was in Petitioner's control. Petitioner was not "held to answer" until February 20, 2024, because he asked the court

to delay the preliminary hearing, and there is no mandate to hold Petitioner harmless for creating that delay. As it does when evaluating the "three-term rule," the Court should recognize that "[a]ny term at which a defendant procures a continuance" that delays the proceedings "is not counted" against the State. *See* syl. pt. 6, *State v. Combs*, 247 W. Va. 1, 875 S.E.2d 139 (2022) (quoting syl. pt. 2, *State ex rel. Spadafore v. Fox*, 155 W. Va. 674, 186 S.E.2d 833 (1972)). Petitioner was indicted within the appropriate time frame prescribed for the purposes of West Virginia Code § 62-2-12, as triggered by the point at which he was "held to answer." It does not matter for these purposes that he was confined for an extended time while awaiting the preliminary hearing, but if it did matter, Petitioner's own part in the delay should not be disregarded.

But also, Petitioner miscalculates the application of the two-term rule to his proceedings. Much the same way that "[i]n computing the three-term rule we do not count the term at which the indictment is returned," *see State v. Fender*, 165 W. Va. 440, 446, 268 S.E.2d 120, 124 (1980), it is similarly true that the term in which a defendant is "taken before a justice [of the peace] for examination . . . is not to be counted as one of the two terms within which, according to the requisitions of the statute, the prisoner must have been indicted, or discharged from imprisonment . . . ." *Glover v. Commonwealth*, 10 S.E. 420, 422 (Va. 1889).[3] The taking of a defendant "before

[3] *Glover v. Commonwealth* interpreted Virginia Code 1887, § 4001, which provided that

> [a] person in jail on a criminal charge shall be discharged from imprisonment, if a presentment, indictment, or information be not found or filed against him before the end of the second term at which he is held to answer, unless it appear to the court that material witnesses for the commonwealth have been enticed or kept away, or are prevented from attendance by sickness or inevitable accident, and except, also, in the case provided by the following section [when sent to a lunatic asylum or "delivered to friends]; and in those cases where such criminal charge is one of felony, the second term of the court shall be construed to mean the second

(continued. . .)

a justice for examination" in modern parlance is the preliminary hearing. W. Va. Code § 62-1-8 ("If the offense is to be presented for indictment, the preliminary hearing shall be conducted by a justice of the county in which the offense was committed within a reasonable time after the defendant is arrested, unless the defendant waives examination.")

This deep-rooted consideration confirms that Petitioner has not, even for a single day, been held in violation of West Virginia Code § 62-2-12. Petitioner was held to answer in the Circuit Court of Ohio County in the January 2024 term of court, and that term "is not to be counted as one . . . within which [Petitioner] must have been indicted, or discharged from imprisonment . . . ." *Glover*, 10 S.E. at 422. Petitioner filed his petition—prematurely—in this Court during the circuit court's May 2024 term, but that was only the first term to be counted for West Virginia Code § 62-2-12. Petitioner was indicted a mere weeks ago, at the beginning of the September 2024 term of court. The timing of the indictment unequivocally shows that Petitioner was indicted well "before the end of the second term of the court, at which he is held to answer" inasmuch as the next term of the circuit court will not open for several months. Petitioner, therefore, is not currently, and was

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> term thereof at which a grand jury was impaneled; but in all other cases of a criminal charge, it shall have no such restricted meaning.

*Available at* https://bit.ly/3N23vnn. This language is slightly expansive of the language found in Virginia Code 1860 c. 207, § 13 (the apparent forerunner of West Virginia Code § 62-2-12) which provided that

> [a] person in jail, on a criminal charge, shall be discharged from imprisonment, if he be not indicted before the end of the second term of court, at which he is held to answer, unless it appear to the court, that material witnesses for the commonwealth have been enticed or kept away, or are prevented from attendance, by sickness or inevitable accident, and except also in the case provided by the following section [when not indicted by reason of insanity].

*Available at* https://bit.ly/4dcbkSp.

not at any time prior, held in violation of West Virginia Code § 62-2-12. Accordingly, a writ should not lie.

## CONCLUSION

Respondent Shawn Straughn requests this Court refuse Petitioner's petition for writ of habeas corpus.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Michele Duncan Bishop, counsel for Respondent, do hereby certify that I have served a true and accurate copy of the foregoing **Brief of Respondent** upon Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, September 23, 2024, and addressed as follows:

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