

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
CHARLESTON, WEST VIRGINIA

Docket Nos. 35478 & 35483

STATE OF WEST VIRGINIA,  
Plaintiff (Appellee),

v.

Appeal from the:  
Circuit Court of Cabell County, West Virginia  
Case Nos.: 98-F-240 and 02-C-561

MEREDITH LEE VANHOOSE,  
Defendant (Appellant).

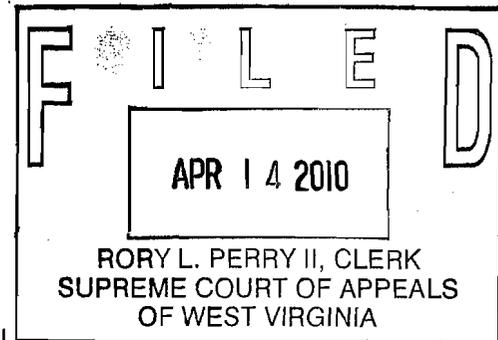
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APPELLANT'S BRIEF

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PREPARED BY:

Ronald G. Salmons (W. Va. Bar No. 10304)  
Paul David Knipp (W. Va. Bar No. 10570)  
*Ronald G. Salmons, Attorney at Law, PLLC*  
6836 State Route 3  
P.O. Box 161  
West Hamlin, WV 25571  
*Counsel for Appellant, Meredith Lee Vanhoose*



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**KIND OF PROCEEDING, NATURE OF THE RULING BELOW**  
**AND STATEMENT OF THE CASE**

On September 7, 2000, in Cabell County case number 98-F-240, the Appellant entered a conditional plea under W.Va. R.Cr.P., Rule 11(a)(2), reserving his right to appeal said plea under contentions of violation of his state and federal rights to a speedy trial. Despite the appointment of appellate counsel, no appeal was ever filed. On April 9, 2009, Appellant's habeas corpus petition 02-C-561 was heard by the Circuit Court of Cabell County. By order entered April 30, 2009, the Appellant was resentenced in case number 98-F-240, and Appellant's habeas corpus petition was denied and dismissed.

This brief on appeal is

1. Seeking review of the violations of Appellant's state and federal constitutional rights to a speedy trial committed by the Circuit Court of Cabell County; and
2. Challenging the order of the Cabell County Circuit Court denying and dismissing Appellant's habeas corpus petition.

Notwithstanding Appellant's numerous motions for speedy trial and Appellant's state and federal rights to a speedy trial, Appellant was incarcerated approximately 900 days while awaiting trial, all because Appellant did not waive his marital privilege against adverse spousal testimony, which would have allowed the State to call Appellant's spouse as a witness against Appellant.

**The Court: This case is not going to be tried until she [Appellant's spouse] has – until she is available to testify for the State because you all have represented to me in open court that he is not the killer; she's the killer.**

Mr. Hatcher (Defense counsel): So, you are just going to keep continuing it if it takes a year?

**The Court: If need be, right.**

Mr. Hatcher: Note our objection.

**The Court: Sure. Well, it's not fair. It's not fair.**

(6/29/99 Tr. at 14.)

**The Court: You all stood up in here and said that he didn't do the killing; she did the killing. And I just said, you know, if she wants to get a divorce and testify, she should have a right to do that. I know he has rights, too; but people also have rights.**

Mr. Hatcher: Well, but what if it takes a year and a half?

**The Court: Well, he will remain in custody for a year and a half until we try the case.**

(7/13/99 Tr. at 23-24.)

In fact, the Court imprisoned Appellant in a filthy, substandard facility for approximately 900 days, from March 30, 1998, to September 7, 2000, when the Appellant, having lost all hope of ever receiving a trial, acquiesced and entered a conditional plea under W.Va. R.Cr.P., Rule 11(a)(2). Appellant reserved his right to appeal said plea under contentions of violations of his state and federal rights to a speedy trial, including those rights under W. Va. Code § 62-3-1 and W. Va. Code § 62-3-21, West Virginia's "One-Term Rule" and "Three-Term Rule." All of which contradicted the Court's own opinion, "[t]his Court can only grant a continuance beyond the January 2000 Term without running afoul of the defendant's constitutional right to a speedy trial for reasons enumerated in West Virginia Code § 62-3-21." (12/30/99 Order at 5-6.)

Appellant was appointed appellate counsel on September 25, 2000, and at various times thereafter. However, until this present appeal, no appeal was ever filed. Appellant was heard upon his habeas corpus petition, contending, among other things, ineffective assistance of appellate counsel. By Order of the Circuit Court of Cabell County, West Virginia, entered April 30, 2009, Appellant's prayer for relief regarding this contention was denied. However, the court

resentenced the Appellant so that he may perfect his bargained-for appeal, nine years after said agreement.

Appellant has always maintained, including the time he was imprisoned awaiting trial that: (1) Appellant was denied his state and federal rights to a speedy trial under West Virginia's "One-Term Rule" (W. Va. Code § 62-3-1), a violation of Appellant's due process rights under Article III, §§ 10, 14, 17 of the Constitution of West Virginia, the 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendments of the United States Constitution, and Appellant's rights under said statute; and (2) Appellant was denied his state and federal rights to a speedy trial under West Virginia's "Three-Term Rule" (W. Va. Code § 62-3-21), a violation of Appellant's due process rights under Article III, §§ 10, 14, 17 of the Constitution of West Virginia, the 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendments of the United States Constitution, and Appellant's rights under said statute.

## STATEMENT OF THE FACTS

### **A. Summary of Procedural History**

On March 30, 1998, the Appellant was arrested, charged with two counts of murder and placed in the Cabell County, West Virginia jail. On September 18, 1998, a Cabell County grand jury returned Indictment # 98-F-240, formally charging Appellant with two counts of first-degree murder. Appellant was, thereafter, incarcerated for approximately 900 days, never having gained release on bond and never having a trial.

On September 7, 2000, Appellant pleaded guilty to first-degree murder with mercy on Count One of the Indictment and guilty to second-degree murder on Count Two of the Indictment. Said plea included Appellant's reservation of his right to appeal, contending violations of his state and federal rights to a speedy trial, including those under West Virginia's One-Term and Three-Term Rules. Appellant was sentenced to life with mercy on Count One and a suspended sentence on Count Two, which was to run consecutive to his sentence on Count One, and five years probation to follow said sentence if Appellant is granted parole.

Appellant counsel, George Beter, was timely appointed to represent the Appellant in his appeal, and a Notice of Intent to Appeal was timely filed. Requests for Extensions of time for filing an appeal were granted thereafter; however, appellant counsel failed to file an appeal on Appellant's behalf, and appellate counsel was permitted to withdraw.

On January 14, 2008, this counsel filed a Petition for Writ of Habeas Corpus contending violations of Appellant's right to a speedy trial and contending original appellant counsel's representation was ineffective. After hearing arguments on the Habeas Corpus Petition, the Circuit Court of Cabell County, West Virginia, by order entered on April 30, 2009, denied

Appellant's contention of ineffective assistance of counsel, but resentenced Appellant so that this appeal could be filed on his behalf.

### **B. Facts**

The Appellant was arrested on March 30, 1998, and was indicted on September 18, 1998, having never been released on bond. Original trial counsel was allowed to withdraw and was subsequently replaced with attorney, George Beter. Following Mr. Beter's appointment the court reset Appellant's trial for January 6, 1999.

On January 6, 1999, Mr. George Beter, over the objections of Appellant, represented to the court he wished to reschedule the trial date from January 6, 1999 to a date later in the term so he might hire experts. (1/6/99 Tr. at 2-5.)

At the January 6, 1999 hearing, the trial court stated that the Cabell County Prosecutor's Office was ready for trial at that time, but due to defense counsel's request, the trial court would reset the matter for May 11, 1999. (Id. at 2-4.) Although the trial was originally set for May 11, 1999, the court, *sua sponte*, reset the trial to May 18, 1999. (1/7/99 Order.) However, the court specifically stated all parties should be ready for the new trial date. (1/6/99 Tr. at 4-5.) At said hearing, both Mr. Beter and the Appellant indicated to the trial court that Appellant wished to invoke his right to a speedy trial; however, the trial court was inclined to continue the matter. (Id. at 2-5.)

Subsequent to the January 6, 1999 hearing, the Appellant's parents hired Charles Hatcher as co-counsel. Despite the infusion of new counsel, all parties were reminded of the May 18, 1999, trial date and their obligation to be ready for trial on that date. (2/18/99 Tr. at 5.)

At the May 7, 1999 hearing, the State argued a Motion to Continue, based on contact from the Appellant's wife stating that she had filed for divorce in Kentucky and that she wished

to testify against her husband once the divorce was granted. (5/6/99 Mot. to Cont. and 5/7/99 Tr. at 17-18.) Specifically, the State requested a stay in the proceedings until Appellant and his spouse's divorce was granted. (5/6/99 Mot. to Cont.) After argument, the trial court granted the State's Motion to Continue and held resetting the trial in abeyance until a determination of Appellant's spouse's ability to appear. In the state's Motion to Continue and in oral arguments thereon, the State argued they did not know the whereabouts of Appellant's spouse and that they had only recently spoken to her. (See 5/6/99 Mot. to Cont. and 5/7/99 Tr. at 17-18.) However, at presentment to the grand jury, the testimony of the detective clearly indicated that the police were aware of the whereabouts of the Appellant's spouse. (Grand Jury Tr.) Appellant's spouse filed for divorce only after meeting with the Cabell County assistant prosecutor and police.

On May 11, 1999, the parties reconvened with the purpose of determining the availability of Appellant's spouse's to appear as well as to set the next trial date. The following conversation ensued between the court and Appellant's counsel, Mr. Hatcher.

The Court: Speedy trial - there's other ways to get a speedy trial besides the Three-Term Rule also.

Mr. Hatcher: I understand. And we think we have a right to be tried in this Term of Court.

The Court: Well, I wouldn't blame you. Well, you are going to be tried in this Term of Court, but we've got until September. Wait a minute. Yes, on this Term of Court.

Mr. Hatcher: And we're going to get a trial this Term of Court?

The Court: Should. If everything goes the way I'm planning on it, we're going to have a trial this term. Right.

Mr. Hatcher: But they won't be divorced by September, Your Honor, if he doesn't go down there.

The Court: We're going to recess.

(5/11/99 Tr. at 103.)

Later that same month the trial court set a new trial date for August 24, 1999. (5/18/99 Tr. at 177.)

On June 29, 1999, Mr. Charles Hatcher notified the court he planned to either be admitted *pro hac vice* for Appellant's divorce in Kentucky or planned on deposing the Appellant's wife in Kentucky. (6/29/99 Tr. at 11-12.) After which, the following dialogue ensued:

The Court: Let me tell you this. If you are going to represent her – and represent him and if that delays the proceedings, you all are alleging that she is the person who did the shooting.

....

If you are going to represent him in the divorce proceedings and that - that prohibits her from testifying in this case then I am going to reset the case again until such time as they are divorced so that she can testify against him.

Mr. Hatcher: I don't understand what you're saying. I'm not representing her.

The Court: I'm saying if your representation of him causes them still to be married the next time we come back to court when it's set, then I'm going to grant the State another continuance . . . .

Mr. Hatcher: Your Honor--

The Court: If they are – so, if they are still married at the time it is set in August, whenever it is, and the State needs – wants it reset, it will be reset.

Mr. Hatcher: Even if I didn't have anything to do with the continuance? I'm not stopping the divorce action.

The Court: Okay.

Mr. Hatcher: There is nothing that has happened in this case –.

The Court: If they—if they are divorced and they can go ahead at that time, that’s fine. If the divorce action is delayed as a result of your being involved in the case, then it’s going—if they want to reset it, then I will grant that motion.

Mr. Hatcher: But I’m representing to the Court they won’t get divorced by August. Period. And I will withdraw—if—they will not be divorced.

The Court: Then –

Mr. Hatcher: I have not made – I want the record to be clear. I have not made an appearance down there.

The Court: This case is not going to be tried until she has – until she is available to testify for the State because you all have represented to me in open court that he is not the killer; she’s the killer.

Mr. Hatcher: So, are you just going to keep continuing it if it takes a year?

The Court: If need be, right.

(Id. at 12-14.)

The dialogue continues and the court states that the prosecution did not know Appellant’s spouse would be a witness. Mr. Hatcher replies “[h]ow could they not?” (Id. at 15.)

A similar dialogue took place on July 13, 1999. Wherein, the following statements were made:

The Court: When is the case set for trial?

Mr. Chiles: August 27<sup>th</sup> – 24<sup>th</sup>. But apparently from what Mr. Hatcher was saying there is no way it will go.

Mr. Hatcher: No, your honor. We are going to be ready for trial. All I said – and I might as well say this on the record – we will be ready for trial. We were ready for trial the last time.

....

The Court: Well, I just didn't want you all to be under a misunderstanding and be ready for trial and then they come in for a Motion for a Continuance and we continue it. I just wanted to let you know in advance.

You all stood up in here and said that he didn't do the killing; she did the killing. And I just said, you know, if she wants to get a divorce and testify, she should have a right to do that. I know he has rights, too; but people also have rights.

Mr. Hatcher: Well, but what if it takes a year and a half?

The Court: Well, he will remain in custody for a year and a half until we try the case. I would love to get this case over tomorrow; and probably Mr. Chiles would, too.

(7/13/99 Tr. at 22-24.)

On September 27, 1999, the Appellant filed a Motion for Speedy Trial. (9/27/99 Mot. for Speedy Trial.) The court considered the Motion on October 5, 1999. At that hearing, Appellant's counsel argued that the Appellant properly invoked spousal immunity. Further, Appellant argued that it was improper and in violation of Appellant's constitutional rights to a speedy trial for the court to allow the prosecutor to change its case after a year and a half and not let the Appellant be tried on the facts for which the grand jury heard the charge and upon which the prosecutor had previously indicated his preparedness for trial. Trial counsel expressly informed the court, "[w]e [the defense] would like to go to trial on November 15<sup>th</sup> [1999]. (10/5/99 Tr. at 3.) The court stated, "[t]o me this Court has made it clear in the past that this case will not be tried until the spouse has the right to fully tell her side of the story." (*Id.* at 5.) The court found good cause to continue the trial despite the fact that the delay in Appellant's divorce proceedings in Kentucky was due to his spouse's failure to appear. (*Id.* at 5-8.) The court continued the trial to January 25, 2000.

On November 2, 1999, Appellant filed a Renewed Motion for Speedy Trial. (11/2/99 Renewed Mot. for Speedy Trial) In an Opinion Order, the court denied the Renewed Motion for

Speedy Trial stating “[i]t is the court’s opinion that West Virginia Code § 62-3-1 does not allow a motion for speedy trial beyond the term which the defendant was indicted. Instead, the court finds that the speedy trial issue is now governed by West Virginia Code § 62-3-21 and the law as set forth in State ex rel Shorter v. Hey, 170 W. Va. 249, 294 S.E.2d 51 (1981).” (12/30/99 Order at 3-4.) Additionally, the Court stated, “[t]his Court can only grant a continuance beyond the January 2000 Term without running afoul of the defendant’s constitutional right to a speedy trial for reasons enumerated in West Virginia Code § 62-3-21.” (Id. at 5-6.)

At a January 25, 2000, hearing, the court again continued the case to ascertain whether the parties’ divorce case could be bifurcated as to the issues of divorce and custody. Appellant’s counsel, Charles Hatcher, reminded the court that there was a good chance the parties would still not be divorced if objections were filed to the divorce commissioner’s recommendation. The court set the return date for February 22, 2000. (1/25/00 Tr.)

At the February 22, 2000, hearing, the parties agreed that Appellant and his spouse were still not divorced; however, Appellant’s counsel again showed that Appellant’s spouse’s failure to appear for depositions, as well as her neglect of her children, had caused a delay in the proceedings and could cause further delay. The court decided to hold matters in abeyance until after the March 3, 2000, divorce proceeding hearing date. (2/22/00 Tr.)

At the April 20, 2000, hearing, Appellant’s counsel informed the court that the Kentucky divorce commissioner ruled on the Bifurcation Motion concerning divorce and custody. However, Appellant’s counsel also advised the court of Appellant’s intention to file an appeal of the commissioner’s recommendation. (4/20/00 Tr. at 2-3.)

The Court: I don’t – I still have trouble understanding why the defendant wanted to contest the divorce other than the fact that she would not – she would be prevented from testifying against

him. I am sure these people don't have any assets. The only thing they have got is this child or children.

(Id. at 5.)

The court then used the Appellant's decision to exercise his rights to an appeal in the Kentucky divorce case as the basis for a finding of good cause to continue the case into yet another term of court.

The Court: If the defendant is going to appeal the decision of the Judge in granting a divorce, then I am going to find good cause again to continue it to the next Term of court; and I'm going to go ahead and set it for trial.

(Id. at 8.)

From September 1998 until Appellant's plea in September 2000, the trial court granted continuances, finding either "good cause" in the best interest of justice or found the Appellant was at least partially guilty of the delay because he refused to: (1) grant a no-fault divorce; (2) failed to waive his marital privilege against adverse spousal testimony; or (3) failed to allow bifurcation of marital and custody issues in the Kentucky divorce. As a result of the continuances granted by the trial court, the State held the Appellant for at least five terms of court without trial.

## ASSIGNMENTS OF ERROR

1. Appellant was denied his state and federal constitutional right to a speedy trial under West Virginia's "One-Term Rule" (W. Va. Code § 62-3-1), a violation of Appellant's due process rights under Article III, §§ 10, 14, 17 of the Constitution of West Virginia, the 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendments of the United States Constitution, and Appellant's rights under said statute.

2. Appellant was denied his state and federal constitutional right to a speedy trial under West Virginia's "Three-Term Rule" (W. Va. § Code 62-3-21), a violation of Appellant's due process rights under Article III, §§ 10, 14, 17 of the Constitution of West Virginia, the 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendments of the United States Constitution, and Appellant's rights under said statute.

3. Appellant was denied his state and federal constitutional rights to effective assistance of counsel when appellate counsel failed to file an appeal on Appellant's behalf.

## ARGUMENT

### A. Spousal Privilege

Neither the United States Constitution nor the Constitution of West Virginia requires a person to forego any right or privilege in order to assert the protection of the right to a speedy trial guaranteed by both constitutions. There is no contingency attached to the right to a speedy trial.

The Sixth Amendment of the United States Constitution states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Article III Section 14 of the Constitution of West Virginia states, in part: "Trials of crimes . . . shall be . . . without unreasonable delay. . . ."

The laws of West Virginia afford certain privileges to husband and wife. W.Va. Code § 57-3-3 states:

In criminal cases husband and wife shall be allowed, and, subject to the rules of evidence governing other witnesses, may be compelled to testify in behalf of each other, but neither shall be compelled, nor, without the consent of the other, allowed to be called as a witness against the other except in the case of a prosecution for an offense committed by one against the other, or against the child, father, mother, sister or brother of either of them. The failure of either husband or wife to testify, however, shall create no presumption against the accused, nor be the subject of any comment before the court or jury by anyone.

W.Va. Code § 57-3-4 states:

Neither husband nor wife shall, without the consent of the other, be examined in any case as to any confidential communication made

by one to the other while married, nor shall either be permitted, without such consent, to reveal in testimony after the marriage relation ceases any such communication made while the marriage existed.

The Appellant decided not to waive his privileges as provided in W. Va. Code §§ 57-3-3, -4, and nowhere is it required that he waive these privileges in order to retain his constitutional right to a speedy trial. The Appellant repeatedly sought a speedy trial and was repeatedly denied that right by the court as the court over and over continued Appellant's case and incarcerated Appellant for approximately 900 days without trial, grossly violating Appellant's constitutional and statutory rights.

#### **B. Assignment of Error 1**

Appellant was denied his state and federal constitutional right to a speedy trial under West Virginia's "One-Term Rule" (W. Va. Code § 62-3-1), a violation of Appellant's due process rights under Article III, §§ 10, 14, 17 of the Constitution of West Virginia, the 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendments of the United States Constitution, and Appellant's rights under said statute.

These rights were violated when the trial court denied Appellant his right to a speedy trial under West Virginia's "One Term Rule" on the grounds that criminal defendants are only able to invoke the "One Term Rule" during the term of their indictment.

In the 12/30/99 Order, the trial court held:

It is the court's opinion that West Virginia Code § 62-3-1 does not allow for a motion for speedy trial beyond the term in which the defendant was indicted. Instead, the court finds that the speedy trial issue is now governed by West Virginia Code § 62-3-21 and the law set forth in Shorter v. Hey, 294 S.E.2d 51 (W. Va. 1981).

The Supreme Court of Appeals of West Virginia has held, contrary to the trial court's ruling:

[t]o confine W. Va. Code, 62-3-1, to the term in which the indictment is returned would virtually negate the right because of the liberal good cause for continuance policy we have adopted under this statute. If there were no mechanism for a defendant to demand a prompt trial after the term of the indictment, then his only recourse would be to wait until the end of the period allowed by the three-term rule, which marks the outside limit of the defendant's right to a speedy trial in this state.

Good v. Handlan, 342 S.E.2d 111, 116 (W. Va. 1986); see also, State v. Spence, 388 S.E.2d 498, n. 7 (W. Va. 1989).

The determination of good cause for continuance of a trial beyond the term of court in which the defendant was indicted falls within the discretion of the court under the statute. When the court determines good cause exists, the trial court may, pursuant to statute, grant a continuance beyond the term of court of the indictment at the request of either the prosecutor, the defense, or upon the court's own motion. However, repeatedly granting continuances based on Appellant's refusal to waive a privilege or right in order to assert another constitutional right amounts to an abuse of discretion that would negate the fundamental purpose of W. Va. Code § 62-3-1.

The Appellant does not maintain that the continuance of the case from the September 1998 term to the January 1999 term is at issue. During said period, Appellant's trial counsel withdrew from the case. Also not at issue is the continuance of the case from the January 1999 term to the May 1999 because Appellant's counsel insisted on it, over Appellant's strenuous objection.

On May 11, 1999, the court continued the case to August 24, 1999, under the assumption that Appellant and his spouse would be divorced. At the June 29, 1999, hearing, the court

learned the Appellant may not be divorced and stated the trial would not be held on August 24, 1999, if the parties were not divorced. In fact, the court and defense counsel had the following dialogue:

The Court: This case is not going to be tried until she has – until she is available to testify for the State because you all have represented to me in open court that he is not the killer; she’s the killer.

Mr. Hatcher: So, are you just going to keep continuing it if it takes a year?

The Court: If need be, right.

(6/29/99 Tr. at 14.)

Even this decision is of no consequence as neither the Appellant nor his counsel ever filed a written Motion for Speedy Trial in this term of court. “[A] defendant must assert his speedy trial right under the one term rule by a timely written motion[.]” Keller v. Ferguson, 355 S.E.2d 405, 407 (W. Va. 1986).

However, it is the continuances allowed in the September 1999 term that the one-term rule amounts to an abuse of discretion. On September 27, 1999, the Appellant filed a timely Motion for Speedy Trial. The court considered the Motion on October 5, 1999. At that hearing, the court continued the case because the parties were not fully divorced. In fact, the court found good cause to continue the trial despite the fact that the cause of the delay in Appellant’s divorce proceedings were not of his creation. In fact, Appellant’s spouse failed to appear at the proceeding and that was the cause of the delay. (10/5/99 Tr. at 5-8.) The trial was then continued to January 25, 2000.

On November 2, 1999, the Appellant filed a Renewed Motion for Speedy Trial. (11/2/99 Renewed Mot. for Speedy Trial.) The court denied the Renewed Motion for Speedy Trial stating

“[i]t is the court’s opinion that West Virginia Code § 62-3-1 does not allow for a motion for speedy trial beyond the term which the defendant was indicted. Instead, the court finds that the speedy trial issue is now governed by West Virginia Code § 62-3-21 and the law as set forth in State ex rel. Shorter v. Hey, 170 W. Va. 249, 294 S.E.2d 51 (1981).” (12/30/99 Order at 3-4.)

Appellant argues that the court’s ruling was erroneous as the one-term rule clearly extends beyond the term of indictment without requiring Appellant to show prejudice. As this court concluded in Good: “W.Va. Code, 62-3-1, is not limited to the term of court at which an indictment is returned, but is applicable to any term of court in which an accused asserts his right to a prompt trial. Where such right is asserted, the accused must be tried during that term unless good cause can be shown for a continuance.” Good, 342 S.E.2d at 116. Moreover, this court held in Keller that speedy trial issues are only governed by W. Va. Code § 62-3-21 and Article III, Section 14 of the West Virginia Constitution when a timely motion is *not* made. Keller, 355 S.E.2d at 407.

Appellant maintains that the only reason the court found good cause to continue his trial was due to Appellant’s divorce not being finalized — the same reason the court used in at least three prior hearings. Appellant did not choose to file for divorce. His spouse filed for divorce. Appellant did not choose to delay the divorce proceedings; Appellant’s spouse and the Kentucky courts did. Appellant did not choose to be indicted. The State of West Virginia chose to indict him in September of 1998, well before any divorce proceeding.

The State only has a right to request a continuance in this situation if the defendant’s actions have substantially hindered the prosecution’s trial preparation. (See, Syllabus Point 1, State v. Alexander, 245 S.E.2d 633 (W. Va. 1978) (overruled on other grounds by State v. Kopa, 31 S.E.2d 412 (W. Va. 1983)). Appellant did not hinder the prosecution’s trial preparation. In

fact, the Cabell County Prosecutor's Office stated it was ready for trial, eleven months prior, at the January 6, 1999 hearing. (1/6/99 Tr. at 1.)

The State of West Virginia must have reasoned that it had a case strong enough to indict Appellant in September, 1998. At the time of Appellant's indictment, the State knew there were only two living witnesses to the events of March 25, 1998: Appellant and his spouse. The State knew that Appellant did not have to testify. And finally, the State knew Appellant's spouse could not testify unless Appellant waived the marital privilege under West Virginia Code § 57-3-3. Despite this, the State still chose to indict the Appellant and still informed the court of their preparedness at the January 6, 1999, hearing.

The Court's findings of good cause were based upon the defense's strategy to implicate Appellant's spouse as the shooter. However, Appellant's spouse admitted on three different occasions, including the night of the shootings, that she was the shooter. If Appellant's spouse had not filed for divorce, the State would be in the same position as it was when it indicted Appellant. Furthermore, the court stated the Appellant's spouse had the right to come to trial to defend herself against the accusations. That, however, is not the issue as Appellant's spouse had never been charged with this crime. The issue is the Appellant's right to a speedy trial. The purpose of the right to a speedy trial is to avoid oppression and prevent delay. It imposes on the courts and the prosecution an obligation to proceed with reasonable dispatch. *See*, 21 Am. Jur. 2d *Criminal Law*, § 242. This did not happen in Appellant's case.

The trial court's determination of good cause for the continuances was incorrect and improper. While W. Va. Code § 62-3-21 is the three term rule, its justifications, including witness unavailability, may be applied to the one term rule found in W. Va. Code § 62-3-1. "[T]he cause justifying continuances listed in the three-term rule may be applied in a one-term

situation.” Shorter, 294 S.E.2d at 51. Consequently, Appellant’s spouse was not unavailable to the State of West Virginia in a preparation sense, but rather the State could have maintained that she was unavailable in a testimonial sense. Unfortunately for the State, even this argument is erroneous, because while Appellant’s spouse may have been unavailable as contemplated by the witness unavailability provision of West Virginia Code § 62-3-21, the rules of evidence do not preclude admission of her statements to the police. See, State v. Bailey, 365 S.E.2d 46, 50 (W. Va. 1987).

In Bailey, just as in Appellant’s case, the defendant invoked his marital privilege precluding his spouse from testifying against him at trial, however, her statements to the police were not deemed testimonial. The privilege found in W. Va. Code § 57-3-3 bars testimony, not extrajudicial statements that meet the 804(b)5 exception to the hearsay rule. Detective Tim Murphy, in the presence of Assistant Prosecutor Ray Nolan, interviewed Appellant’s spouse. (5/7/99 Transcript at 17-18.) Using Bailey as a template, the State had the ability to try Appellant without his spouse’s testimony. The State merely had to introduce Appellant’s spouse’s statements via Detective Murphy, yet the State insisted on Appellant’s divorce prior to proceeding with the trial of Appellant.

The court’s denial of Appellant’s right to a speedy trial was not arbitrary and capricious, it was clearly erroneous. As a result, the court denied Appellant’s right to a speedy trial and should be reversed as to its rulings.

### **C. Assignment of Error 2**

Appellant was denied his state and federal constitutional right to a speedy trial under West Virginia’s “Three-Term Rule” (W. Va. Code § 62-3-21), a violation of Appellant’s due

process rights under Article III, §§ 10, 14, 17 of the Constitution of West Virginia, the 5<sup>th</sup>, 6<sup>th</sup> and 14<sup>th</sup> Amendments of the United States Constitution and Appellant's rights under said statute.

As demonstrated, the trial court continued Appellant's trial numerous times. In fact, the court addressed the myriad of continuances in its 12/30/99 Opinion Order Denying Defendant's "Notice of Renewed Motion for Speedy Trial" for the September 1999 term. The court stated there were at least six continuances to that date: September 1998 to January 1999 (Court's own motion); January 6, 1999 to May 11, 1999 (Defendant's Motion); May 11, 1999 to May 18, 1999 (Court's own motion); May 18, 1999 to August 24, 1999 (Prosecutor's motion, with the Court finding it in the best interest of justice to continue the trial); August 24, 1999 to November 16, 1999 (Court's motion, finding it in the best interest of justice); November 16, 1999 to January 25, 2000 (Court's motion, finding it in the best interest of justice). Additionally, there were continuances resetting the trial to May 1, 2000, then to August 28, 2000, and then to September 8, 2000, with none of the continuances being upon the motion of the Appellant. Throughout this ordeal, the Appellant repeatedly filed motions for dismissal and for a speedy trial.

In that same 12/30/99 Order denying the Appellant's requested relief, the court stated, "[s]ince the court and the prosecutor have continued the trial to date, the defendant must be tried by the end of January 2000 term, the last day being April 30, 2000. This Court can only grant a continuance beyond the January 2000 Term without running afoul of the defendant's constitutional right to a speedy trial for reasons enumerated in West Virginia Code § 62-3-21."

Giving the court every benefit of the doubt, the Appellant had to have a trial by April 30, 2000. That did not happen because the court continued the case once more when it found on April 20, 2000, that the Appellant's appeal of Appellant's divorce would be, as the court found, "chargeable to the defendant and not chargeable to the State in that said continuance was

necessitated by the Defendant's actions, thus delaying the ability to try the case." (4/20/00 Order.)

Appellant was denied his state and federal constitutional rights and his statutory rights when the court denied him a speedy trial under West Virginia's "Three-Term Rule" by finding good cause to continue the Appellant's trial beyond three terms and the court's own final date of April 30, 2000.

West Virginia Code § 62-3-21 states in part:

Every person charged by presentment or indictment with a felony or misdemeanor, and remanded to a court of competent jurisdiction for trial, shall be forever discharged from prosecution for the offense, if there be three regular terms of such court, after the presentment is made or the indictment is found against him, without a trial, unless the failure to try him was caused by his insanity; or by the witnesses for the State being enticed or kept away, or prevented from attending by sickness or inevitable accident; or by a continuance granted on the motion of the accused; or by reason of his escaping from jail, or failing to appear according to his recognizance, or of the inability of the jury to agree in their verdict. . . .

The court's 12/30/99 Order plainly states "this Court can only grant a continuance beyond the January 2000 Term without running afoul of the defendant's constitutional rights to speedy trial for reasons enumerated in West Virginia Code § 62-3-21." The trial was reset for good cause; a reason not enumerated in W. Va. Code § 62-3-21, therefore, the final April 20, 2000, continuance was improper and denied the Appellant his constitutional right to a speedy trial.

The three-term rule is the legislative enactment of the constitutional right to a speedy trial. State v. Carrico, 427 S.E.2d 474, 478 (W. Va. 1993). Regardless of the wording in the court's April 20, 2000 Order, the court continued the trial, on the record, for good cause. On April 20, 2000, the court made the following statement: "[i]f the defendant is going to appeal the

decision of the Judge in granting a divorce, then I am going to find good cause again to continue it to the next term of court; and I'm going to go ahead and set it for trial." (4/20/00 Tr. at 8.) Good cause does not apply in this situation.

While W. Va. Code § 62-3-21 is the three-term rule, its justifications may be applied to the one-term rule found in W. Va. Code § 62-3-1, not vice-versa. The causes justifying continuances listed in the Three-Term Rule may be applied in a one-term situation. See, Shorter, 294 S.E.2d 51. However, the possible reasons justifying good cause are broader than those listed under the Three-Term Rule. Lewis v. Henry, 400 S.E.2d 567, 570-71 (W. Va. 1990). The only reasons a trial judge may continue a trial under W. Va. Code § 62-3-21 are:

insanity; or by the witnesses for the State being enticed or kept away, or prevented from attending by sickness or inevitable accident; or by continuance granted on the motion of the accused; or by reason of his escaping from jail, or failing to appear according to his recognizance, or of the inability of the jury to agree in their verdict.

W. Va. Code § 62-3-21 specifically says that unless an enumerated reason is found:

Every person charged by presentment or indictment with a felony or misdemeanor, and remanded to a court of competent jurisdiction for trial, shall be forever discharged from prosecution for the offense, if there be three regular terms of such court, after the presentment is made or the indictment is found against him, without a trial. . . .

The court, in this situation, clearly stepped beyond the enumerated reasons found in W. Va. Code § 62-3-21 when it ordered a continuance predicated on good cause.

Appellant did not cause any delay in the Kentucky divorce proceeding or his West Virginia case. Appellant, knowing that his child had been abused and neglected while in the care of Appellant's spouse, protected his child's rights under Kentucky law and his own rights under West Virginia and Kentucky law. In fact, Appellant's parents were eventually awarded custody

of Appellant's and his spouse's child. (8/17/00 Ky. Custody Order.) The position that Appellant's exercise of his statutory rights under Kentucky law did not comport with the notion of judicial economy in Cabell County should not abrogate his constitutional rights to a speedy trial in the State of West Virginia.

Instead of being protected by his statutory and constitutional rights, the Appellant was blamed for the repeated delays in going to trial. Appellant was also forced to endure the continued demands of the trial court that he waive some of his rights by granting his wife a no-fault divorce, which would allow her to testify in the proceedings before the trial court. The trial court repeatedly made it clear to the Appellant that he would sit in jail until he waived his statutory and constitutional rights.

No precedent exists to support the trial court's demands that Appellant waive his statutorily and constitutionally granted rights and privileges. It is wrong to hold him without bail or trial until he does so. The West Virginia Legislature said so statutorily, and the Supreme Court of Appeals of West Virginia upheld those laws. These oppressive tactics prejudiced the Appellant. While a showing of actual prejudice is unnecessary under a three-term argument, Appellant was, nonetheless, prejudiced. For example, two of Appellant's witnesses died while the trial was being repeatedly delayed. Further, Appellant was incarcerated for approximately 900 days without a trial, all after repeatedly invoking his right to a speedy trial, clearly in disregard of Appellant's constitutional and statutory rights.

In calculating whether the Three-Term Rule has been violated, the term of court at which the indictment is returned is not to be counted." Carrico, 427 S.E.2d at 478-79. In this case, the Appellant was indicted in September 1998 and did not plead until September 2000. The first

term did not count against him as the trial was continued until January 6, 1999. The court's own ruling from that continuance stated he must be tried by April 30, 2000. (12/30/99 Order.)

The remedy for a violation of the Three-Term Rule is discharge from prosecution for the offense. Therefore Appellant must be discharged from his present sentence because he was not tried within three terms of court after his indictment in violation of the Three-Term Rule. Not only must the Appellant's plea and sentence be dismissed, he must be "forever discharged" from prosecution. Pursuant to W. Va. Code § 62-3-21, the remedy for a violation of the three-term rule is dismissal with prejudice. State v. Lacy, 232 S.E.2d 519, 523 (W. Va. 1977). The trial court creatively allowed continuances up to the sixth term of court, however, its last continuance was impermissible, unconstitutional, and caused actual prejudice to the defense's case thereby requiring the Appellant's discharge with prejudice.

Further, "the statutory three-term rule is not the only mechanism for assessing speedy trial standards." State v. Hinchman, 591 S.E.2d 182, 188 (W. Va. 2003). The Hinchman court recognized the standard enunciated in Barker v. Wingo, 407 U.S. 514 (1972). Hinchman, 591 S.E.2d at 188. Barker holds that in determining whether a defendant was denied a trial without unreasonable delay, the following four factors should be considered: (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. Barker, 407 U.S. at 530; See also, Hinchman, 591 S.E.2d at 188.

Appellant herein meets all four prongs as enunciated in Barker and Hinchman. First, the length of the delay was excessive. Approximately 900 days passed between the time Appellant was arrested and when Appellant finally acquiesced and pleaded guilty. Second, the reasons for the delay cannot be attributed to Appellant, but rather to the court and the prosecution's use of a "tactical advantage" by continuing to hold Appellant in jail until he granted his wife a divorce

that would allow her to testify against him, while the state could have easily tried Appellant without said divorce. Third, Appellant repeatedly moved the Court for a speedy trial, with each motion being denied. Fourth, Appellant suffered actual prejudice as two defense witnesses died during the delay, and Appellant was incarcerated in disregard of his right to a speedy trial. Therefore under the criteria set forth in both Barker and Hinchman, Appellant's right to a speedy trial was violated.

#### **D. Assignment of Error 3**

Appellant was denied his state and federal constitutional rights to effective assistance of counsel when appellate counsel failed to file an appeal on Appellant's behalf. After Appellant pleaded guilty on September 7, 2000, Appellant was appointed appellate counsel, George Beter, on September 25, 2000. However, no appeal was ever filed on Appellant's behalf.

Article III, § 14 of the Constitution of West Virginia states in relevant part, “. . . the accused . . . shall have the assistance of counsel. . . .” It is axiomatic that the State constitution requires the right to effective assistance of counsel. State ex rel. Favors v. Tucker, 100 S.E.2d 411, 416 (W. Va. 1957).

The Supreme Court of Appeals of West Virginia has adopted the two-part test set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984), to evaluate claims of ineffective assistance of counsel. State v. Miller, 459 S.E.2d 114, 126 (W. Va. 1995). The Strickland test requires the defendant to prove both that “counsel's performance was deficient under the objective standard of reasonableness,” and “there is reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different.” Id.; See also, State ex rel. McLaurin v. McBride, 640 S.E.2d 204, 216 (W. Va. 2006).

Further, when reviewing counsel's performance pursuant to Strickland and Miller:

. . . courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances . . . .

Miller, 459 S.E.2d at 117.

Thus, under the standard enunciated in Strickland and Miller, to show constitutionally ineffective assistance of counsel [Appellant] must identify specific erroneous acts or omissions that in the context of the entire trial or other critical stages of the criminal proceedings, amounted to ineffective assistance, and he must show that such deprivation prejudiced his defense.

State ex rel Bess v. Legursky, 465 S.E.2d 892, 897 (W. Va.1995)

Under the standards enunciated above, Appellant herein maintains that his appellate counsel's failure to pursue Appellant's appeal fell below the objective standard of reasonableness, and if appellate counsel had pursued Appellant's appeal there is reasonable probability that, but for counsel's unprofessional errors, the result would have been different.

A defendant in a criminal case has an absolute right to offer a petition for appeal. "An indigent criminal defendant has a right to appeal his conviction. He also has a right to a copy of the trial court record, including the transcript of testimony, without cost to him." Rhodes v. Leverette, 239 S.E.2d 136, 139 (W. Va. 1977). Appellant had neither an appeal filed on his behalf nor did he receive a timely copy of his trial record and transcripts. Appellate counsel's assistance fell below an objective reasonable standard when appellate counsel failed to file an appeal on Appellant's behalf; therefore prejudicing Appellant. Appellate counsel's failures prevented Appellant from being able to address irregularities in proceedings against him. Therefore, Appellant was denied his right to an appeal.

Appellant diligently attempted to perfect his appeal as evidenced by several letters of correspondence with counsel, the court, and the State Bar. “The constitutional right to appeal cannot be destroyed by counsel’s inaction or by a criminal defendant’s delay in bringing such to the attention of the court, but such delay may affect the relief granted.” Id. at 145.

In determining appropriate relief for ineffective assistance of counsel in not prosecuting a timely appeal, the court should consider whether there is a probability of actual injury as a result of such denial, or alternatively whether the injury is entirely speculative or theoretical, and where the denial of a timely appeal was probably harmless, except in the case of extraordinary dereliction on the part of the state the appropriate remedy is not discharge but such remedial steps as will permit the effective prosecution of an appeal.

Syllabus Point 2, Carter v. Bordenkircher, 226 S.E.2d 711 (W. Va. 1976).

Appellant suffered actual prejudice as he was denied his right to an appeal, through no fault of his own, but rather through ineffective assistance of his counsel. Appellant diligently attempted to perfect his appeal but was subject to ineffective assistance of his original appellate counsel. He has been prejudiced as he has been incarcerated unconstitutionally for nine years without presentation of an appeal on his behalf.

### CONCLUSION

Appellant was jailed approximately 900 days while awaiting trial, all the time Appellant was steadfastly demanding a speedy trial. Instead of being protected by his statutory and constitutional rights, the Appellant was blamed for the repeated delays in going to trial and was forced to endure the continued demands by the trial court that the Appellant waive these rights by granting a no-fault divorce to his wife, thus allowing her to testify in the proceedings before the trial court. The trial court repeatedly made it clear to the Appellant that he would sit in jail

until he waived his statutory and constitutional rights. And, he did sit in jail for approximately 900 days without a trial.

Succumbing to the overwhelming dire hopelessness of his continued incarceration in a filthy, substandard facility, Appellant acquiesced and pleaded guilty, accepting a conditional plea allowing Appellant the right to appeal his conviction based upon the trial court's failure to give Appellant a speedy trial. But, no appeal was filed and Appellant is still incarcerated.

And, to use the words of the trial court: **"Sure. Well, it's not fair. It's not fair."**  
(6/29/99 Tr. at 14.)

**PRAYER FOR RELIEF**

For the foregoing reasons, Appellant respectfully requests that this Honorable Court dismiss Appellant's plea and sentence, release the Appellant from his incarceration, and pursuant to West Virginia Code § 62-3-21, forever discharge the Appellant from prosecution and award Appellant such other relief this Honorable Court deems just and appropriate.

RESPECTFULLY SUBMITTED,  
MEREDITH LEE VANHOOSE,  
By Counsel



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Ronald G. Salmons (W.Va. Bar #10304)  
Paul David Knipp (W.Va. Bar #10570)  
*Ronald G. Salmons, Attorney at Law, PLLC*  
P.O. Box 161  
West Hamlin, WV 25571  
(304) 824-5711 (phone)  
(304) 824-2544 (fax)

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
CHARLESTON, WEST VIRGINIA

Docket Nos. 35478 & 35483

STATE OF WEST VIRGINIA,  
Plaintiff (Appellee),

v.

Appeal from the:  
Circuit Court of Cabell County, West Virginia  
Case Nos.: 98-F-240 and 02-C-561

MEREDITH LEE VANHOOSE,  
Defendant (Appellant).

CERTIFICATE OF SERVICE

I, Ronald G. Salmons, counsel for the Appellant, Meredith L. Vanhose, do hereby certify that I have served true copies of this Appellant's Brief upon the following by certified mail this 14<sup>th</sup> day of April, 2010:

Silas B. Taylor, Esq.  
Managing Deputy Attorney General  
Office of Attorney General  
West Virginia Capitol  
Building 1 Room 26-E  
Charleston, WV 25305.

Chris Chiles, Esq.  
Prosecuting Attorney of Cabell County  
750 5<sup>th</sup> Avenue  
Huntington, WV 25701



Ronald G. Salmons (W.Va. Bar #10304)  
Paul David Knipp (W.Va. Bar #10570)  
*Ronald G. Salmons, Attorney at Law, PLLC*  
P.O. Box 161  
West Hamlin, WV 25571  
(304) 824-5711 (phone)  
(304) 824-2544 (fax)