

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WALTER JESSIE,

Appellant,

v.

Supreme Court No. \_\_\_\_\_  
Circuit Court No. 07-F-10 (Mingo)

STATE OF WEST VIRGINIA,

Appellee.

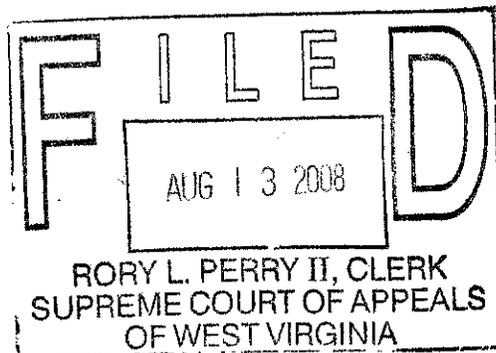
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PETITION FOR APPEAL

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APPELLANT'S BRIEF

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## PROCEEDINGS AND RULINGS BELOW

The petitioner and defendant below, Walter Jessie, was convicted on May 9, 2007, in the Circuit Court of Mingo County, West Virginia, of one (1) count of "Unlawful Assault," a lesser included offense of "Malicious Assault," in violation of West Virginia Code §61-2-9.

The petitioner filed various pretrial and post-trial motions regarding the charges against him. Specifically, the petitioner filed an Omnibus Discovery Motion seeking whether the State intended to seek to introduce flight evidence, however the petitioner never was advised of such intent. *See*, Defendant's Omnibus Discovery Motion ¶16. Additionally, the petitioner filed a Motion to Dismiss based upon a perceived violation of his Constitutional Right to a Speedy Trial under the Constitution of West Virginia and the Constitution of the United States said motion being denied by the Court by Order entered on March 15, 2007. *See*, Defendant's Motion to Dismiss; *See also*, Court's Order Denying Defendant's Motion to Dismiss Indictment; and *See also*, TR pp. 3-17, generally.

At the close of evidence, the petitioner moved the Court for judgment of acquittal, said motion being denied. *See*, Amended Jury Trial Order; TR pp. 96-98.

Then, the petitioner proceeded to present his defense.

Upon submission of the case to the jury, the petitioner again moved the Court for judgment of acquittal, said motion being denied.

The jury deliberated and returned a verdict of guilty of one (1) count of Unlawful Assault. *See*, Amended Jury Trial Order entered May 17, 2007.

On June 11, 2007, the petitioner moved the Court for a new trial in accordance with Rule 33 of the West Virginia Rules of Criminal Procedure, said Motion being denied by Order entered

June 22, 2007.

The petitioner was sentenced by the Circuit Court of Mingo County, West Virginia, to one (1) to five (5) years in the State Penitentiary on June 11, 2007. *See*, Sentencing Order entered June 15, 2007.

The petitioner then timely filed a Notice of Intent to Appeal; however, counsel was unable to get the appeal timely filed. Accordingly, counsel for petitioner moved this Honorable Court for an Order granting the petitioner additional time in which to affect his appeal. By Vacation Order entered on November 26, 2007, this Honorable Court Ordered the Circuit Court of Mingo County, West Virginia, to resentence the petitioner for purposes of appeal.

Accordingly, on March 7, 2008, the petitioner was resentenced to one (1) to five (5) years in the State Penitentiary. *See*, Resentencing Order entered March 13, 2008.

Then, on July 10, 2008, the petitioner moved the Circuit Court of Mingo County, West Virginia, for additional time to perfect his appeal, said Motion being granted. *See*, Order Extending Time Period of Appeal.

This Petition for Appeal now follows.

## STATEMENT OF FACTS

The petitioner and defendant below, Walter Jessie, was convicted on May 9, 2007, in the Circuit Court of Mingo County, West Virginia, of Unlawful Assault in violation of West Virginia Code §61-2-9.

The conviction arose from an incident between the petitioner and the victim, Randy Francis, that occurred on August 1, 2004. On that date, the victim alleged that he was beaten by the petitioner with a tire iron. The petitioner contended that the alleged victim was the aggressor and that he was defending himself and/or others from the unprovoked attack.

The petitioner was arrested and arraigned on August 26, 2004, twenty-five (25) days after the incident.

The petitioner was indicted by the January term of the Mingo County Grand Jury and arraigned on January 17, 2007, over two and one-half (2 ½) years after his initial arrest.

The petitioner filed a Motion to Dismiss citing his Constitution Right to a Speedy Trial under Article III Section 14 of the Constitution West Virginia and Sixth Amendment of the Constitution of the United States; however, the Motion to Dismiss was denied by Order entered on March 15, 2007. *See*, Defendant's Motion to Dismiss; *See also*, Court's Order Denying Defendant's Motion to Dismiss Indictment; and *See also*, TR pp. 3-17, generally.

The petitioner was then tried for "malicious assault" and convicted of the lesser included offense of "unlawful assault" by a Mingo County Petit Jury on May 9, 2007. *See*, Amended Jury Trial Order.

## ASSIGNMENTS OF ERROR

### I. Speedy Trial Errors.

- A. Petitioner was denied his right to a Speedy Trial under Article 3 Section 14 of the *Constitution West Virginia* and Sixth Amendment of the *Constitution of the United States*, by the two and one-half (2 ½) year delay from his initial arrest until his indictment and trial.
- B. The trial court erred in finding that the petitioner was not prejudiced by a two and one-half (2 ½) year delay from his initial arrest until his indictment and trial thus denying him Due Process protection, under Article 3 Section 10 of the *Constitution West Virginia* and the Fifth Amendment of the *Constitution of the United States*.
- C. The trial court erred in finding that the petitioner waived his right to a speedy trial as a result of his initial counsel's failure to move for a speedy trial thus denying him Due Process protection, under Article 3 Section 10 of the *Constitution West Virginia* and the Fifth Amendment of the *Constitution of the United States*.

- II. Petitioner was denied effective assistance of counsel as guaranteed by Article III, Section 14 of the *Constitution of West Virginia* and the Sixth Amendment of the *Constitution of the United States* as petitioner's initial counsel failed to move for a speedy trial, thus effectively waiving this right as found by the trial court.

III. Petitioner was denied Due Process protection, under Article 3 Section 10 of the *Constitution West Virginia* and the Fifth Amendment of the *Constitution of the United States*, by the State's failure to inform the petitioner of its intent to elicit flight evidence.

## DISCUSSION OF LAW

### I. SPEEDY TRIAL ERRORS

**A. Petitioner was denied his right to a Speedy Trial under Article 3 Section 14 of the Constitution West Virginia and Sixth Amendment of the Constitution of the United States, by the two and one-half (2 ½) year delay from his initial arrest until his indictment and trial.**

The petitioner was denied his right to a Speedy Trial by the two and one-half (2 ½) year delay from the time of his initial arrest until his indictment and trial.

Article 3 Section 14 of the Constitution of West Virginia and the Sixth Amendment of the Constitution of the United States guarantees a defendant the right to a speedy trial. Article 3 Section 14 of the Constitution of West Virginia states in pertinent part, "Trials of crimes, and of misdemeanors, unless herein otherwise provided, shall be ... without unreasonable delay[.]" Additionally, the Sixth Amendment of the Constitution of the United States of America states in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]"

In the case at hand, the petitioner was arrested on August 26, 2004, for an incident that allegedly occurred on August 1, 2004. Then, in January 2007, the petitioner was indicted by the Mingo County Grand Jury.

On March 2, 2007, the petitioner filed a Motion to Dismiss indictment noting that between his arrest and his indictment eight (8) terms of the Mingo County Grand Jury had convened without action in this matter – nearly 2 ½ years without action. *See*, Motion to Dismiss and Court's Order Denying Defendant's Motion to Dismiss.

This Honorable Court has held, "The Sixth Amendment speedy trial right begins with the actual arrest of the petitioner and will also be initiated where there has been no arrest, but formal

charges have been brought by way of an indictment or information.” State v. Hinchman, 214 W.Va. 624 (Syl. Pt. 4)(2003)(citing, State v. Drachman, 178 W.Va. 207, Syl. Pt. 1, 1987). This Court went on to state, “A determination of whether a defendant has been denied a trial without unreasonable delay requires consideration of four factors: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant’s assertion of his rights; and (4) prejudice to the defendant. The balancing of the conduct of the defendant against the conduct of the State should be made on a case-by-case basis and no one factors either necessary or sufficient to support a finding that the defendant has been denied a speedy trial.” State v. Hinchman, 214 W.Va. 624 (Syl. Pt. 6)(2003)(citing, State v. Foddrell, 171 W.Va. 54, Syl. Pt. 2, 1982). Additionally, this Court has held, “The Due Process Clause of the Fifth Amendment of the United States Constitution and Article III, Section 10 of the West Virginia Constitution require at the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the State’s delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense.” State v. Hinchman, 214 W.Va. 624 (Syl. Pt. 7)(2003)(citing, Hundley v. Ashworth, 181 W.Va. 379, Syl. Pt. 2, 1989).

In order to show that a defendant is prejudiced by a delay in prosecution, this Court has held, “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.” State v. Hinchman, 214 W.Va. 624 (Syl. Pt. 9)(2003)(citing, State v. Richey, 171 W.Va. 342, Syl. Pt. 1, 1982). This Court went on to state, “The effects of less gross delays upon a defendant’s due process rights must be determined by a trial court by weighing the reasons for

delay against the impact of the delay upon the defendant's ability to defend himself." State v. Hinchman, 214 W.Va. 624 (Syl. Pt. 10)(2003)(citing, State ex rel. Leonard v. Hey, 269 S.E.2d 394, Syl. Pt. 2, 1980).

Lastly, Rule 48(b) of the West Virginia Rules of Criminal Procedure states, "If there is unnecessary delay of more than one year in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the Circuit Court, the court shall, on its own motion, dismiss the indictment, information or complaint, without prejudice. If there is unnecessary delay in bringing a defendant to trial, the court may, upon proper motion, dismiss the indictment, information or complaint."

In the case hand, the petitioner was arrested on August 26, 2004, based upon a complaint and warrant issued on August 2, 2004. In the report of investigation that was provided to the petitioner through discovery, it appears that the State obtained a statement from Geneva Jessie, the petitioner's mother, on August 2, 2004. In her statement, Ms. Jessie alleges that the petitioner, Walter Jessie, told her that he (Walter Jessie) was going to find Randy Francis and kick his ass. Then, the State waits two years to take statements from the alleged victim, Randall Francis, and two additional witnesses, Antoinette Hatfield and Clarissa Lynn Tackett.

At the time of the incident, the petitioner, Walter Jessie, had four witnesses who would have told police, and eventually testified, that Randy Francis was the aggressor in this incident. However, because of the State's delay in bringing this case to trial, two of the witnesses died and two others moved out-of-state. In support of the petitioner's contention, he submitted an affidavit which was attached to his Motion to Dismiss. In the affidavit, the petitioner identifies the two deceased witnesses as Paulette Patrick and Michael Hinkle; furthermore, he identifies the

two subjects who have moved out-of-state as being Kenny Allen and Shannon Allen. Only one of the four witnesses, Kenny Allen, testified for the petitioner as two were dead and the other could not be located. *See*, Defendant's Motion to Dismiss.

Had the State timely prosecuted the petitioner, the petitioner contends that he would have had at least four (4) witnesses to provide corroborating testimony that the alleged victim, Randy Francis, was the aggressor in this incident; further, the petitioner asserts that the witnesses would have testified that alleged victim, Randy Francis, was looking for the petitioner to whip him for at least two months prior to the incident. However, by failing to timely prosecute the petitioner, the State has denied the petitioner the right to a speedy trial under both the West Virginia and the United States Constitutions and has denied him his Due Process protections under both constitutions.

Accordingly, the petitioner moves this Honorable Court to find that the delay in his prosecution was violative of his speedy trial rights guaranteed under both the Sixth Amendment of the Constitution of the United States and Article 3 Section 14 of the Constitution of West Virginia Constitution and violative of his due process protections accorded under the Fifth Amendment of the Constitution of the United States and Article 3 Section 10 of the Constitution of West Virginia.

**B. The trial court erred in finding that the petitioner was not prejudiced by a two and one-half (2 ½) year delay from his initial arrest until his indictment and trial thus denying him Due Process protection, under Article 3 Section 10 of the *Constitution West Virginia* and the Fifth Amendment of the *Constitution of the United States*.**

The petitioner asserts that the trial court erred in finding that he was not prejudiced by the delay between his initial arrest and his indictment and trial.

This Court has set forth a four (4) part test when considering whether a defendant has been denied a speedy trial. In State v. Hinchman, this Court stated, "A determination of whether a defendant has been denied a trial without unreasonable delay requires consideration of four factors: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant. The balancing of the conduct of the defendant against the conduct of the State should be made on a case-by-case basis and no one factors either necessary or sufficient to support a finding that the defendant has been denied a speedy trial." State v. Hinchman, 214 W.Va. 624 (Syl. Pt. 6)(2003)(citing, State v. Foddrell, 171 W.Va. 54, Syl. Pt. 2, 1982).

Additionally, this Court has stated, "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." State v. Hinchman, 214 W.Va. 624 (Syl. Pt. 9)(2003)(citing, State v. Richey, 171 W.Va. 342, Syl. Pt. 1, 1982). This Court went on to state, "The effects of less gross delays upon a defendant's due process rights must be determined by a trial court by weighing the reasons for delay against the impact of the delay upon the defendant's ability to defend himself." State v. Hinchman, 214 W.Va. 624 (Syl. Pt.

10)(2003)(citing, State ex rel. Leonard v. Hey, 269 S.E.2d 394, Syl. Pt. 2, 1980)

In denying the petitioner's motion to dismiss based upon the petitioner's speedy trial argument, the Circuit Court of Mingo County held as follows:

15. It is undisputed that eight terms of the Grand Jury convened between the time the Defendant was charged and the time he was indicted.

16. The State asserts that the indictment was delayed because the original investigating officer left the Sheriff's Department and a new officer had to start a new investigation.

17. It is undisputed that the Defendant did not assert his right to a speedy trial.

18. Therefore, the Court **FINDS** that when factors 1, 2, and 3 of Hinchman are weighed the Defendant's right to a speedy trial was not violated. Although the length of the delay was considerable the Court **FINDS** that the delay was justified due to the fact that the Deputy Joe Smith had to start a new investigation when Deputy Jason Smith left the Sheriff's Department.

19. The Court **FINDS** that the Defendant was not prejudiced by the delay of the indictment. Further, the Defendant has additional witnesses who are available to testify on his behalf. The Defendant did not assert that the State was aware that he intended to call Paulette Patrick and Michael Hinkle as witnesses and never informed the State that Paulette Patrick and Michael Hinkle had information that may be favorable to the Defendant. The affidavit that the Defendant submitted to the Court is self-serving. There is no corroborative evidence that verifies what Paulette Patrick Michael Hinkle would have said or that it would be relevant. Furthermore, the Defendant did not assert that the State played any part in the unavailability of witnesses or participated in any deliberate device.

20. After weighing all four factors under Hinchman, the Court **FINDS** that the Defendant's right to a speedy trial was not violated.

Order Denying Defendant's Motion to Dismiss ¶¶15-20.

The petitioner concedes that the affidavit he submitted was self-serving. However, this does not change the fact that two potential defense witnesses, Paulette Patrick and Michael

Hinkle, were deceased by the time the petitioner was indicted and tried. Additionally, two other witnesses, Kenny Allen and Shannon Allen, had divorced and both were living out-of-state. The petitioner was lucky enough that Kenny Allen voluntarily appeared and testified in this matter. TR pp. 118-129, generally.

The trial court, in its ruling, found that the petitioner “was not prejudiced by the delay of the indictment.” The trial court reasoned, “the Defendant has additional witnesses who are available to testify on his behalf.” *See*, Order Denying Defendant’s Motion to Dismiss at ¶19. Yet, the petitioner was out numbered. Had Shannon Allen been located and the two deceased witnesses been alive then the petitioner could have demonstrated a pattern of conduct that the alleged victim had been threatening the petitioner – through more than one witness. However, this could not occur as two of the four potential witnesses had died during the course of the State’s delay in presenting this case. Additionally, the other two witnesses had divorced and both had moved out-of-state; luckily, Kenny Allen was located and voluntarily agreed to come in from Georgia to testify for Mr. Jessie. The absence of petitioner’s witnesses resulted in a benefit to the State as it paraded numerous witnesses in to testify against Mr. Jessie; however, Mr. Jessie could only find one disassociated witness to testify for him all as a result of the delay.

During the argument of the petitioner’s Motion to Dismiss the following exchange occurred in attempting to illustrate the point:

**Kuenzel:** What I alleged in my motion and in Mr. Jesse’s affidavit was that [the witnesses] would have eventually appeared here and testified that Randy Francis was the aggressor in the incident and that he had been threatening to whip Mr. Jessie for two months prior to this incident ever occurring and

then on whatever night was when the incident arose the two came in contact with each other and Mr. Jessie defended himself against Mr. Francis.

**Court:** They weren't eyewitnesses, but they know of prior incidents before indicating a pattern of aggression?

**Kuenzel:** That's my understanding, Your Honor.

**Sparks:** And, Your Honor, they're not even mentioned in any statements and there's another witness, Tony Reynolds, and I know she's alive. In fact, the last I knew she was living at Magnolia Gardens and working at Long John Silvers. We had quite a bit of witnesses who had seen this.

**Court:** **Do you have other witnesses other than the Defendant himself? I'm not talking about eyewitnesses, but other witnesses that will testify for the Defendant that Mr. Francis was the aggressor and testify to the same matters that Ms. Patrick and Mr. Hinkle could have testified to but for their untimely demise?**

**Kuenzel:** I'm not aware of any, Judge, but – and I understand the Court's question.

**Court:** **I want to know if it's cumulative. I want to know if there's a bunch of other witnesses out there that's going to say the same things where there's no real prejudice to the Defendant. If you have 10 other witnesses going to say the same thing, that Francis was the aggressor, then the two additional witnesses to say the same thing may have been just cumulative anyway and it minimizes the degree prejudice. If, however, that's the only game you had in town, different ballgame, perhaps.**

**Kuenzel:** And that's my understanding, Judge, but, Judge, here's – My understanding of the law is that once

we've made a *prima facie* showing they need to put on evidence –

**Court:** That's true, and that's why I'm asking you to now to do your *prima facie* showing by telling me exactly what the degree of prejudice is and then I'm going to shift gears to them when we get done and ask them specifically –

**Kuenzel:** And that's my showing; My showing is this affidavit says those two decedents would have come in here and testified that he was not the aggressor, that threats have been made to him two months prior to and that now that they're deceased, of course, they can't come in and testify and so that prejudices our case.

**Sparks:** So, Your Honor, what we've got is an affidavit from the Defendant, a self-serving affidavit, that states that he had two witnesses that, although they did not see the incident and were not eyewitnesses, that they happened to witness two months earlier some kind of provocation. Well, under our law none of that would be provocation for malicious assault and certainly that evidence would not be very probative on the issue of was his conduct justified under the law on the day this crime occurred. Something that happened up to sixty days earlier just isn't sufficient to establish a defense in this case, self-defense or otherwise. In fact, it would be confusing to the jury. Two months earlier, it would probably be admissible, but for someone to come in here – may come in here – He don't know. **We're just taking a self-serving affidavit and speculation and conjecture that they'll come in here and testify. We don't have a statement. He doesn't have a statement from these people or anything.**

**Kuenzel:** But they're dead;

**Sparks:** But he could have got that statement. He had ample time to get that statement before they did die, and, you know, we could come in here and say we had two or three dead people that would say that he's the most dangerous guy in Mingo County. We don't have any proof whatsoever, any corroborative evidence, that these two individuals would have come in here and even if they would how probative is that? That two months earlier something happened?

**Court:** Mr. Kuenzel, did you or an investigator communicate with the two witnesses? Do you have any written statements from them?

**Kuenzel:** As I told you a moment ago, I just got involved in this in September – no, in January. This is my first involvement in it.

**Court:** Let me ask you a little bit more about the testimony that you think they would have proffered. The affidavit does indicate it was two months earlier. When and where and how was that supposedly communicated or what did they observe, question one, and, question two, was there anyone else there other than Patrick and Hinkle when this prior provocation occurred, and, thirdly, did they have any knowledge of anything between the window of the sixty days up until this incident allegedly occurred?

**Lyall:** No. The State had never heard these names before Mr. Kuenzel submitted this, and if it comes up as Walter Gauze and Chris Chapman as potential witnesses, is that admissible, too, or Carla Collins? You know, these people are gone, dead, and the State did nothing that told them to be dead, to be

removed. The State has done nothing wrong.

**Sparks:** **And the facts of the case, Your Honor's: The witnesses say - eyewitnesses, not only the victim, but eyewitnesses, that this Defendant hit the victim with a pipe eight or nine times in one witness, which is his - I guess to a statement - his own Mother said that he said, "Watch my kids because I'm going to go kick Randy Francis' a double s." That's his own Mother testifying. That's pretty credible to give a statement to this effect, and no matter what happened two months earlier with that evidence that would be no legal justification. There was no threat, no viable self-defense argument there. He was the aggressor.**

**Kuenzel:** **And the reason we don't know of a threat is because my two witnesses are dead, Your Honor, and my client tells me what they would have testified to was that on a previous occasion Randy Francis had told them, encourage them to help draw Mr. Jessie out so that he could catch him out and attack him and that happened for two months that he talked to those people prior to this occurring. The statements that they talk about from the victim and these other people, those were all taken two years after the fact. That was taken just before this term of grand jury. That's not acceptable.**

**Court:** Did former counsel before you got involved in the case take any statements from Patrick and Hinkle?

**Kuenzel:** I don't know that they did, Judge. From what I saw of the record they showed up in magistrate court and waived this preliminary hearing and that was it, but what I'm saying is they had two officers on this, two officers who investigated it, but Mr. Lyall's proffer

just a moment ago and one of the officers left the department. The other one is still there. It's unacceptable to rely on the one officer leaving to say because he left this fell thru the cracks. There was another officer there. They didn't even take a statement from the victim until two years after the fact, and now here I am trying to go back and defend Mr. Jessie and I'm trying to track down two witnesses and what I'm finding out are two of them are deceased.

**Sparks:** And, Your Honor, it's not uncommon for three or four officers to file a complaint. One officer always takes the lead, but, regardless, even if this were all true, the law does not recognize preemptive strikes. You can't say I'm going to get him before he gets me. That doesn't work.

**Court:** Is the defense in this case with regard to the incident charged in the indictment, is the defense self-defense?

**Kuenzel:** It will be self-defense.

**Court:** Based upon events of the date of the incident?

**Kuenzel:** It would be cumulative –

**Court:** I understand, in addition to;

**Kuenzel:** All this stuff that led up to the date of the incident and then the confrontation that happened on that day. That would all be cumulative.

TR pp. 8, ¶16 – 14, ¶12 (emphasis added).

The trial court acknowledged that a problem could exist if the witnesses who were unavailable were the only witnesses around; however, the trial court noted that if the petitioner had 10 other witnesses to say the same thing then it would be cumulative. TR p. 9, ¶¶17-24.

The State responded that the affidavit submitted by the petitioner was self-serving. The State

argued that the petitioner had plenty of time to go out and obtain statements from the prospective witnesses before the indictment and trial.<sup>1</sup> The amusing point of the State's argument is that the police themselves did not go out and obtain statements from the victim nor any witnesses until two years after the petitioner's arrest, two years after the incident occurred. TR p. 11, ¶¶2-14.

Then the State argues that it has two eyewitnesses and that these witnesses indicate that the petitioner was the aggressor – inferring that anything that the missing witness and the deceased witnesses had to offer would not be relevant as it relates to the defense of self-defense. TR p. 12, ¶¶12-21. Petitioner's counsel responded that no one would know because the witnesses are dead; nonetheless, petitioner's counsel proffered that the witnesses would have testified to the alleged victim making threats to the petitioner prior to this incident. TR pp. 12, ¶¶22-24, 13, ¶¶1-7.

As the State waited over two and one-half (2 ½) years from the time of the petitioner's arrest until the time of his indictment; as the only reason for the delay was that the lead investigator had left, even though additional officers could have followed the case<sup>2</sup>; and as two (2) potential witnesses died prior to the petitioner's indictment and one had left the State, the petitioner asserts that the trial court erred in finding that he was not prejudiced by the delay in presentment of his case to the grand jury. *See, Order Denying Defendant's Motion to Dismiss*

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<sup>1</sup> The petitioner will not get into the numerous arguments the State would make if the petitioner sought to introduce statements from deceased witnesses, who were not available to testify, to support his position.

<sup>2</sup>The petitioner would note that the officer who ultimately took over the investigation and had to "reinvestigate" the incident was, in fact, at the scene on the night of the alleged crime with the officer who left employment from the sheriff's office and really would not have had to reinvestigate at all as he was at the crime scene and accompanied the other officer through all aspects of the investigation. TR pp. 32, ¶8 – 33, ¶18.

¶¶19.

Accordingly, the petitioner moves this Honorable Court to find that the delay in his prosecution was violative of his speedy trial rights guaranteed under both the Sixth Amendment of the Constitution of the United States and Article 3 Section 14 of the Constitution of West Virginia Constitution and violative of his due process protections accorded under the Fifth Amendment of the Constitution of the United States and Article 3 Section 10 of the Constitution of West Virginia.

**C. The trial court erred in finding that the petitioner waived his right to a speedy trial as a result of his initial counsel's failure to move for a speedy trial thus denying the petitioner his Due Process protection, under Article 3 Section 10 of the *Constitution West Virginia* and the Fifth Amendment of the *Constitution of the United States*.**

The trial court erred in finding that the petitioner waived his right to a speedy trial as a result of his initial counsel's failure to move for a speedy trial.

In State v. Hinchman, this Court stated, "A determination of whether a defendant has been denied a trial without unreasonable delay requires consideration of four factors: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant. The balancing of the conduct of the defendant against the conduct of the State should be made on a case-by-case basis and no one factors either necessary or sufficient to support a finding that the defendant has been denied a speedy trial." State v. Hinchman, 214 W.Va. 624 (Syl. Pt. 6)(2003)(citing, State v. Foddrell, 171 W.Va. 54, Syl. Pt. 2, 1982).

In the Order denying petitioner's Motion to Dismiss, the trial court held, "It is undisputed

that the Defendant did not assert his right to a speedy trial.” Order Denying Defendant’s Motion to Dismiss ¶¶17.

The petitioner asserts that the trial court erred in finding that he did not assert his right to a speedy trial, thus denying the petitioner the due process protections afforded him under the Constitution of West Virginia and the Constitution of the United States.

During the hearing on the Defendant’s Motion to Dismiss, the trial court inquired, “Was there any assertion by the Defendant of his rights to a speedy trial?” TR p. 3, ¶¶22-23. Then, the trial court noted, “It seems to me the two issues are the Defendant’s assertion of his rights, and I don’t know if he asserted anything or not at this point.” TR p. 7, ¶¶5-7.

The following exchange then occurred:

**Kuenzel:** Judge, I got into this late. I didn’t get into this until after he was indicted and after his arraignment, but after reviewing his file it appeared he was arrested back in July or August of ‘04, and whoever his counsel was then waived the preliminary hearing in magistrate court to get it bound over here to circuit court.

**Court:** Did anybody ever move to dismiss the bound over?

**Kuenzel:** Not to my knowledge, Your Honor; Like I said, I didn’t get involved in this till after he was indicted, the most recent indictment. I didn’t represent him at that time.

**Court:** **We probably don’t have a big issue then with regard to assertion of rights until you got on board**, so the [prejudice] issue is the issue that’s really the critical issue in the case.

TR p. 8, ¶¶1-14 (emphasis added).

Accordingly, the petitioner asserts that he was denied due process protections under both the Constitution of West Virginia and the Constitution of the United States by holding him responsible for his counsel’s failure to assert his speedy trial rights.

**II. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY ARTICLE 3, SECTION 14 OF THE *CONSTITUTION OF WEST VIRGINIA* AND THE SIXTH AMENDMENT OF THE *CONSTITUTION OF THE UNITED STATES* AS PETITIONER'S INITIAL COUNSEL FAILED TO MOVE FOR A SPEEDY TRIAL, THUS EFFECTIVELY WAIVING HIS RIGHT AS FOUND BY THE TRIAL COURT.**

The petitioner claims that he was denied effective assistance of counsel as guaranteed by Article 3, Section 14 of the *Constitution of West Virginia* and the Sixth Amendment of the *Constitution of the United States* as petitioner's initial counsel failed to move for a speedy trial, thus effectively waiving his right as found by the trial court.

In West Virginia, "claims of ineffective assistance of counsel are to be governed by the two-prong test established in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." SER Vernatter v. Warden, West Virginia Penitentiary, 207 W.Va. 11, 528 S.E.2d 207 (1999)(Syl. Pt. 3)(citing, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995)(Syl. Pt. 5).

In the case at hand, petitioner's initial counsel was appointed to him following his arrest on or about August 24, 2004. Then, counsel waived his preliminary hearing causing his case to be transferred to the Circuit Court of Mingo County, West Virginia, for further proceedings. Then, two and one-half (2 ½) years later, after the petitioner finally was indicted, initial counsel moved to be relieved as she indicated that a conflict in representation had arisen. Yet, during the preceding two and one-half (2 ½) year period, she took no effort to ensure that the petitioner's rights were protected by moving for a speedy trial. *See I., C., supra*, petitioner's argument

relating to waiver of his speedy trial right.

Accordingly, under an objective standard, counsel should have moved for a speedy trial for the petitioner. Additionally, had counsel moved the trial court for a speedy trial then there is a reasonable probability that the trial court would have made a different decision based upon counsel's argument during the hearing on the petitioner's Motion to Dismiss. *See I., C., supra*, petitioner's argument relating to waiver of his speedy trial right.

Accordingly, the petitioner moves this Honorable Court to find that the petitioner's initial counsel's failure to move for a speedy trial was unreasonable under an objective standard and find that, had counsel moved for a speedy trial, a differing result may have occurred all of which denied the petitioner his due process protections under both the Constitution of West Virginia and the Constitution of the United States and the

**III. PETITIONER WAS DENIED DUE PROCESS PROTECTION, UNDER ARTICLE 3 SECTION 10 OF THE CONSTITUTION OF WEST VIRGINIA AND THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, BY THE STATE'S FAILURE TO INFORM THE PETITIONER OF ITS INTENT TO ELICIT FLIGHT EVIDENCE.**

The petitioner was denied Due Process protection, under Article 3 Section of the *Constitution of West Virginia* and the Fifth Amendment of the *Constitution of the United States*, by the State's failure to inform the petitioner of its intent to elicit flight evidence from its witnesses.

"In certain circumstances evidence of the flight of the defendant will be admissible in a criminal trial as evidence of the defendant's guilty conscience or knowledge. Prior to admitting such evidence, however, the trial judge, upon request by either the State or the defendant, should

hold an in camera hearing to determine whether the probative value of such evidence outweighs its possible prejudicial effect.” Accord v. Hedrick, 176 W.Va. 154, 342 S.E.2d 120 (Syl. Pt. 7)(1986)(citing, State v. Payne, 167 W.Va. 252, 280 S.E.2d 72 (Syl. Pt. 6)(1981).

Additionally, this Court also has “utilized the doctrine of plain error to examine unobjected error that is prejudicial to a defendant and may have materially affected the outcome of the criminal proceeding.” State ex rel. Morgan v. Trent, 195 W.Va. 257, 261, 465 S.E.2d 257, 261 (1995)(citations omitted). Further, this Court addressed the elements of plain error that is found in Rule 30 and Rule 52(b) of the West Virginia Rules of Criminal Procedure in State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995). In Miller, the Court noted, “To trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” Miller, Syl. Pt. 7. Further, in State v. England, 180 W.Va. 342, 376, S.E.2d 548 (1994), the Court dictated the following summary: “The plain error doctrine contained in Rule 30 and Rule 52(b) of the West Virginia Rules of Criminal Procedure is identical. It enables this Court to take notice of error, including instructional error occurring during the proceedings, even though such error was not brought to the attention of the trial court. However, the doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result.” England, Syl. Pt. 4.

In preparing for trial, the petitioner filed various pretrial motions regarding the charges against him. Specifically, the petitioner filed an Omnibus Discovery Motion seeking whether the State intended to seek to introduce flight evidence, however the petitioner never was advised of

such intent. *See*, Defendant's Omnibus Discovery Motion ¶16. Nonetheless, the State still caused flight evidence to be introduced.

During the direct testimony of Officer Joe Smith, the State elicited the following testimony from the officer:

- Q:** I'm assuming later on someone arrested Walter Jessie. Is that correct?
- A:** That's correct.
- Q:** Why did you arrest Walter Jessie?
- A:** Uh – We got a warrant for him and I believe they actually picked him up maybe in Ohio. I'm not sure, and I'm going to say that, or maybe back here. It was later, though. I don't have the date of arrest, but the incident occurred on the 1<sup>st</sup> of August, 2004, we got information he went to Ohio right after it happened and we were unable to get him picked up because we couldn't find out where he was and he was arrested sometime after that back here.

TR pp. 34, ¶¶23-24, 35 ¶¶1-10.

Although counsel did not immediately object to this line of questioning, the State nonetheless attempted to elicit flight evidence again from another witness, Melanie Jessie.

- Q:** Eventually, were you with Walter when he was located, arrested?
- A:** Uh – I was with him but not with him. He was -- excuse me -- He was Ginsenging when they picked him up. He was coming out of the mountains at the head of Pigeon Creek.
- Q:** How many days after this?
- A:** It was about a month or two. I'm not sure.
- Q:** Did you wonder why it took a month?
- A:** Why did it take a month?
- Q:** I asked the question. Did you ever think about it?
- A:** No.

**Q:** Did Walter ever go to Ohio during this time?  
**Kuenzel:** Objection.  
**Court:** Sustained. Approach. (Bench Conference)  
**Court:** No notice of flight.  
**Kuenzel:** Right. We didn't, and I didn't object to it earlier and I tried during the break to find it in the Rules and I'm assuming it's case law and I looked in the Rules of Evidence and things to try to find it and I couldn't. I did let it slip by.  
**Court:** I'm going to sustain the objection. If you had evidence of flight we could have had an in camera hearing and we could have proceeded with it –  
**Lvall:** The first time I heard about it was in the testimony today.

Even after having requested flight evidence in the Omnibus Discovery Motion and not having been provided with any notice of flight evidence, the State nonetheless elicits flight evidence from two of its witnesses. Accordingly, as the error was plain, as it adversely affected the petitioner, and as it substantially affected the petitioners rights to due process, the petitioner prays that this Honorable Court will find that the petitioner's due process protections under both the Constitution of West Virginia and the Constitution of the United States have been violated.

#### **IV. RELIEF REQUESTED**

For the foregoing reasons, your petitioner respectfully requests that this Honorable Court set aside the jury verdict in this case, to vacate the petitioner's sentence, and to remand the case to the Circuit Court of Mingo County, West Virginia, for further proceedings in this matter.

Respectfully submitted,  
Walter Jessie,  
By counsel



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*Counsel for petitioner*

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WALTER JESSIE,

Appellant,

v.

Supreme Court No. \_\_\_\_\_  
Circuit Court No. 07-F-10 (Mingo)

STATE OF WEST VIRGINIA,

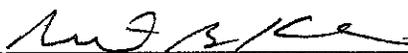
Appellee.

CERTIFICATE OF SERVICE

The undersigned, Robert B. Kuenzel, counsel for the petitioner, Walter Jessie, does hereby certify that he has on this the 8<sup>th</sup> day of August, 2008, served a true copy of the attached Appellant's Petition for Appeal and Brief upon the State of West Virginia by depositing a true copy of same in the United States Mail at Logan, West Virginia, postage prepaid, or via facsimile, or via hand delivery to the person(s) listed below:

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STATE OF WEST VIRGINIA

Appellee.

PETITIONER'S DESIGNATION OF RECORD

The petitioner hereby designates the following portions of record to be reproduced for purposes of this appeal.

1. Order appointing counsel entered on or about January 19, 2007.
2. Defendant's Omnibus Discovery Motion entered on or about January 31, 2007.
3. Defendant's Motion to Dismiss entered on or about March 2, 2007.
4. Order denying defendant's Motion to Dismiss entered on or about March 15, 2007.
5. Amended Jury Trial Order entered on or about May 17, 2007.
6. Sentencing Order entered on or about June 15, 2007.
7. Order denying post-trial motions June 22, 2007.
8. Resentencing Order entered on or about March 13, 2008.
9. Order extending time period for filing appeal on or about July 10, 2008.
10. Partial Transcript prepared by Bonnie Gilman, certified court report for the 30<sup>th</sup> Judicial District.

  
\_\_\_\_\_  
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