
NO. 35483, 35478

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

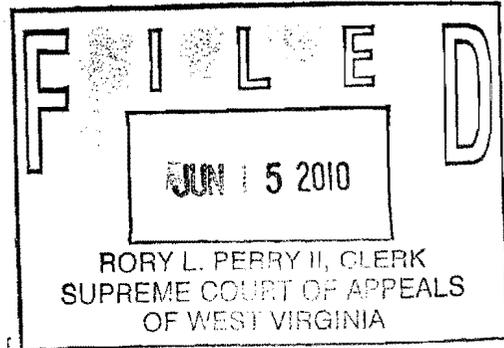
STATE OF WEST VIRGINIA,

Plaintiff Below,
Appellee,

v.

MEREDITH LEE VANHOOSE,

Defendant Below,
Appellant.



BRIEF OF APPELLEE

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BRIEF OF APPELLEE

I.

**KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW**

This is an appeal from Appellant's conditional pleas of guilty to one count of first degree murder and one count of second degree murder entered September 8, 2000 and the denial of Appellant's petition for writ of habeas corpus on April 30, 2009.

As the procedural history is so closely linked to the substance of the grounds of error raised by Appellant, a more extensive procedural history than usual is included with the State's "Statement of Facts" below.

II.

STATEMENT OF FACTS

Because the Appellant entered a guilty plea, there is limited fact development in the record regarding the crimes. However, according to the record, on March 26, 1998, police received a 911 call placed by Appellant, Meredith Lee VanHoose (hereinafter the "Appellant") from his apartment in Huntington, West Virginia reporting that his wife, Michelle VanHoose, had shot and killed two intruders. (Vol. II of the Record [hereinafter "R."] at 206, 210, 229.) Upon arrival, police immediately escorted Appellant and his wife from the scene, put Appellant in the back of a police car, Miranidized him, and then proceeded into the apartment.

When police entered they found the bodies of Eric Glen Smith, age 20, and James Nichols Flowers, age 18, "obviously" dead as the result of gunshot wounds from a high powered semi-automatic assault weapon later identified as a SKS 7.6 rifle. (Vol. II, R. at 206, 231 at p.1.)¹ According to the police report, the body of "victim #1" later identified as Smith, lay on the floor on his side in a pool of blood and his "brains adjacent to him." (Vol. II, R. at 210.) "Victim #2", later identified as Flowers, "had the entire rear section of his head blown off." (*Id.*)

According to the Medical Examiner's (hereinafter referred to as ME) report, Smith was shot in the temple at close range. The bullet traveled from Smith's right temple through to his left temple. The ME noted that Smith's brain was "protrud[ing] from the calvarium and is found in a plastic bag next to the body." (Vol. II, R. at 80.) Flowers died from gunshot wounds to the chest and head. One shot traveled through his left forearm and came to rest in his left lung. Another bullet traveled

¹Several documents in the record were neither numbered nor paginated, therefore for purposes of reference to the record unnumbered documents will have particularized reference explained individually.

through Flowers' right palm and through the back of his skull. He was described by investigators as being crouched in a defensive position when he was found. (Vol. II, R. at 231, p. 2.) Portions of the bullet were recovered from Flowers' chin and neck. (Vol. II, R. at 84.) The wound track was back to front and downward.

According to the crime scene investigation, Smith was shot while standing in the kitchen at close range in the right temple and immediately fell to the floor. Flowers was then shot in the left arm, the bullet landing in his left chest and lung. After he collapsed, Flowers tried to shield the back of his head with his hand and was shot at close range, with the bullet passing through his right hand, blowing the back of his head off and settling in his lower jaw. (Vol. II, R. at 281.) The shot to Smith was apparently unexpected as he still had his hand in his right pocket. (Vol. II, R. 231 at p. 6.)

Appellant and his wife were formally questioned immediately following the crime. Initially, Appellant told investigators that his wife had killed the two victims because they had tried to rape her. Appellant claimed that when he heard a knock on the door, he told his wife to tell whoever it was that he wasn't home because he didn't want to be disturbed. Appellant then went upstairs while his wife went to the door. Appellant and his wife's initial version of events vary at this point between the victims forcing their way in or breaking in but Appellant initially told a law enforcement officer that Smith and Flowers broke in. Appellant claims that shortly after Smith and Flowers entered, he heard crying and sounds of distress. According to Appellant, when he came downstairs he discovered Smith and Flowers attempting to pull his wife's clothes off. When Appellant attempted to help his wife, Smith and Flowers began attacking him. According to Appellant's first version of events, it was while he was being attacked, that his wife retrieved the

rifle from the kitchen and shot the victims. (Vol. II, R. at 212-215.) Petitioner also initially stated that he did not know the victims. (*Id.*)

Michelle VanHoose told police during questioning immediately following the crime, that Smith and Flowers knocked on the door and asked for her husband. When she told them her husband was not home, they threatened to hurt her and her baby if she did not have sex with them. She said Appellant then came downstairs and tried to protect her and when he did, Smith and Flowers attacked him. She then got the gun and killed them both. (Vol. II, R. at 184-185.)

During his original statement, Appellant posed a hypothetical to investigators and asked if it would be self defense if he had killed the victims for breaking into his apartment. Investigators told Appellant self defense was contingent on the facts. Appellant then maintained his original story. (Vol. II, R. at 214.)

A few days later, Appellant contacted police and told them he wanted to change his story because he was laboring under terrible guilt. Appellant met with investigators and told them it was actually he who had killed Smith and Flowers after he found them sexually assaulting his wife. Appellant further told investigators that he instructed his wife to make the false confession because she was a juvenile and would not be subject to prosecution. (Vol. II, R. at 217-219.) Appellant also told police he didn't regret killing the victims because they deserved it. (*Id.*)

During subsequent statements and after an investigation, several aspects of Appellant's story did not pan out. According to Appellant's original statements, he did not know Smith and Flowers before the murders. He later told police he met them at a vo-tech school they all attended. (Vol. II, R. at 214.) Appellant told investigators Smith and Flowers forced their way into the apartment (in the version where he was the killer) yet there were no signs of forced entry on the door and the

deadbolt was intact. Neighbors told investigators that Smith and Flowers knocked on Appellant's door and *he* let them in without incident. (Vol. II, R. 226 at page 13.²) Subsequent investigation revealed that Smith and Flowers had been at the apartment before and that Appellant sold marijuana to them both. Also, none of the neighbors reported hearing any type of commotion prior to the murders which happened about 15 minutes after Appellant invited Smith and Flowers into the apartment. (*Id.* at 14-15.)

The scene of the crime itself showed no evidence whatsoever of any sort of struggle and one of the victims had his entire right hand still in his pocket when he died. (Vol. II, R. 231 at p. 2, 6.³) During an investigator's grand jury testimony, he stated that immediately upon viewing the scene, Appellant's story became suspect as the scene was not consistent with any sort of struggle. (Vol. II, R. 231 at p. 2.) The crime scene investigation also revealed that the paths of the bullets were not consistent with being fired during a struggle. The trajectories of the bullets were also consistent with being fired from the murder weapon being in a shoulder resting position of someone Appellant's height. (Vol. II, R. at 281-283.)

Gunshot residue tested positive for both Appellant and his wife. Michelle VanHoose exhibited gunshot residue on both of her hands and on her face. (Vol. II, R. at 198.) A shirt supposedly worn by Appellant did not test positive for gunshot residue. (Vol. II, R. at 279.)

²This is a summary report of the investigation at page 226 of the record that is neither paginated nor numbered. The pages are numbered for reference by Appellee, with page number one, being the page entitled "Summary" and continuing thereafter.

³The grand jury transcript is also neither paginated nor numbered. For reference, it is referred to as R. 231 with the first page of text being designated as page one and continuing on thereafter.

The investigation also revealed that Appellant had a long history of being abusive towards Michelle VanHoose and another former spouse. Several sources revealed that Michelle VanHoose was afraid of Appellant who had a history of violent behavior. (Vol. II, R. 231 at p. 5.)

Proceedings Relevant to the Three-Term Rule and Appellant's Grounds for Error

Below are the relevant dates for purposes of Appellants grounds for error regarding the alleged one-term and three-term rule violations.⁴

January, 1998 term of court -

March 30, 1998 - Criminal complaints filed - Two counts of murder. Committed to jail, bond later set at \$500,000 but not at this time. (Vol. II, R. at 1-I.)

Not yet indicted. Term not counted for purpose of one-term or three-term rules.

May, 1998 term of court -

May 5, 1998 - bound over to grand jury following a preliminary hearing. (See Vol. II, R. at 1-X.)

Neither one-term nor three-term rules applicable in this term.

⁴§ 62-3-21. Discharge for failure to try within certain time

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; and every person charged with a misdemeanor before a justice of the peace, city police judge, or any other inferior tribunal, and who has therein been found guilty and has appealed his conviction of guilt and sentence to a court of record, shall be forever discharged from further prosecution for the offense set forth in the warrant against him, if after his having appealed such conviction and sentence, there be three regular terms of such court without a trial, unless the failure to try him was for one of the causes hereinabove set forth relating to proceedings on indictment

September, 1998 term -

September 18, 1998 - Indicted on two counts of murder (98-F-240) (Vol. II, R. at 2.)

Term of indictment. Not counted against three-term rule. (“When calculating the three terms, the term of indictment is not counted as one of those terms. See Syl. Pt. 1, *State ex rel. Smith v. DeBerry*, 146 W. Va. 534, 120 S.E.2d 504 (1961), overruled on other grounds, *State ex rel. Sutton v. Keadle*, 176 W. Va. 138, 342 S.E.2d 103 (1985)). Also, term where Appellant required to assert speedy trial rights for purposes of the one-term rule.⁵

January, 1999 term -

January 6, 1999 - Order continuing trial on motion of defense. Trial set for May 18, 1999. (Vol. II, R. at 40.)

April 2, 1999 - Michelle VanHoose files for divorce in Kentucky.

This term counted against defense - still not running within meaning of three-term rule.

May, 1999 term -

First Term for Purposes of Three-Term Rule (one-term rule no longer applicable).

May 7, 1999 - State files motion to continue. (Vol. II, R. at 167, 441.) States as grounds pending divorce and refusal of defendant to waive privilege. Defense opposed the motion. Court enters order continuing the trial from May 18 until such time as defendant’s divorce is finalized. (Vol. II, R. at 315). Continued until August 24, 1999.

August 4, 1999 - Judge reset trial for November 16, 1999. Rules defendant responsible for delay because he won’t agree to bifurcate his divorce. (Vol. II, R. 314.) Also ruled trial would not be held until wife could testify.

Under Appellant’s theory of error, this continuance was attributable to the State and thus was the first term to expire under the three-term rule.

⁵West Virginia’s “one-term” rule states in pertinent part: W. Va. Code § 62-3-1. Time for trial; depositions of witnesses for accused; counsel, copy of indictment, and list of jurors for accused; remuneration of appointed counsel

When an indictment is found in any county, against a person for a felony or misdemeanor, the accused, if in custody, or if he appear in discharge of his recognizance, or voluntarily, shall, unless good cause be shown for a continuance, be tried at the same term.

September, 1999 term -

Second Term in Three-Term Rule.

September 27, 1999 - Defense files motion for speedy trial.

October 5, 1999 - Hearing on motion for speedy trial. Defense argued State should be required to proceed on the facts available at the time and asserted the spousal privilege. Court ruled that the trial wouldn't be set until the divorce was final; ruled that fault therein lies at least partially with the defendant. (Vol. II, R. at 290, 307, 313.)

Renewed motion for speedy trial filed by defense - no discernable date. (Vol. II, R. at 293.)

November 9, 1999 - Hearing on renewed motion for speedy trial. (Vol. II, R. at 311.)

December 30, 1999 - Judge files opinion order finding that the speedy trial statute does not control but cites to *Shorter v. Hey* 170 W. Va. 249, 294 S.E.2d 51 (1981) for good cause provisions for continuing trial to next term of court. Holds under *Hey* that a motion to continue is discretionary. Held that new trial date of January 2000 satisfies three-term rule. (Vol. II, R. At 315.) Also rules that one-term rule no longer controlling because it passed after the term of indictment.

*Under Appellant's theory of error, this continuance was attributable to the State and thus was the **second term to expire** under the three-term rule.*

January 2000 term -

Third Term in Three-Term Rule.

January 24, 2000 - Motion to dismiss indictment filed by defense. (Vol. II, R. at 322.)

February 10, 2000 - Trial set for April 2000. (Vol. II, R. at 351.)

February 15, 2000 - Motion to dismiss indictment denied. (Vol. II, R. at 326.)

April 20, 2000 - Status conference. Defense informs court that temporary divorce order entered but defendant appealing order. Trial court rules that defendant's appeal of divorce order purposefully rendered witness Michelle VanHoose unavailable. Continued trial until August 29, 2000 and attributes continuance to defense. (Vol. II, R. at 365.) Defense objects.

*Under Appellant's theory of error **three terms of court expire**.*

May 2000 term -

May 1, 1999 - Order entered reflecting results of status conference and setting trial for August 29, 2000.

August 28, 2000 - Defense files renewed motion to dismiss indictment. (Vol. II, R. at 398.) Argues three-term rule violated.

August 29, 2000 - Renewed motion for speedy trial by defense. (Vol. II, R. at 400.) Motion to dismiss indictment. Denied same date on grounds that because Appellant opposed bifurcation of the divorce, he “caused a material witness, Michelle VanHoose to be kept away and unable to testify[.]” Also ruled that all continuances were attributable to the defense. (*Id.* at 436, 440.) Set trial for September 8, 2000. Court also ruled *parties divorced* for purposes of trial. (*Id.* at 442, p. 3; Vol. III, R. at 552.)

September 1, 2000 - Writ of prohibition filed in Supreme Court on above facts for three-term-violation. Denied that day - Starcher and Scott would grant. (Vol. III, R. at 553.)

September 7, 2000 - Defendant enters conditional plea pending appeal. (Vol. III, R. at 532.)

September 8, 2000 - Order appointing appeal counsel. (Vol. III, R. at 550.)

September 12, 2000 - Defendant/Appellant sentenced to life with mercy and forty years, consecutive. Forty year sentence suspended and replaced with five years supervised probation. (Vol. III, R. at 545.)

Post-conviction -

March 2, 2001 - Order extending time for appeal entered. (Vol. III, R. at 559.)

No direct appeal filed.

July 10, 2002 - *Pro se* petition for writ of habeas corpus filed.

January 26, 2005 - Appointed counsel, files a memo in support of original *pro se* habeas.

June 8, 2006 - Habeas dismissed by trial court Judge Ferguson, without findings and re-sentences Appellant for purposes of appeal. Habeas counsel later withdraws. (Vol. III, R. at 661.)

January 14, 2008 - Amended petition for habeas corpus filed by new post conviction counsel.

April 30, 2009 - Petition denied and Appellant re-sentenced again for purposes of direct appeal.

November 19, 2009 - Combination direct and habeas appeal filed, both granted.

Divorce Proceedings

April 2, 1999 - Michelle VanHoose files for divorce. (Vol. II, R. at 373.)

Michelle VanHoose failed to appear for two depositions in her divorce. (Vol. II, R. at 295.) Based on Michelle VanHoose's failure to appear, trial counsel filed a Renewed Motion for Speedy Trial on November 1, 1999. (*Id.* at 293.) Appellant's Kentucky divorce lawyer moved to hold Mrs. VanHoose in contempt for not appearing at the depositions. (*Id.* at 299.)

February 1, 2000 - Michelle VanHoose moves to bifurcate. (Vol. II, R. at 382.)

March 16, 2000 - Appellant objects to findings and recommendations granting bifurcated divorce. (Vol. II, R. at 384.)

April 6, 2000 - Partial divorce decree entered in Kentucky. (Vol. II, R. at 375.)

June 12, 2000 - Appellant (herein) appeals divorce order. (Vol. II, R. at 363.)

During a hearing on August 29, 2000, the trial court ruled that Ms. VanHoose was available to testify and found that she was divorced and free from the marital privilege. (Vol. II, R. at 440, p. 3.)

III.

RESPONSE TO ASSIGNMENTS OF ERROR

I. 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) in violation of Appellant's due process rights under Article III, §§ 10, 14, 17 of the Constitution of West Virginia, the 5th, 6th and 14th Amendments of the United States Constitution, and Appellant's rights under said statute.

State's Response:

Petitioner argued no prejudice outside of the violation of the rule itself and no remedy exists for violation of one-term rule without a showing of prejudice. Moreover, the one-term rule applies only to the term of indictment. Appellant did not assert his speedy trial rights under the one-term rule until after the term of indictment had passed.

II. Appellant was denied his state and federal constitutional right to a speedy trial under West Virginia's "Three-Term Rule" (W. Va. § 62-3-21) in violation of Appellant's due process

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

State's Response:

Appellant's refusal to waive the privilege in light of the fact that he claimed his wife was the real killer and he was actually innocent of the crimes he was charged with committing, operated to entice or keep away a material witness under an enumerated exception to the three-term.

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

State's Response:

This claim was mooted by the granting of Appellant's direct appeal by this Court. Moreover, this Court has crafted no remedy for ineffective assistance of appellate counsel outside direct review with the assistance of competent appellate counsel.

IV.

ARGUMENT

A. BECAUSE APPELLANT ACCUSED HIS WIFE OF MURDER AS A MATTER OF TRIAL STRATEGY HIS REFUSAL TO WAIVE THE PRIVILEGE ACTED TO ENTICE AND KEEP AWAY A MATERIAL WITNESS UNDER THE ENUMERATED EXCEPTIONS TO THE THREE-TERM RULE AND TO FURTHER CREATE DELAYS ATTRIBUTABLE TO THE DEFENSE.

1. The Standard of Review.

Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review.

State v. Paynter, 206 W. Va. 521, 526 S.E.2d 43 (1999), Syl. Pt. 1, *Crustal R.M.S. v. Charlie AL.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

This Court has also indicated that a circuit court's final order and ultimate disposition are reviewed under the abuse of discretion standard.

Syl. Pt. 1, *State ex rel. Hechler v. Christian Action Network*, 201 W. Va. 71, 491 S.E.2d 618 (1997).

West Virginia recognizes two marital privileges: the spousal testimony privilege and the marital confidence privilege. The two are distinct and must be analyzed separately. The spousal testimony privilege is much broader than the marital confidence privilege in that it bars all adverse testimony; whereas, the marital confidence privilege applies only to confidential communications and can be asserted even after the dissolution of the marriage. On the other hand, the spousal testimony privilege is narrower than the marital confidence privilege in that it applies only to criminal proceedings and can be asserted only during the marriage.

State v. Bradshaw, 193 W. Va. 519, 526, 457 S.E.2d 456, 473(1995).⁶

The marital privilege.

As noted in the procedural history *supra*, Michelle VanHoose originally told investigators she killed the victims because they were raping her. Appellant later told investigators *he* killed the victims to protect his wife. Appellant and not Michelle VanHoose was charged with the instant crimes. Appellant then asserted the marital privilege to prevent his wife from offering testimony or making a statement on the record. Trial counsel also objected to his wife's testimony at a 404(b)

⁶§ 57-3-3. Testimony of husband and wife in criminal cases.

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.

§ 57-3-4. Confidential communications between husband and wife.

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.

hearing. However, once Appellant asserted the privilege, he, through trial counsel, consistently maintained that it was actually his wife who committed the crimes, thereby asserting actual innocence as a theory of defense.

Appellant fails to mention in his brief that he, through counsel, consistently maintained over the some “900” days he was awaiting trial that his wife was the killer and not himself all the while asserting the privilege so she could neither admit nor deny the allegations (one could argue Appellant’s accusation were also a violation of the privilege he so vigorously protected for himself).

As will be more fully set forth below, the record is replete with the development of Appellant’s “wrong man” trial strategy of shifting blame to his wife with an eye on raising reasonable doubt in the minds of the jurors. It was the perfect plan made all the easier by his wife’s original assertions, the gun powder residue results, and his ability to prohibit her from denying the charges by invoking the privilege.

Had Appellant, in fact, simply invoked the privilege and demanded a speedy trial, the argument here would be different. But by accusing his wife of committing the crimes *he* was charged with committing, then asserting the privilege, Appellant manipulated both the privilege and the three-term rule in such a way as to render the delays in the proceedings attributable to the defense.

In its response to the Cabell County prosecutor’s discovery request, the defense disclosed they would be introducing evidence of love letters from Michelle VanHoose written to Appellant in prison and copies of her police record as well as a copy of the 911 tape wherein Appellant claimed Michelle VanHoose killed the victims. (Vol. II, R. at 126.) As grounds for trial counsel’s motion

to dismiss the indictment, the defense argued that “there was bruising on the Defendant’s wife and Defendant’s wife confessed . . . that she had shot the victims.” (*Id.* at 235A.)

In a motion to compel, the defense requested Michelle VanHoose’s school records, criminal records and records that she had filed a false kidnaping report with law enforcement in order to avoid getting in trouble for skipping school. (Vol. II, R. at 247.) An expert retained by the defense surmised that a palm print recovered from the murder weapon was “not . . . large enough to be Lee VanHoose’s”. (*Id.* at 253.) Trial counsel also seized upon the results of gun powder tests showing gunshot residue on Michelle VanHoose’s hands and face and an absence of residue on a shirt supposedly worn by Appellant at the time of the murders. (*Id.* at 279.)

During the September 10, 1999, hearing on the admission of evidence pursuant to W.V.R.E. 404(b), the trial court stated:

Let me tell you my position in this matter, and I know the defendant is in jail. He’s been in jail a long time. I have made up my mind a long time ago that this case will not proceed until she is able to come in and say everything that she needs to say in this case ***because the defendant has claimed that she is the person who actually did the shooting.***

(Vol. II, R. at 308, p. 8 (emphasis added.))

During the 404(b) hearing, trial counsel continued to advance his notions of Michelle VanHoose’s guilt:

Counsel: You know, if this lady wants to - - you know, Judge, we know that she’s given statements to law enforcement officers she killed these fellows.

Court: I know what.

Counsel: And we’re not going to make it easy for her to skate. ***I’m going to prosecute her. Do you understand? The Prosecutor is not going to prosecute her, I ‘m going to --***

Court: Well, - -

Counsel: --as much as the law allows me to; and I'm not going to make it easy for her to hide behind the shield of the law and sit in there and perpetrate a fraud on this Court and the people of the State of West Virginia.

(Vol. II, R. at 308, p. 14.)

Trial counsel further elaborated:

Court: I'm just thinking about the accusations that you all have made every time you have come into court that he's not guilty. If he's not guilty, then he stands trial and takes whatever happens.

Counsel: Judge, that was that way before I got in this case. This woman came out of a house filled with gunpowder with two dead people and told someone she shot them.

(*Id.* at p. 17.)

During an October 5, 1999, motions hearing, trial counsel argued in support of his pending speedy trial motion: "[I] don't believe that this Court should let a woman who has admitted to being a murderer dictate to this court when this case is tried." (Vol. II, R. at 307, p. 3)

At the Tuesday, November 9, 1999, hearing on Appellant's motion for a speedy trial, trial counsel stated:

Counsel: I have an Affidavit I think that it's important for the Court to review. This is from a lawyer down in Kentucky - - Lowell Spencer - - who represents Mr. VanHoose in Kentucky, and I think what the Court has done by its prior order that this case can't go to trial until the divorce has allowed *this woman who has admitted to killing two boys to control this Court, control the State of West Virginia, control the defendant because you have given her the opportunity* - - and if you read that, all makes sense.

The Judge in Kentucky ruled that the case won't go forward until she gives a deposition, and we've set two depositions. She doesn't show up. All she has to do is not show up and this will go forever.

Now she's the person that has admitted committed [sic] these murders.

We have to - - the Court has to fashion something that puts an end to her ability to control this Court. All right.

Counsel: That Affidavit sets out that her attorney had notice. It sets out what the Court in Kentucky ruled. It sets out what her lawyer said she did know to go to these depositions. *She's just not going to show. She doesn't have any motive at all while you're holding him in jail on murder charges she confessed to.*

Court: Okay.

Counsel: So, we believe now that she hasn't again showed up gives my client a right to be tried right now. We'll start this trial Monday.

Court: No, we won't.

Counsel: Well, I mean, I'm telling you we have the right by Constitution, we have the right by statute to have this case tried.

The statute - - the Legislature set up this immunity that the Court recognizes under the Court's present system it's not working. There is no way that we should let this woman control and keep this man in jail for a crime *he didn't commit.*

(Vol. II, R. at 311, p. 4- 5 (emphasis added.))

Trial counsel continued to attack the delay brought on by Michelle VanHoose's failure to appear for the divorce depositions and her clear manipulation of the court. Trial counsel claimed Ms. VanHoose had "jacked every one in this room around for a year." (*Id.* at 8.)

During every pre-trial hearing, trial counsel continually referred to Michelle VanHoose as a "murderer" or a "confessed murderer" or an "admitted murderer". (Vol. II, R at 439, p. 11; 440, p. 9; 441, p. 12.) Trial counsel argued that Appellant was fighting the divorce proceedings not to delay them and prevent his wife from testifying, but to seek custody of the minor child of the parties because the child was being abused. Trial counsel argued that Appellant sought custody so the child

would not be in the custody of a “murderer”. (*Id.* at 311, p. 15.) During a pre-trial hearing on Ms. VanHoose’s competence to testify and the status of the divorce proceedings, trial counsel again argued that Appellant had sought custody of their minor child “because his wife is a murderer.” (*Id.* at R. 441, p. 14.) During the same hearing, the State argued the necessity of obtaining eye witness testimony from Michelle VanHoose: “[I]t’s clear that the defense from their representations are going to say she did it.” To which trial counsel replied: “[W]e are not going to say she did it. She said she did it.” (*Id.* at p. 16.) Trial counsel then referred to Michelle VanHoose as the “ admitted murderer.” (*Id.* at 17.) Throughout the proceedings, trial counsel maintained Appellant’s innocence. Even at the bond hearing, trial counsel threw it in after the trial court questioned the relevance of testimony from an investigating officer regarding Michelle VanHoose’s statement:

Counsel: Well, Your Honor, I believe in regard to bond one of the things that the Court should consider is the fact that another person confessed to the Huntington Police Department about these crimes. One of the factors you *are* going to consider.

(Vol. II, R. 442 at p. 7 (emphasis added.))

In fact, trial counsel used the actions of the police in releasing the Appellant based on the “confession” of Michelle VanHoose, to support his motion to set bond: “As a result of that [confession] someone made the decision to let Mr. VanHoose, Lee VanHoose and Michelle VanHoose, go home.” (Vol. II, R. 442 at 9.) Trial counsel also played the 911 tape wherein Appellant stated several times that his wife had killed the victims because they attacked her and himself. (*Id.* at 32-37.)

In a hearing conducted on August 29, 2000, during which the trial court declared that Ms. VanHoose was legally divorced and available to testify, trial counsel argued:

I think it may be a little onerous on the intention of the Court and the attitude of the court that a person walks free, but I think the court also understands that there is other evidence that Michelle already confessed twice to this murder independently of the defendant's presence; and, yet the prosecution wants to try the defendant.

And the scientific evidence which has been produced here by Mr. Murphy and so forth indicates that she had just as much gunpowder residue on her as this defendant. So, how do we justify that? This is selective prosecution.

(Vol. II, R. 440 at p. 22.)

Later, trial counsel implored the court to "dismiss this indictment and seek one and encourage the Prosecutor to go after the *right* person." (Vol. II, R. at 440, p. 24.)

- a. **The trial court did not abuse its discretion by continuing the trial and attributing the continuance to the defense, given Appellant's invocation of the marital privilege while accusing his estranged wife of the murders. The combination of Appellant's assertion of marital privilege and his implication of his estranged wife in the crimes for which he was to stand trial operated to impede and delay the fact finding process.**

Testimonial exclusionary rules and privileges contravene the fundamental principle that " 'the public . . . has a right to every man's evidence.' " *United States v. Bryan*, 339 U.S. 323, 331, 70 S. Ct. 724, 730, 94 L.Ed. 884 (1950). As such, they must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Alkanes v. United States*, 364 U.S. 206, 234, 80 S. Ct. 1437, 1454, 4 L.Ed.2d 1669 (1960) (Frankfurter, J., dissenting). Accord, *United States v. Nixon*, 418 U.S. 683, 709-710, 94 S.Ct. 3090, 3108-3109, 41 L.Ed.2d 1039 (1974). Here we must decide whether the privilege against adverse spousal testimony promotes sufficiently important interests to outweigh the need for probative evidence in the administration of criminal justice.

Trammel v. U.S., 445 U.S. 40, 51100 S. Ct. 906, 912, 63 L. Ed. 2d 186 (1980).

Although *Trammel* is not controlling under the present set of facts or in West Virginia common law or statute it is, nonetheless, persuasive and although not directly on point, still contemplates the possible exploitation of the marital privilege and the resulting unintended harm to justice, as represented by this case.

The statutory nature of West Virginia's marital privilege distinguishes it from the federal marital privilege which is governed by the common law. *See* Fed. R. Evid. 501 (providing that federal testimonial privileges are to be "governed by the principles of the common law as they may be interpreted by the courts . . . in the light of reason and experience"). However, the statutory nature of West Virginia's marital privileges does not make the right absolute or an exception to common law modification through interpretation in light of persuasive federal authority such as *Trammel*. The marital privilege is not a constitutional right. *See e.g.* "The only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. *Branzburg v. Hayes*, 408 U.S. 665, 690, 92 S. Ct. 2646, 2661, 33 L. Ed. 2d 626 (1972).

The spousal privilege has traditionally operated solely for the purpose of preserving a marriage and preventing a spouse from making a choice between keeping his or her marriage intact or lying. "The traditional justification for a marital adverse testimonial privilege is that it serves the public good because forcing one spouse to testify against another in a criminal case would lead to one of two unacceptable results: it could potentially cause a break up of the marriage if the witness spouse voluntarily inculpated her husband, or it could promote perjury." *U.S. v. Banks*, 556 F.3d 967, 985 (9th Dist. 2009)(citations and quotations omitted.).

In this case, both the party's pending divorce, the wife's willingness to testify against her husband and the husband's willingness to accuse his wife of the brutal murders he admitted to committing, clearly shows that the historical rationale of the privilege is inapplicable.

Here, the privilege acted solely as the linchpin of the defense's trial strategy and a method whereby Appellant could both keep that strategy intact and thwart the fact-finding process to defeat justice.⁷

In *Trammel*, the Supreme Court rejected the blanket testimonial privilege, while recognizing a communications privilege. The *Trammel* Court found that the testimonial privilege lay with the testifying spouse and not the accused spouse and provided for an exception to the privilege by reasoning that the purpose of the privilege should not be to thwart justice by binding the testifying spouse with the privilege. "The privilege can have the untoward effect of permitting one spouse to escape justice at the expense of the other. It hardly seems conducive to the preservation of the marital relation to place a wife in jeopardy solely by virtue of her husband's control over her testimony. *Trammel*, 445 U.S. 40, 52-53, 100 S. Ct. 906, 100.

In *Trammel*, the situation was somewhat similar to the instant case in that the testifying spouse was an unindicted co-conspirator who sought to testify under a grant of immunity. The Supreme Court examined the dangers of creating a blanket spousal privilege in light of the history, purpose and spirit of the privilege and noted that when one spouse is willing to testify against the other, the purpose of the privilege is defeated. "When one spouse is willing to testify against the other in a criminal proceeding--whatever the motivation--their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve." *Trammel*, 445 U.S. at 52, 110 S. Ct. at 913.

⁷Arguably a good strategy under the state of the law, but still an exploitation and distortion of the purpose of the privilege at the price of justice nonetheless.

The only purpose the marital privilege served in this case was to allow Appellant to freely accuse his wife of the crimes he was charged with committing because he knew she could not answer for herself. This operated not only to cast suspicion on a wife who could not defend herself but to potentially exonerate a cold blooded killer. Neither of these scenarios could possibly have been contemplated by the original spirit of the marital privilege as passed by the West Virginia legislature.

There is nothing sacrosanct about our statutory privilege. It is open to judicial interpretation as is any statute which is not unambiguous.

West Virginia is not alone in having a marital privilege statute. Minn.Stat. § 595.02. The Minnesota Supreme Court has observed:

The policy underlying the privilege against adverse spousal testimony is to preserve marital harmony. *Trammel v. United States*, 445 U.S. 40, 44, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980); *State v. Feste*, 205 Minn. 73, 74-75, 285 N.W. 85, 86 (1939); 1 McCormick on Evidence § 66, at 280 (John W. Strong ed., 5th ed.1999). The preservation of marital harmony is not, however, an absolute goal to be pursued blindly. See *State v. Hannuksela*, 452 N.W.2d 668, 676 (Minn.1990) (refusing to consider the policy of protecting "the serenity of the marital relationship" in isolation); *Leecy*, 294 N.W.2d at 283 (noting that a marriage nearing dissolution will not support assertion of the privilege against adverse spousal testimony); see also Minn.Stat. § 595.02, subd. 1(a) (listing exceptions).

State v. Gianakos, 644 N.W.2d 409, 422 (Minn. 2002).

In *Gingkos*, the Minnesota court found that "despite the statutory nature of Minnesota's marital privilege, its roots are in the common law, and that this court retains inherent power to adopt standards by judicial opinion relating to the admissibility of evidence in the *interest of justice*." *Id.* at 415 (emphasis added). The *Gingkos* court ultimately declined to carve out an exception to the privilege under the joint criminal activity theory of waiver but did recognize its previous narrowing of the privilege under the "sham marriage" exception not enumerated in the state's marital privilege statutes. The Minnesota court declined to apply the "sham marriage" common law exception to

Giankos because the facts of that case did not support it. Additionally, the Minnesota court in *Giankos* fully acknowledged the progressive narrowing of the statute by common law over the years citing to “this court's previous rulings narrowly construing the statute to avoid creating ‘artificial barriers’ to the truth.” Citing *State v. Hannuksela*, 452 N.W.2d 668, 676, *Larson v. Montpetit*, 275 Minn. 394, 402, 147 N.W.2d 580, 586 (1966) (“[E]videntiary privileges constitute barriers to the ascertainment of the truth and are therefore to be disfavored and narrowly limited to their purposes[.]”).

As the Supreme Court noted in *Trammel*, a strict interpretation of the privilege can create a situation where every spouse has “one safe and unquestionable and ever ready accomplice for every imaginable crime.” *Trammel*, 445 U.S. at 52, 100 S.Ct. 906 (quoting 5 Jeremy Bentham, *Rationale of Judicial Evidence* 340 (1827)).

Pennsylvania also has a marital privilege statute, 42 Pa. CSA § 5913. The Pennsylvania Courts have also considered the substance of marital communications when finding that threatening a spouse with a crime wasn't covered under the privilege nor was a husband bragging to his wife that he had been unfaithful to her with her own minor daughter. In so finding, the court stated: “It is safe to say that the communications appellee made to his wife here [(threatening to kidnap her and bragging he'd had sex with her minor daughter)] are not the sensitive, marital harmony-inspiring communications contemplated by the common law authorities, or the Pennsylvania General Assembly, in erecting this privilege.” *Com. v. Spetzer* 813 A.2d 707, 720 (Pa. 2002). “It would be perverse, indeed, to indulge a fiction of marital harmony to shield statements which prove the declarant spouse's utter contempt for, and abuse of, the marital union.” *Id.* at 721 (citations and quotations omitted).

In *Spetzer*, the Pennsylvania court held that in light of a child protective services statutory regulation exempting child abuse proceedings from the marital privilege, read in *pari materia* with common law and the State's marital privilege statute, the legislature intended an exemption to the privilege for child abuse and neglect proceedings. Although Pennsylvania's marital privilege statute had no exceptions for crimes against children at the time, the *Spetzer* court held that the State's child protective services statutory regulations relayed the intent of the legislature, and, in light of common law, provided the means to effectively modify the statute.

Indeed this Court has looked with skepticism at the privilege through the evolution of our law on the issue: "This Court consistently has suggested that spousal privileges should be restricted not enlarged." *State v. Bradshaw*, 193 W. Va. 519, 457 S.E.2d 456 (1995) at fn. 20 (citations omitted.)

While Appellant's ground for error is not founded on whether privileged testimony was admitted at trial since there was no trial, any finding by this Court that use of the privilege by Appellant was not provided for under the marital testimonial privilege statute would support the State's position that the delay in trial was chargeable to the defense.

The Ohio courts also contemplated the question of interpreting Ohio's marital privilege statute to the meet the ends of justice: "Such privileges, however, should be narrowly construed and are accepted only to the 'limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth[.]'" *State v. Bryant*, 564 N.E.2d 709, 711, 56 Ohio App.3d 20, (Ohio App. 6 Dist. 1988) citing *Alkanes v. United States* (1960), 364 U.S. 206, 234, 80 S. Ct. 1437, 1454, 4 L. Ed.2d 1669 (Frankfurter, J., dissenting). In *Bryant*, the court found that even though the wife was a victim of a crime committed by her husband, not included in the enumerated exceptions to Ohio's marital

privilege statute, upholding the privilege served no “public interest” in excluding her testimony. The Ohio court reversed the trial court’s order limiting the wife’s testimony under the spousal privilege exceptions. Ohio’s statute at that time, like West Virginia’s, was statutory.

The evolution of the marital privilege in both state and federal statute and common law has been to narrow it because of the unintended consequences it had on the ends of justice. Indeed this Court once reversed the murder conviction of a man who shot and killed his infant child while it was being held in its mother arms, the intended victim. This Court in reversing, held that “A wife is not a competent witness against her husband in a prosecution against him for the murder of his infant child, of the age of 14 months, though the same pistol ball killed the child and wounded the wife while the child was in her arms.” *State v. Woodrow*, 58 W. Va. 527, 52 S.E. 545 (1905). Although the legislature modified the statute later to exclude crimes against family members, *Woodrow* is a good example of what can follow if the statute is construed literally at the price of justice.

Under the present set of facts, the privilege as pressed by Appellant, gave him blanket freedom to accuse his spouse of the crime with some additional evidence to support the claim before the jury. Taken to its logical conclusion, Appellant could have had his wife essentially tried *in absentia* during his own trial but without evidentiary and constitutional protections to either protect her or limit the extent to which he could divert suspicion from himself and create reasonable doubt.

Also under facts such as this case and under the state of the law as urged by Appellant, one spouse could commit murder in the presence of the other, confess, then accuse the other spouse who would also confess, then both could invoke the privilege leaving the State to decide who to charge and try against a defense armed with an incriminating admission from the uncharged spouse. Far-fetched? Perhaps, but not so far removed for the instant case.

On the facts presented herein, the assertion of the marital privilege served to make the delay caused thereby, attributable to the Appellant for purposes of the three-term rule analysis.

On this point, the State will leave this Court with the well reasoned analysis of former Justice and law professor, Franklin D. Cleckley:

Trammel is not followed in West Virginia. The West Virginia court, although not deciding to abolish or weaken the privilege, continues its assault against spousal privilege. See *State v. Bailey*, 179 W. Va. 1, 365 S.E.2d 46 (1987) (The court suggested that privilege “is one of the most ill-founded precepts to be founded in common law. It is enough that it continues to exist at all. When it is encountered it is better to be trimmed than enlarged.”); *State v. Jarrell*, 191 W. Va. 1, 442 S.E.2d 223 (1994) (court suggested by reference that “the privilege is more of a hindrance to the efficient administration of justice than an effective device safeguarding the institution of marriage:).

Both *Jarrell* and *Bailey* demonstrate the hostility that this court has shown towards the spousal privilege. Unfortunately, this hostility has manifested itself in bizarre holdings that are difficult to reconcile with both the spirit and letter of the statute. *For the sake of clarity and consistency, it is time for the court to reverse itself in State v. Evans*, 170 W. Va. 3, 287 S.E.2d 922 (1982) (court suggested that only the legislature could change this statutory-protected privilege] and adopt *Trammel notwithstanding the existence of the statutory enactment*. There is simply no valid or good reason for this court to wait for more legislative initiative in this area. West Virginia Code § 57-3-3 is nothing more than codification of common law. The legislature by adopting W. Va. Code § 57-3-3 merely intended to put in a concise statutory form what the courts had determined for the good of society. It is clear that the courts have now modified its view as to the desirability of the continued viability of the privilege and there is nothing wrong with the court communicating this change to the legislature by adopting and following *Trammel*.

1 Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers § 5-4(D)(2)(a)(5-81-82) (4th ed.2000) (emphasis added and footnotes incorporated.)

- b. Because Appellant’s invocation of the privilege kept his wife from defending herself from accusations of being the actual killer instead of him, Appellant was enticing or keeping a material witness away within an enumerated exception to the three-term rule.**

Our analysis begins with two related Code provisions, W. Va. Code §§ 62-3-1 (1981) (Repl.Vol.2000), and 62-3-21 (1959) (Repl.Vol.2000). W. Va. Code §

62-3-1, commonly called the “one term rule,” provides, that one charged by indictment shall be tried within one term of court unless good cause for a continuance is shown. W. Va. Code § 62-3-21, commonly called the “three term rule,” provides that a person subject to an indictment or present must be tried within three-terms of court unless certain limited enumerated exceptions are satisfied.

State ex rel. Brum v. Bradley, 214 W. Va. 493, 496, 590 S.E.2d 686, 689 (2003).

The enumerated exceptions to the three-term rule state in pertinent part:

[U]nless 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[.]

In this case, Appellant did not invoke the marital privilege to preserve his marriage, or protect his wife from choosing between perjuring herself or betraying the man she loved. Appellant invoked the privilege then accused his “beloved”, if seriously estranged wife, of committing the crimes as a matter of trial strategy. When Appellant incorporated his wife into his trial strategy by accusing her, he surrendered her status as spouse for purpose of the marital privilege and rendered her a material witness for purposes of the enumerated exceptions to the three-term rule.

Although this Court has not addressed the standard for determining what actions by an accused constitute “enticing or keeping a witness away” under the three-term rule, the State requests this Court to determine under the facts present, that because of Appellant’s implication of his wife in the crimes *he* admitted committing, his accusations rendered the privilege inapplicable. By implicating his wife, Appellant should be held to have waived the privilege in the same way an attorney client privilege is waived when a client accuses counsel of incompetence or wrong doing or seeks out legal advice on committing a future crime. *See e.g. Medical Assurance*, 213 W. Va. 457, 473, 583 S.E.2d 80, 96 (2003). (Davis, J., concurring (discussing the crime-fraud exception to

the attorney client privilege) (quoting *Volcanic Gardens Mgt. Co., Inc. v. Paxson*, 847 S.W.2d 343, 348 (Tex.Ct.App.1993)).

By accusing his or her attorney of committing malpractice, a client waives the attorney/client privilege. When a spouse accused of a crime implicates the other of that same crime, that should act to waive the privilege and create a material witness within the meaning of the statute.

When considering the intent of the marital privilege in light of how it was applied in this case, any relief granted by this Court for a violation of the three-term rule, would certainly act to create a legal loophole not anticipated by the legislature in crafting the privilege.

B. APPELLANT’S CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WAS CURED BY THE GRANTING OF APPELLANT’S DIRECT APPEAL.

When we measure the performance of petitioner's appellate counsel against the *State v. Thomas* standard, we conclude that the petitioner was denied his right to effective assistance of counsel on appeal. He is entitled to appointment of counsel for the purpose of perfecting a new appeal.

Whitt v. Holland, 176 W. Va. 324, 326, 342 S.E.2d 292, 294 (1986), citing *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974).

This Court further found in *State v. Merritt* 183 W. Va. 601, 396 S.E.2d 871 (1990) that even in cases of extraordinary dereliction of appellate counsel, there is no relief, absent that flowing from legitimate error in the proceedings, for ineffective assistance of appeal counsel except an appeal:

Today we further address the issue of extraordinary dereliction in yet another context by examining whether a remedy exists for such dereliction once the appeal has been heard and found to be lacking in merit. The issue presented is as follows: If the grounds for habeas corpus relief center on the denial of an appeal, whether through the failure to provide effective counsel or a timely transcript, once the appeal has been heard and found to be without merit, is the defendant entitled to a remedy for any extraordinary dereliction in connection with the appeal process? We think not. The Fourth Circuit Court of Appeals has previously arrived at this same

conclusion in *United States v. Johnson*, 732 F.2d 379 (4th Cir.1984), cert. denied, 469 U.S. 1033, 105 S. Ct. 505, 83 L.Ed.2d 396 (1984).

Id., 183 W. Va. at 611, 396 S.E.2d at 881.

In *Merritt* this Court found that appellate counsel's seven year delay in filing the appellant's direct appeal constituted dereliction and ineffectiveness in violation of the appellant's right to appeal but declined to carve out relief independent of legitimate error flowing from the trial court proceedings themselves. Therefore, absent error in the proceedings, Appellant's appointment of appellate counsel for purposes of direct appeal, and the granting of that appeal by this Court, cured any ineffectiveness of appellate counsel.

C. APPELLANT DID NOT MOVE FOR A TRIAL UNDER THE ONE-TERM RULE UNTIL THE THIRD TERM. APPELLANT ALSO FAILED TO ARGUE PREJUDICE RESULTING FROM THE CONTINUANCE GRANTED BY THE TRIAL COURT.

Whereas W. Va. Code, 62-3-1, provides a defendant with a statutory right to a trial in the term of his indictment, it is W. Va. Code, 62-3-21, rather than W. Va. Code, 62-3-1, which is the legislative adoption or declaration of what ordinarily constitutes a speedy trial within the meaning of U.S. Const., amend VI and W. Va. Const., art. III, § 14.

Syllabus point 1 of *State ex rel. Shorter v. Hey*, 170 W. Va. 249, 294 S.E.2d 51 (1981).

In *State v. Carrico*, 189 W. Va. 40, 427 S.E.2d 474 (1993) this Court explained the difference between the standard for a violation of the three-term rule and the one-term rule.

[T]he three-term rule provides that a post-indictment delay cannot be much longer than a year without an act on the defendant's part to extend the term between indictment and trial; the three-term rule operates no matter whether the defendant asks for a trial ...; the "one-term" rule ... prevents *extreme prejudice* against a defendant for delay, for if an event that *may cause prejudice* is impending and the defendant moves for a trial within one-term of court, the prosecution will need to show a high level of "good cause" to persuade the court to continue the case.

Carrico, 189 W. Va. at 44, 427 S.E.2d at 478 (citations omitted).

West Virginia's one-term rule, unlike its three-term rule, articulates no penalty for any violation thereof.⁸ In contrast, the three-term rule has no provision for continuance of a trial outside the enumerated exception for good cause but provides for a discharge from indictment for any violation thereof. Any continuance of a trial beyond the first term after indictment is left up to the sound discretion of the trial court. See Syl. Pt. 2 of *State ex rel. Shorter v. Hey*, 170 W. Va. 249, 294 S.E.2d 51 (1981), "The determination of what is good cause, pursuant to W. Va. Code, 62-3-1, for a continuance of a trial beyond the term of indictment is in the sound discretion of the trial court, and when good cause is determined a trial court may, pursuant to W. Va. Code, 62-3-1, grant a continuance of a trial beyond the term of indictment at the request of either the prosecutor or defense, or upon the court's own motion."

Most importantly, the one-term rule applies only the term of court in which the indictment was returned. "W. Va. Code, 62-3-1, provides a defendant with a statutory right to a trial in the term of his indictment[.]" *State ex rel. Brum v. Bradley* 214 W. Va. 493, 496, 590 S.E.2d 686, 689 (2003). In this case, Appellant was indicted during the January 1998 term. During the May 1998 term, Appellant moved for a continuance. It wasn't until the September 1998 term that Appellant moved for a speedy trial under the one term rule - the third term of indictment.

⁸West Virginia's "one-term" § 62-3-1. rule states in pertinent part:

Time for trial; depositions of witnesses for accused; counsel, copy of indictment, and list of jurors for accused; remuneration of appointed counsel

When an indictment is found in any county, against a person for a felony or misdemeanor, the accused, if in custody, or if he appear in discharge of his recognizance, or voluntarily, shall, unless good cause be shown for a continuance, be tried at the same term.

Even at that, Appellant failed to show how his defense was prejudiced by the delay as required to make a showing of a violation of one-term rule. See Syl. Pt. 4 of *State ex rel. Shorter v. Hey*, 170 W. Va. 249, 294 S.E.2d 51:

Where the trial court is of the opinion that the state has deliberately or oppressively sought to delay a trial beyond the term of indictment and such delay has resulted in substantial prejudice to the accused, the trial court may, pursuant to W. Va. Code § 62-3-1, finding that no good cause was shown to continue the trial, dismiss the indictment with prejudice, and in so doing the trial court should exercise extreme caution and should dismiss an indictment pursuant to W. Va. Code § 62-3-1, only in furtherance of the prompt administration of justice.

Appellant is required to show that the State oppressively sought to delay the trial to the detriment of his ability to mount a defense before showing resulting prejudice. He has neither sufficiently argued nor demonstrated such. There is no error in the trial court's continuance for good cause.

V.

CONCLUSION

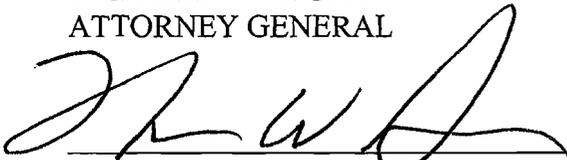
For the foregoing reasons, the Appellant's conviction should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

by Counsel

DARRELL V. McGRAW
ATTORNEY GENERAL

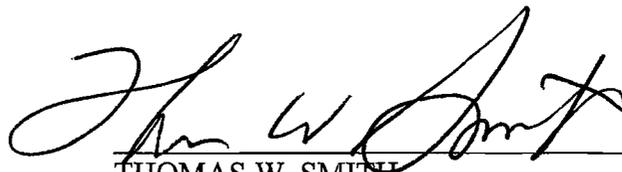


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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Appellee's Brief* was mailed to counsel for the Appellant by depositing it in the United States Mail, first-class postage prepaid, on this 15th day of June, 2010, addressed as follows:

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