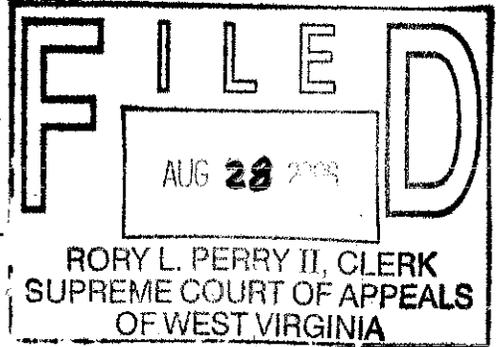


33213

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CHARLESTON



STATE EX REL. KEITH ODELL MCCOURT,
Petitioner,

vs.

THE HONORABLE JACK ALSOP,
Judge of the Circuit Court of Webster County,
West Virginia,
Respondent.

FILED
2006 JUL 17 PM 2:33
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

PETITION FOR WRIT OF PROHIBITION

To the Honorable Justices of the Supreme
Court of Appeals of West Virginia

**KIND OF PROCEEDING AND NATURE OF RULING
IN LOWER TRIBUNAL**

Your petitioner, Keith Odell McCourt, seeks an appeal of a Order denying Defendant's
Motion to Dismiss Indictment entered by the Circuit Court of Webster County, West Virginia on
the ___th day of May, 2006.

Said Order set a trial date for Mr. McCourt for August 22, 2006 on an indictment

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CHARLESTON

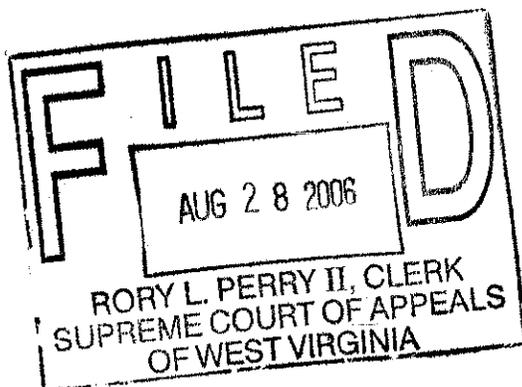
STATE EX REL. KEITH ODELL MCCOURT,
Petitioner,

vs.

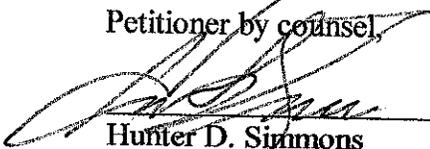
THE HONORABLE JACK ALSOP,
Judge of the Circuit Court of Webster County,
West Virginia,
Respondent.

From the Circuit Court of
Webster County, West Virginia
Case No. 94-F-24

PETITION FOR WRIT OF PROHIBITION



Petitioner by counsel,



Hunter D. Simmons
47 West Main Street
Buckhannon, WV 26201
(304) 472-9499
W.V. Bar No. 9458

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CHARLESTON

STATE EX REL. KEITH ODELL MCCOURT,
Petitioner,

vs.

THE HONORABLE JACK ALSOP,
Judge of the Circuit Court of Webster County,
West Virginia,
Respondent.

CLERK OF THE SUPREME COURT
OF WEST VIRGINIA
CIRCUIT COURT, W. VA.

2006 JUL 17 PM 2:33

FILED

PETITION FOR WRIT OF PROHIBITION

To the Honorable Justices of the Supreme
Court of Appeals of West Virginia

**KIND OF PROCEEDING AND NATURE OF RULING
IN LOWER TRIBUNAL**

Your petitioner, Keith Odell McCourt, seeks an appeal of a Order denying Defendant's Motion to Dismiss Indictment entered by the Circuit Court of Webster County, West Virginia on the 17th day of July, 2006.

Said Order set a trial date for Mr. McCourt for August 22, 2006 on an indictment

returned on September 6, 1994.

STATEMENT OF FACTS

On or about the 5th day of July, 1994, a criminal complaint and warrant was issued against Keith Odell McCourt for sexual assault in the second degree. Mr. McCourt was not arrested at that time.

An Indictment was returned by the Grand Jurors of the State of West Virginia, in and for the County of Webster, on September 6, 1994. Said indictment was not served on Mr. McCourt at that time.

A bench warrant was issued by the Court of Webster County on the 18th day of January, 1995. Said warrant was not served on Mr. McCourt at that time.

A bench warrant was issued by the Court of Webster County on the 8th day of May, 1995. Said warrant was not served on Mr. McCourt at that time.

A bench warrant was issued by the Court of Webster County on the 18th day of January, 1996. Said warrant was not served on Mr. McCourt at that time.

A bench warrant was issued by the Court of Webster County on the 22nd day of May, 1996. Said warrant was not served on Mr. McCourt at that time.

A bench warrant was issued by the Court of Webster County on the 9th day of September, 1996. Said warrant was not served on Mr. McCourt at that time.

No further action was taken by the Court of Webster County until Mr. McCourt was arrested on the 24th day of March, 2006 for the offense of Driving Under the Influence of Alcohol, Second Offense, and Driving while License Suspended for DUI. Subsequent to that arrest he was arrested for the 1994 criminal charge and was arraigned on the 1st day of May, 2006.

Mr. McCourt made a motion to Dismiss Indictment and Discharge Defendant From Prosecution on the 14th day of May, 2006. The Circuit Court of Webster County denied said Motion.

ASSIGNMENTS OF ERROR

I.

THE TRIAL COURT EXCEEDED ITS AUTHORITY AND ABUSED ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO DISMISS INDICTMENT IN VIOLATION OF WEST VIRGINIA CODE 62-3-21, THE THREE TERM RULE.

POINTS AND AUTHORITIES RELIED UPON

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Sixth Amendment

WEST VIRGINIA CONSTITUTION AND STATUTES

Article III, Section 14 of the West Virginia State Constitution

W.Va Code 62-35-21.....

WEST VIRGINIA SUPREME COURT OF APPEALS CASES

State ex rel. George Stines v. The Honorable George Allen Locke, 159 W.Va. 292, 220 S.E.2d 443 (1975);

State of West Virginia v. Lacy, 160 W.Va. 96, 232 S.E.2d. 519 (1977);

State ex rel. John Sutton v. Thomas H. Keadle, 176 W.Va. 138, 342 S.E.2d 103 (1986).

State ex rel. Boso v. Warmuth, 270 S.E.2d 631 (1975)

State ex rel. Parsons v. Cuppett, 155 W.Va. 469 184 S.E.2d 616 (1971)

DISCUSSION OF LAW

I.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS INDICTMENT AND DISCHARGE DEFENDANT FROM PROSECUTION FROM THE INDICTMENT RETURNED SEPTEMBER 6, 1994; A VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL AND HIS RIGHTS UNDER WEST VIRGINIA CODE 62-3-21.

The Court has often stated that the three-term rule statute is a legislative enactment which is designed to afford the Defendant a speedy trial as mandated by Article III, Section 14 of the West Virginia Constitution and the constitutional requirement that a criminal sentence "shall be proportioned to the character and degree of the offense" is explicitly stated in Article III, Section 5 of our State Constitution. *State ex rel John Sutton v. Thomas H. Keadle 176 W.Va. 138 (1986)*

One charged with a crime is entitled to be forever discharged from prosecution upon such charge, if he is not tried within three regular terms of court after the term in which the indictment is found against him, unless the failure to try is excused for one of the reasons contained in Code, 62-3-21 *State ex rel. Parsons v. Cuppett, 155 W.Va. 469 (1971)*

A careful examination of the record in this case clearly shows that there was no action, fault, or failure on the defendant's part, to prevent him from being brought to trial in the term of court following his indictment in September, 1994 or in any term of court in the subsequent twelve years.

The defendant was incarcerated in the State of Virginia for a period of years shortly after the return of the indictment in 1994 and the Court has recognized that W.Va. Code 62-3-21 imposes a duty on the State to exercise reasonable diligence to procure temporary custody of an out-of-state accused for the purpose of offering him a speedy trial once his out-of-state whereabouts become known. The failure of the State so to act will cause the terms during which the accused was in out-of-state custody to be chargeable against the State under the "Three Ter, Rule." *State ex rel. Boso v. Warmuth*, 270 S.E. 2d 631 (W.Va. 1980) The record reflects that no NCIC search or other appeal to law enforcement was taken by the State to determine the Defendant's whereabouts

A bench warrant was issued by the Court of Webster County on the 18th day of January, 1995, on the 8th day of May, 1995, on the 18th day of January, 1996, on the 22nd day of May, 1996, and finally on the 9th day of September, 1996. No further action was taken in this case in the subsequent ten years until defendant's arrest in 2006. When an indictment or presentment is found or made the court shall award process against the accused to answer to the same, if he be not in custody. Such process, if the prosecution be for a felony, shall be a *capias*... *W.Va. Code 62-2-13*. The State took no action after the 9th day of September, 1996. Inordinate delay in the issuance and execution of the *Capias* following return of an indictment is not contemplated by the statute; is inconsistent with the speedy trial requirement of the federal and state constitutions and the West Virginia Statute, W.Va. Code 62-3-21. *State v. Lacy* 160 W.Va. 96, 232 S.E.2d 519 (1977)

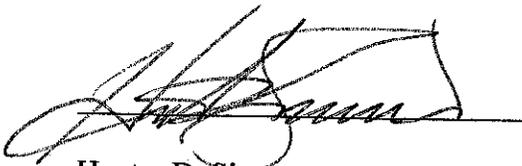
RELIEF REQUESTED

WHEREFORE, The Petitioner prays that the Court overrule the Order following the May 14, 2006 hearing; dismiss the indictment in Webster County Criminal Case 94-F-24, discharge Keith Odell McCourt from further prosecution, and any other relief that this Court may deem appropriate under the circumstances.

Respectfully submitted

Keith Odell McCourt

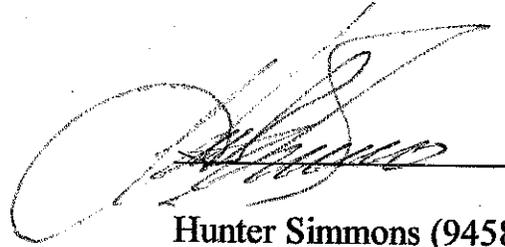
By Counsel



Hunter D. Simmons
47 West Main Street
Buckhannon, WV 26201
304/472-0988
WV Bar No. 9458

CERTIFICATE OF SERVICE

I, Hunter Simmons, counsel for the defendant, do hereby certify that on July 17, 2006, I served the foregoing "Petition for writ of prohibition" upon The Honorable Jack Alsop, Judge of the Circuit Court of Webster County, and upon Dwayne C. Vandevender, Webster County Prosecuting Attorney, 137 South Main Street, Webster Springs, WV 26288 by hand delivery.

A handwritten signature in black ink, appearing to read "Hunter Simmons", is written over a horizontal line.

Hunter Simmons (9458)
47 West Main Street
Buckhannon, WV
(304) 472-9499