

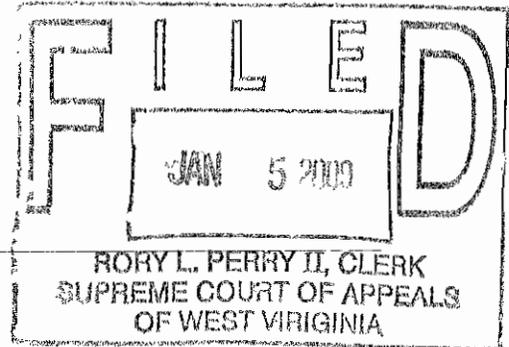
**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
At Charleston**

CASE No. _____

STATE OF WEST VIRGINIA
Ex Rel: JAMES L. KNOTTS,
Relator,

v.

THE HONORABLE RICHARD FACEMIRE,
Judge of the Circuit Court of Clay County; and,
THE HONORABLE DANIEL B. DOTSON, III,
Special Prosecuting Attorney of Clay County,



Respondents.

**EMERGENCY PETITION FOR
A WRIT OF PROHIBITION**

To: The Honorable, the Justices of said Court:

**I.
TYPE OF PROCEEDING**

This is a Petition for a Writ of Prohibition, brought pursuant to Article VIII, Section 3 of the Constitution of West Virginia, and Chapter Fifty-Three, Article One, Section One, et seq (§53-1-1) of the Code of West Virginia (1931, as amended) which grants original jurisdiction in prohibition and mandamus to this Honorable Court.

This relief is sought on an expedited or emergency basis to prevent the respondents from conducting a criminal jury trial set to begin on Tuesday, January 6, 2009 at 9:00 a.m.

**II.
STATEMENT OF THE CASE**

An indictment, containing one hundred twenty-nine counts, was returned against the defendant on July 15, 2008. All of the counts charge either sexual assault in the first degree, incest, sexual abuse by a custodian, or sexual assault in the third degree.

The counts, running consecutively and beginning with Court I, allege that the first offense occurred on March 16, 1991 and Count 129 alleges that the last offense occurred on March 18, 1994. Thus, the allegations contained in Count I occurred - if at all - seventeen years before the Indictment was returned, and the last offense occurred - if at all - more than fourteen years before the Indictment was returned.

Witness statements, obtained during discovery, reveal that both the Sheriff of Clay County (Clarence Douglas) and the Prosecuting Attorney of Clay County (Jeff Davis) had actual knowledge of these allegations in 1995 but chose not to act.

In a statement dated September 13, 2006, Senior Trooper J. T. Portillo interviewed Jesse Nicholas, mother of the purported victim, during which he asked, "How come law enforcement wasn't notified?"

"They were," Mrs. Nicholas responded. Then she explained in detail how she had personally met with Sheriff Douglas and Prosecutor Davis and told them everything she knew about the alleged molestation.

On March 4, 2008, former prosecutor Davis gave a statement in which he explained why he chose not to prosecute. The statement summary reports that, "Davis...stated the reason the case was not prosecuted was because the victim's mom and dad came into the office and told him they wanted to handle the situation inside the family and no longer wished to pursue prosecution..."

Former Prosecutor Davis also reported that Connie Knotts (then the defendant's wife) "...came in at the time of the allegations and talked about the situation..." As an aside, not long thereafter, in 1996, Davis represented Mrs. Knotts in her divorce against the defendant.

III. ARGUMENT

A delay, measured in years, between the alleged commission of a crime and the indictment, when the State had actual notice of the alleged crime, is presumptively prejudicial.

In discovery Ordered by the Court and provided by the State, there are therapy notes by Beth Wright Bragg, M.A., L.P.C., a licensed professional counselor, who saw the purported victim on multiple occasions. The counseling sessions began on February 13, 1995. After a session on March 1, 1995, Ms. Bragg wrote, **"I did not see you again for over two months. I had contacted the Prosecutors's Office and was told that they were aware of the situation."** (Emphasis supplied). Here, we have a mandatory reporter who, in fact, reported her suspicions to the prosecutor's office, only to learn that the prosecutor was already "...aware of the situation." The Office of the Prosecuting Attorney had this information thirteen years before seeking an indictment. And, it makes no difference who the prosecutor was or that the office may have changed hands multiple times. The prosecutor, in that capacity, is the embodiment of the State. Therefore, the State had knowledge of the accusations but did not act.

This Court held in State ex rel State v. Hill, 201 W.Va. 95, 491 S.E. 2d 765 (1997) that:

"Our rule for determining when a defendant's due process rights are violated was stated in State ex rel. Leonard v. Hey, ___ W. Va. ___, 269 S.E.2d 394 (1980). In Leonard we found that a **delay of eleven years between arrest and indictment "is presumptively prejudicial to the defendant and violates his right to due process of law. . . ."** Syllabus Point 1, Leonard. (Emphasis supplied) When the delay is not presumptively prejudicial, Leonard requires that the effect of the delay be determined "by weighing the reasons for the delay against the impact of the delay upon the

defendant's ability to defend himself." Syllabus Point 2, in part, Leonard; in accord Syllabus Point 1, State ex rel. Bess v. Hey, 171 W. Va. 624, 301 S.E.2d 580 (1983). When the delay is not presumptively prejudicial, the defendant has the initial burden of showing how the delay prejudiced his case. In Syllabus Point 1, State v. Richey, 171 W. Va. 342, 298 S.E.2d 879 (1982), we said:

"The general rule is that where there is a delay between the commission of the crime and the return of the indictment or the arrest of the defendant, the burden rests initially upon the defendant to demonstrate how such delay has prejudiced his case if such delay is not *prima facie* excessive."

In this case, the delay was clearly and undeniably "...*prima facie* excessive..." Therefore, it is presumptively prejudicial. Also, in this case, the purported victim actually spoke to the Prosecuting Attorney of Clay County more than thirteen years prior to indictment and, in an exercise of prosecutorial discretion, the State decided not to proceed. Thus, the State knew of the allegations long ago and decided not to act.

A delay of thirteen to seventeen years between the alleged crimes and the indictment places the defendant at an untenable disadvantage and completely destroys any remote possibility of alibi defenses and effectively disables potential witnesses on his behalf. Who could possibly recall where one was or what one was doing on a particular day that long ago? While many professional, such as doctors and lawyers, keep date books recording appointments and other activities, who among them keeps those books for more than a decade?

The Defendant is clearly prejudiced because the delay effectively deprives him any opportunity to impose the defense of alibi and forces him to attempt to prove an unprovable negative.

The delay in this case is presumptively prejudicial and violates the defendant's rights to due process as guaranteed by Article 3, Section 10 of the Constitution of the State of West Virginia.

Additionally, this Court has held that the equitable doctrine of laches applies to criminal cases to the same extent it applies to civil cases. As such, the question is: is it fair to allow the State to wait thirteen to seventeen years to bring this action?

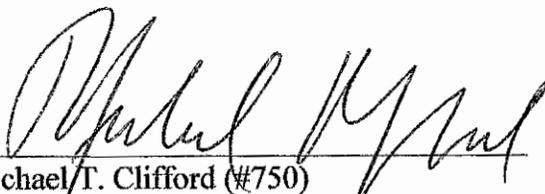
Counsel respectfully urges this Honorable Court to conclude that even though the Code of West Virginia imposes no statutes of limitation on the prosecution of felonies, that the doctrine of fundamental fairness embodied in the due process clause of the Constitution of both the United States and the Constitution of the State of West Virginia, imposes a duty on the State to act within a reasonable time.

IV.
PRAYER

WHEREFORE YOUR RELATOR PRAYS that this Honorable Court issue an immediate Order directing the Respondents to refrain from seating a jury or conducting a trial in this matter; and to issue a peremptory rule, directed to the Respondents, compelling them to show cause, if any they can, why they should not be prohibited from proceeding with the prosecution of this case.

Respectfully submitted,

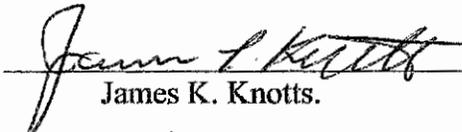
James Knotts
Relator by Counsel


Michael T. Clifford (#750)

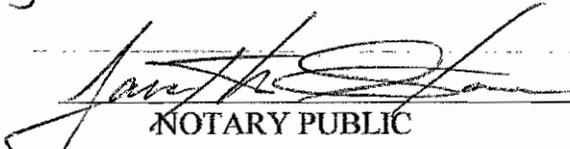

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STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

Taken, subscribed and sworn to before me, the undersigned authority, this 3rd day of
January, 2009, by James K. Knotts, relator


James K. Knotts.

My commission expires: February 1, 2017.


NOTARY PUBLIC



CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the annexed Petition for a Writ of Prohibition was hand-delivered to both of the respondents, in person, on Monday, January 5, 2009.



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