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Criminal Procedure

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CRIMINAL PROCEDURE

I. PRELIMINARY HEARING


During the period covered by this survey, the West Virginia Supreme Court of Appeals examined the rights of a defendant at a preliminary hearing. Specifically, the court defined the purpose of a preliminary hearing and addressed the right of a defendant to have counsel present. The outcome of these cases serves to strengthen the defendant’s position at this early stage of prosecution. These decisions assure that when a preliminary hearing is conducted it shall be conducted with defense counsel present and that the defense shall have the right to present evidence within certain limits.

In Desper v. State, petitioner sought to compel the respondents to grant him a new preliminary hearing because the magistrate failed to permit defense counsel to call police officers as witnesses. Petitioner allegedly robbed a Go-Mart store in Charleston, West Virginia. One of the police officers that the defendant sought to call had participated in a photograph identification and the taking of a written statement of James R. Young, an employee of the Go-Mart store and the State’s only witness at the preliminary hearing. During the hearing, defense counsel attempted to call the officers. The State objected, asserting that defense counsel intended only to engage in discovery. The magistrate sustained the objection.

The supreme court noted that in West Virginia a preliminary hearing is not constitutionally required; however, when such a hearing is conducted, it is regarded as a critical stage in the prosecution. The purpose of a preliminary hearing is to determine whether there is probable cause to believe an offense has been committed and that the defendant has committed it. The court stated that the purpose of such an examination “is not to provide the defendant with discovery of the nature of the State’s case against the defendant, although discovery may be a by-product of the [hearing].” The court pointed out the various tools under the West Virginia Rules of Criminal Procedure available for discovery purposes. Preliminary hearings are conducted pursuant to rule 5.1 of the West Virginia Rules of Criminal Procedure.

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4 Id. at 440 (citing State ex rel. Rowe v. Ferguson, 268 S.E.2d 45 (W. Va. 1980)).
5 Id. at 440 (citing State v. Stout, 285 S.E.2d 892, 893 (W. Va. 1982)).
7 Desper, 318 S.E.2d at 442 (citing State ex rel. Rowe v. Ferguson, 268 S.E.2d 45 (W. Va. 1980)).
8 Desper, 318 S.E.2d at 442. The court discussed the following rules: W. VA. R. CRIM. P. 6 (providing for disclosure of matters occurring before a grand jury); W. VA. R. CRIM. P. 7 (permitting a motion for a bill of particulars); W. VA. R. CRIM. P. 12 (providing for notice to the defense of the State’s intention to use certain evidence); W. VA. R. CRIM. P. 12.1 (providing for notice to the defense of State witnesses establishing defendant’s presence at the scene); and W. VA. R. CRIM. P. 16 (the principal discovery rule).
Procedure which provides in part that a defendant may "cross-examine witnesses against him and may introduce evidence in his own behalf." Any rights of the defendant to cross-examine witnesses or produce evidence are necessarily limited to the question of whether probable cause exists. In view of this, the magistrate may require the defendant to explain the relevance of any testimony to a probable cause determination.9

Defense counsel's stated purpose for calling the police officers was to elicit testimony concerning (1) an alleged inconsistency between the arrest warrant and testimony of Young, the State's witness, (2) the photograph identification, and (3) the written statement made by Young. Guided by the procedural requirements of rule 5.1 and taking into account the probable cause parameters on the evidentiary rights of the defendant, the court found that defense counsel should have been permitted to call Detective Lee10 as a witness as a part of the defendant's attempt to challenge probable cause.11 However, the court cautioned that entitlement to examination by the defendant does not justify his seeking to require an unlimited number of witnesses to testify.12 The magistrate's discretion is crucial in this area inasmuch as such examination could "fall victim to an endless wrangle relating to the existence of probable cause."13

Even though the defendant had subsequently been indicted, relief was granted because of the defective preliminary examination. Guided by the holding of Coleman v. Burnett,14 the supreme court remanded and left the nature of the relief to the discretion of the circuit court.15

Desper serves to assure a defendant the right to challenge the State's attempt to establish probable cause at a preliminary hearing. If this right is denied, the hearing may be considered defective.

In State v. Stout16 the court considered whether the holding of defendant's preliminary hearing in absence of his attorney constituted harmless error. Stout allegedly sexually assaulted the ten year old daughter of a woman with whom he had been living. When taken before a magistrate, he indicated that he had retained

9 Desper, 318 S.E.2d at 445.
10 Discussion was limited to Detective Lee inasmuch as the record was speculative as to the other officer's involvement.
11 Desper, 318 S.E.2d at 442-43.
12 Id. at 445.
13 Id.
14 Coleman v. Burnett, 477 F.2d 1187 (D.C. Cir. 1973) (The court directed the trial court to shape relief. It suggested as relief from a defective preliminary examination, even though an indictment had been returned subsequently, that the trial court might set appropriate bounds for an interview of the undercover agent and counsel.).
15 Desper, 318 S.E.2d at 446.
counsel, but later his preliminary hearing was held in his attorney’s absence. Subsequently, defendant was convicted of sexual assault in the third degree. On appeal, Stout claimed the preliminary hearing held in his attorney’s absence constituted error. The supreme court remanded the case to the circuit court for a hearing to determine whether the error was harmless. Upon remand, the circuit court, after attempting to reconstruct the preliminary hearing, determined that the error was harmless. Defendant again appealed.

The West Virginia Supreme Court of Appeals has held that the failure to observe a constitutional right constitutes reversible error unless that error is harmless beyond a reasonable doubt. This rule applies to the right to counsel at a preliminary hearing. The several reasons supporting the necessity of defense counsel at a preliminary hearing are set out in Justice Brennan’s majority opinion in Coleman v. Alabama. Coleman points out that a lawyer’s skilled examination and cross-examination may expose fatal weaknesses in the State’s case, requiring a finding of no probable cause. Also, the skilled interrogation of the State’s witnesses can fashion a useful impeachment tool for cross-examination at trial or preserve testimony favorable to the accused of a witness who does not appear at trial. Furthermore, a lawyer can more efficiently discover the State’s case against the client and can be influential in early decisions such as whether psychiatric examinations are to be ordered or the amount of bail.

Of particular significance in the Stout case was the nature of the offense and its ability to arouse jury emotions. An extensive cross-examination of the ten year old victim at trial may have been devastating to the defendant’s case, but such examination at the preliminary hearing could have been highly effective. Similarly, since testimony indicated the girl’s mother testified at the preliminary hearing but did not testify at trial, the accused lost an important opportunity to preserve testimony possibly favorable to the accused. These circumstances mandated the presence of defense counsel according to the test set out in Coleman v. Alabama. The court, therefore, held that the absence of defense counsel at the appellant’s preliminary hearing was not harmless error. The court stated that an informal interview of the victim and her mother would not have been an adequate substitute for the productive role defense counsel could have played at the preliminary hearing. The conviction was reversed, and the defendant was awarded a new trial.

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11 Stout, 310 S.E.2d at 697.
20 Stout, 310 S.E.2d at 697.
22 Stout, 310 S.E.2d at 699 n.8.
23 Coleman, 399 U.S. 1.
24 Stout, 310 S.E.2d at 700.
25 Id.
II. SPEEDY TRIAL


The West Virginia court in *State ex rel. Miller v. Fury* applied the speedy trial guarantee to misdemeanor prosecutions in magistrate courts. In this case the court relied upon its previous decision in *State ex rel. Stiltner v. Harshbarger*, a case of first impression, to analyze the speedy trial issue as it pertains to magistrate courts. The ruling indicates what time period constitutes a denial of defendant's speedy trial guarantee in magistrate courts.

*Stiltner* held that the speedy trial guarantee of the West Virginia Constitution is applicable to magistrate courts. The legislative definition of "speedy trial" for circuit court proceedings requires that an accused be brought to trial within three terms of court after indictment, unless certain circumstances enumerated in the statute exist that justify postponement. This statutory construction was held applicable to magistrate courts in West Virginia, and the one-year rule was adopted as the outer limits for prosecution where the defendant is free on bond and has done nothing either to hasten or to postpone his trial.

However, the *Stiltner* decision also called for the application in magistrate courts of the "one-term rule" which affects West Virginia circuit courts. Under *Stiltner*, certain criminal trials should be commenced within one hundred and twenty days in magistrate court, unless the court has good cause to continue the case. A court could grant a continuance for good cause for as long as three terms. This rule may apply where the accused is in custody or where a defendant has specifically requested a speedy trial. Under the one hundred and twenty day rule for our magistrate courts, failure to hold a trial within the prescribed period does not automatically result in a dismissal. The court must find that there was no good

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30 State ex rel. Stiltner v. Harshbarger, 296 S.E.2d 861, 864 (W. Va. 1982) (The court inferred that the legislature considered a one-year delay as the outer limit of the right to a speedy trial inasmuch as most circuit courts in West Virginia have three terms of court in one year.).
31 W. Va. Code § 62-3-1 (1984 Supp.) provides, in pertinent part: "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."
32 The court recognized in *Stiltner* that the one-term statute was not applicable to magistrate courts, so by analogy they adopted the one hundred and twenty day rule, reasoning that one term is approximately one hundred and twenty days.
33 *Stiltner*, 296 S.E.2d at 864.
cause to continue the case, and the absence of good cause cannot be presumed from a silent record.\textsuperscript{35}

The recent decisions delineate when a case may be appropriately dismissed in magistrate court under the one hundred and twenty day rule. In \textit{State ex rel. Miller v. Fury}\textsuperscript{36} the petitioner sought to prohibit his prosecution under misdemeanor warrants charging him with driving under the influence of alcohol and resisting arrest. He contended that approximately one hundred and twenty-six days had passed since the issuance of the warrants, and no prosecution had been commenced. He had been released on a recognizance bond after voluntarily appearing before the magistrate. The court held that a case can be dismissed in magistrate court under the one hundred and twenty day rule only when the magistrate finds: "(1) that there was no good cause for continuance; (2) that the State has deliberately or oppressively sought to delay the trial beyond the one hundred and twenty day period; and (3) that such delay has resulted in substantial prejudice to the accused."\textsuperscript{37} Moreover, the court cautioned that the magistrate should exercise extreme care and should dismiss such cases only in furtherance of the prompt administration of justice.\textsuperscript{38} In this case the court concluded that, while no good cause was shown for the State's delay, there was no indication of either deliberate or oppressive delay or of substantial prejudice to the defendant as a result of the delay.\textsuperscript{39}

By adopting such strict conditions for dismissal under the one hundred and twenty day rule, the court in \textit{Fury} suggests, as it has in other recent considerations of the speedy trial guarantee, that the three-term rule (one-year rule) represents the State's declaration of defendant's constitutional speedy trial right.

\section*{III. Confessions}


Admissibility and voluntariness of confessions is an issue the West Virginia Supreme Court of Appeals is called upon to address frequently. Often, confessions are obtained at police headquarters where the accused has been taken for questioning prior to presentment to the magistrate. Such was the situation before the court in \textit{State v. Guthrie}.\textsuperscript{40} In \textit{Guthrie} the defendant was arrested in Virginia on a fugitive

\begin{itemize}
\item \textsuperscript{35} \textit{Stiltner}, 296 S.E.2d at 865.
\item \textsuperscript{36} \textit{Fury}, 309 S.E.2d 79.
\item \textsuperscript{37} \textit{Id.} at 82.
\item \textsuperscript{38} \textit{Id.}
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{40} \textit{State v. Guthrie}, 315 S.E.2d 397 (W. Va. 1984). The court disposed of several other issues raised by appellant Guthrie: The trial court did not err in refusing to accept Guthrie's plea agreement with the prosecutor, since the trial judge followed the procedures proscribed by rule 11 of the West Virginia Rules of Criminal Procedure.

The court would not reverse the lower court's finding that Guthrie was capable of making a
warrant for a murder committed in West Virginia. The fugitive warrant was issued by a Virginia magistrate pursuant to a West Virginia indictment. The magistrate was on call and was aware the officers would return to present Guthrie. Accompanied by a West Virginia trooper, Virginia peace officers arrested Guthrie. At the request of the West Virginia trooper, Guthrie was driven a considerable distance to the Virginia officers' headquarters for questioning, rather than being immediately presented to the magistrate who had issued the warrant. Defendant made a confession within an hour and was then taken to the Virginia magistrate. The entire delay spanned a period of less than three hours. On appeal, the defendant contended that the trial court erred in admitting the confession because it was obtained during a delay in presentment to the magistrate. Guthrie contended that the officers had probable cause to arrest him and the only purpose of the pre-presentment interrogation was to get him to confess.

The West Virginia prompt presentment statute requires that an individual under arrest shall be presented to a magistrate without unnecessary delay. Virginia law contains an analogous provision. Our highest court ruled in State v. Mason that the prompt presentment statute is mandatory. The ruling in Mason was established to safeguard the constitutional rights endangered when government officials are permitted to hold persons in custody for extended periods of time without the intervention of a neutral judicial officer and to guarantee that criminal defendants are treated fairly from the time of arrest to the time of trial.

The supreme court considered the prompt presentment rule as it affects the voluntariness of a confession in State v. Persinger. Under the rule, it is not the length of the delay but its purpose that affects the admissibility of a confession. valid waiver of his rights based on the rule that the trial judge is in the best position to evaluate the credibility of witnesses.

The appellant claimed the State failed to sufficiently rebut his insanity defense so as to permit the matter to go to the jury. Even though the State's rebuttal testimony was slight, the court noted it as evidence and held the sanity question to have been properly presented to the jury.

The trial court did not err in refusing to strike a juror for cause who indicated she had reservations about the efficiency of psychiatrists and psychologists because the record was not developed sufficiently so as to indicate this juror would have been unable to render a fair verdict.

The trial judge properly ruled that Instruction No. 33 which instructed the jury that if they believe John Corprew may have fired the shot that killed David Cloud then they must find George Guthrie not guilty was repetitive of Instruction No. 32 which referred to reasonable doubt as to who fired the murder weapon. Therefore, refusal of Instruction No. 33 was not error.

W. VA. CODE § 62-1-5 (1977). The statute reads in part: "An officer making an arrest under a warrant issued upon a complaint, or any person making an arrest without a warrant for an offense committed in his presence, shall take the arrested person without unnecessary delay before a justice of the county in which the arrest is made."


Id. at 796-97.


Id. at 270.
The delay may be a critical factor where it appears that the sole purpose was to obtain a confession from the defendant, and an unreasonable or unjustifiable delay may render a confession involuntary. The confession in *Persinger* was held inadmissible on another ground, but the court soon addressed the prompt presentment/voluntary confession issue again in *State v. Mitter*. In *Mitter* the court's reasoning in *Persinger* was strictly followed and the second confession of the defendant was deemed inadmissible where the police had held the defendant for the explicit purpose of clearing up a few discrepancies in the first statement. Finally, in a third application of the prompt presentment rule with regard to confessions, the court, in *State v. Wilson*, affirmed the admission of defendant's confession despite a three hour delay. The *Wilson* decision was based on the fact probable cause already had been determined when the arrest warrant was issued and that the defendant had been informed of his rights when the confession was made. The facts in *Guthrie* coincide precisely with the *Wilson* situation; however, the court refused to apply *Wilson* in this case. Guthrie's confession was deemed inadmissible. The delay which resulted in obtaining the confession was considered unjustifiable. Under circumstances where the police officers questioned the defendant rather than presenting him to the magistrate, the court concluded that the confession was inherently unreliable or suspect and, hence, involuntary.

The State argued the prompt presentment rule may not be applied outside our borders and that under Virginia law the confession would be admitted. The court noted that the decision to be made is whether the confession is admissible in our courts. The situation before the court was considered analogous to the rule that if a "working arrangement" between federal and state officials is provable, a federal officer can be held accountable for delays brought about by state authorities. The rationale for the "working arrangement" rule is that federal officials cannot conduct themselves illegally by collaboration with state authorities. Since Virginia and West Virginia police worked together to arrest Guthrie and the delay was prompted by the West Virginia officer, the West Virginia officials could not avoid our state law. Any confession obtained during a delay in prompt presentment created by the police to get the accused to confess may be considered unreliable and, consequently, involuntary. The outcome of the court's treatment of the con-

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47 Id. at 271.
49 State v. Wilson, 294 S.E.2d 296 (W. Va. 1982).
50 Guthrie, 315 S.E.2d at 401.
51 Id.
52 Id.
53 Id. at 401.
54 Id. at 402.
56 Guthrie, 315 S.E.2d at 402.
57 Id. at 401.
fession in this case was fairly evident based upon prior decisions, excepting Wilson. The Guthrie decision is important perhaps because the court made it clear that West Virginia police officers may not avoid the demands of prompt presentment when functioning outside our borders.8

IV. SEARCH AND SEIZURE


During the survey period, the West Virginia court dealt with several important issues regarding search and seizure and considered a warrantless arrest situation. Through its holdings the court (1) clarified the circumstances where an arrest without a warrant may be made,69 (2) recognized the emergency doctrine as an exception to the search warrant requirement,60 and (3) reaffirmed the right of defense counsel to present evidence during a suppression hearing.61

In State v. Farmer62 defendant appealed the revocation of his probation on the ground that the evidence used to sustain his revocation should have been excluded. The sheriff's department had received a complaint that some vehicles had been broken into at a lounge near Princeton, West Virginia, and that certain items had been stolen from a van. A subsequent investigation linked defendant to the commission of the crime. Two officers from the sheriff's department went to the home of Farmer's ex-wife because they had been told he was living there. Outside the home the officers found a vehicle matching the description and license number given to them by a witness. The officers looked inside the locked vehicle and observed certain items matching the description of those reported stolen. The officers went to the ex-wife's house and knocked. They saw Farmer immediately jump out of bed and run through the house. The officers continued knocking for approximately thirty minutes before the ex-wife came to the door and denied that the defendant was inside. They informed her that the defendant had been observed inside the house. One of the officers then entered the house and found the defendant hiding in a closet. He was placed under arrest and advised of his rights. Upon being informed that a warrant would be obtained to search his car, Farmer gave a key to his ex-wife and allowed her to open the trunk. A search of the trunk produced articles which were later identified as those reported stolen. The items inside the passenger compartment were also turned over to the officers by defendant's ex-wife.

The defendant contended his arrest without a warrant was illegal and the

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6 Id. at 403.
62 Farmer, 315 S.E.2d 392.
subsequent search of his vehicle, although pursuant to his consent, was illegal as the fruit of an illegal arrest. The supreme court seized this opportunity to clarify its previous holding in *State v. Canby.*\(^{63}\) In *Canby* the court stated that in order for police officers to make an arrest without a warrant, they must have had at the time of the arrest sufficient probable cause and, in addition, there must have been exigent circumstances which militate in favor of an immediate arrest.\(^{64}\) This broad language could be read to require exigent circumstances for a warrantless arrest *in public* for a felony. However, in *State v. Craft*\(^{65}\) the court precluded a broad reading of *Canby* by stating that "in regard to arrests made in public, this [exigent circumstances requirement] is clearly not the law."\(^{66}\) *Farmer* clears up any lingering doubt created by the *Canby* decision and firmly limits warrantless arrests under exigent circumstances to those arrests made in the home.

Exigent circumstances exist when, under the totality of the circumstances, the police have reasonable grounds to believe that if an immediate arrest is not made, the accused will destroy evidence, flee or otherwise avoid capture, or endanger the safety or property of others while a warrant is sought.\(^{67}\) In *Farmer* the court found overwhelming evidence of probable cause and the existence of exigent circumstances\(^{68}\) to justify a warrantless arrest.\(^{69}\)

Farmer also challenged the search of his vehicle as the fruit of an illegal arrest. The court quickly disposed of this argument by holding that the search was justified because defendant voluntarily consented to the search.\(^{70}\) Under the circumstances, the court found no evidence of duress or coercion and upheld the search.\(^{71}\) The defendant was simply informed of his options to either "show us now or we will get a warrant."\(^{72}\)

In a second case dealing with search and seizure, the West Virginia Supreme Court of Appeals recognized the emergency doctrine as an exception to the search warrant requirement.\(^{73}\) In *State v. Cecil*\(^{74}\) the defendant at trial pleaded guilty to murder in the first degree and sexual abuse in the first degree after the trial had

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\(^{63}\) *State v. Canby*, 252 S.E.2d 164 (W. Va. 1979).

\(^{64}\) *Id.*

\(^{65}\) *State v. Craft*, 272 S.E.2d 46 (W. Va. 1980).

\(^{66}\) *Id.* at 55; see also F. CLECKLEY, HANDBOOK ON WEST VIRGINIA CRIMINAL PROCEDURE 127 (1985).

\(^{67}\) *Canby*, 252 S.E.2d at 167.

\(^{68}\) *Farmer*, 315 S.E.2d at 395-96. Testimony indicated that appellant and his ex-wife were cooperating in an effort to hide appellant. Furthermore, because these two deputies were the only ones on duty for on-the-road work they could not procure a search warrant and prevent both the appellant from fleeing and guard the evidence.

\(^{69}\) *Id.* at 396.

\(^{70}\) *Id.* See Schneckloth v. Bustamonte, 412 U.S. 218 (1973); *State v. Buck*, 294 S.E.2d 281 (W. Va. 1982) (Voluntary consent is an established exception to the search warrant requirement.).

\(^{71}\) *Farmer*, 315 S.E.2d at 397.

\(^{72}\) *Id.*

\(^{73}\) *Cecil*, 311 S.E.2d 144.

\(^{74}\) *Id.*
begun. On appeal, he asserted that his convictions resulted from ineffective assistance of counsel. The most significant contention raised in support of his assertion was his attorney's failure to pursue the issue of whether the search which uncovered the body of the victim was unreasonable under the fourth amendment.

The defendant had been accused of sexually assaulting or abusing and then murdering three-year-old Millie Jean Ratliff at the mobile home of Kenard and Vicky Ratliff, where defendant lived and may have been paying board. The defendant had placed the dead body in a plastic bag and hidden it under the bed. A general search for the child began on August 30, 1981. On August 31, 1981, the defendant was arrested near the mobile home for public intoxication. Acting upon information provided by defendant's father concerning the child's whereabouts, the police converged at the mobile home on the evening of August 31. Kenard Ratliff permitted the police to enter the home, where the body was found. Defendant contended that the body was found as the result of a warrantless and unreasonable search and seizure, an issue counsel did not raise at the suppression hearing.

Generally, searches conducted outside the judicial process, without prior approval, are per se unreasonable, although there are a few specifically established and well-delineated exceptions. These exceptions are "jealousy and carefully drawn." In Cecil, the court recognized the "emergency doctrine" exception.

The doctrine of emergency in the law of search and seizure has never been definitively explained. It must be considered on a case-by-case basis, and its definition has often been tailored to encompass a number of circumstances. A very broad concept of the doctrine has been defined as follows:

Law enforcement officers may enter private premises without either an arrest or

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75 Counsel's performance in such cases is measured by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law. State v. Thomas, 157 W. Va. 640, 203 S.E.2d 445 (1974).

76 The supreme court noted an in camera hearing was conducted to determine the voluntariness of the confessions prior to trial. The court found no error with respect to the admission of the confessions, recognizing the trial court's wide discretion in determining the admissibility of confessions.

77 See, e.g., State v. Kraimer, 99 Wis.2d 306, 298 N.W.2d 568 (1980), cert. denied, 451 U.S. 973 (1981) (warrantless search upheld under the emergency doctrine where police entered a home because of the possible homicide of defendant's wife and potential danger to the children living in the home; also, officers believed a burglary had occurred); State v. Resler, 209 Neb. 249, 306 N.W.2d 918 (1981) (warrantless entry upheld on the ground that defendant, a suspected prowler, was believed to have returned to the apartment after sustaining a gunshot wound and they had an obligation to find him and provide first aid).
a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to properly launch a criminal investigation involving a substantial threat to imminent danger to either life, health, or property, and provided, further, that they do not enter with an accompanying intent to either arrest or search. If, while on the premises, they inadvertently discover incriminating evidence in plain view, or as a result of some activity on their part that bears a material relevance to the initial purpose for their entry, they may lawfully seize it without a warrant.\textsuperscript{81}

Under the circumstances of this case, the West Virginia Supreme Court of Appeals stated that the emergency doctrine permits a limited, warrantless search or entry by police officers where (1) there is an immediate need for their assistance in the protection of human life, (2) the search or entry is motivated by an emergency and not by an intent to arrest or secure evidence, and (3) a reasonable connection between the emergency and area of search exists.\textsuperscript{82}

The police in this case were not attempting to make an arrest or to secure evidence. They were searching for a missing child who they had reason to believe was in the mobile home. The officers had been informed by the defendant's father that the child had fallen and had been placed in a plastic bag under the bed in the mobile home. The officers' actions were motivated by the potential life-threatening consequences which they believed existed. Although defendant was under arrest for intoxication, he was not yet a murder suspect. The court held that under these circumstances the search and seizure in question fell within the emergency doctrine exception,\textsuperscript{83} thereby establishing an exception to the warrant requirement. Defense counsel's failure to pursue the search and seizure issue was not considered ineffective assistance of counsel.

In the final case involving search and seizure, \textit{State v. Ehtesham},\textsuperscript{84} the procedure for conducting suppression hearings was reviewed. Joseph Ehtesham was found guilty of possession of a controlled substance (LSD) with intent to deliver. His assignment of error on appeal was the trial court's refusal to allow him to present evidence at the suppression hearing.

Defense counsel contended at the suppression hearing that (1) the evidence seized under the search warrant was found in the defendant's girlfriend's room; (2) there was no consent to search the girlfriend's room; (3) no arrest warrant for the defendant had been issued at the time of the search; and (4) because the officer did not participate in the initial controlled substance buy, the reliability of the informant who provided information supporting the basis for the search warrant was

\textsuperscript{81} Mascolo, \textit{The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment}, 22 Buffalo L. Rev. 419, 426 (1973) (citations omitted).
\textsuperscript{82} Ceci, 311 S.E.2d at 149.
\textsuperscript{83} Id. at 151.
\textsuperscript{84} State v. Ehtesham, 309 S.E.2d 82 (W. Va. 1983).
an issue to be developed. The trial court refused to continue the hearing and found the evidence admissible.

Previously, our court implied in State v. Harr\(^5\) that a pretrial motion to suppress must be heard. Moreover, a hearing on the admissibility of evidence allegedly obtained by an unlawful search contemplates a meaningful hearing where the state and defense may produce evidence and examine and cross-examine witnesses.\(^6\) Defense counsel in Ehtesham had not been given a meaningful opportunity to develop the issues raised.\(^7\) The supreme court held that the error occurred at two points during the suppression hearing: first, when the trial court refused to allow defense counsel to cross-examine the trooper who had procured the warrant authorizing the search of the defendant's room at Davis and Elkins College;\(^8\) and, also, when the court refused to allow the defendant to develop testimony regarding the reliability of an informant who supplied information supporting the issuance of the warrant.\(^9\) However, defendant's conviction was not reversed. The case was remanded to the circuit court with directions to conduct a further suppression hearing.\(^10\) If the circuit court determined that the evidence seized should be suppressed, defendant would be entitled to a new trial.\(^11\) If it found that the evidence should not be suppressed, the conviction would be upheld without prejudice to defendant's right to challenge the admissibility on appeal.\(^12\)

V. ASSISTANCE OF COUNSEL AND SELF-REPRESENTATION


In State v. Sheppard\(^\) the West Virginia Supreme Court of Appeals addressed the related issues of right to counsel and right to self-representation. Defendant was convicted on two counts of kidnapping and one count of armed robbery. After his arrest, he was taken before a magistrate and informed of the charges against him. Although he refused to sign the acknowledgement of rights form, a checkmark appeared in the box indicating "I want counsel appointed for me." An attorney was appointed to represent him.

\(^5\) State v. Harr, 156 W. Va. 492, 194 S.E.2d 652 (1973) (A question of admissibility of evidence on the ground of unlawful search should be determined in the same manner required for voluntariness of confession, which imposes a duty upon the court to hear the evidence); F. CLECKLEY, supra note 66, at 303-04 (1985).
\(^6\) Harr, 156 W. Va. 492, 194 S.E.2d 652.
\(^7\) Ehtesham, 309 S.E.2d at 84.
\(^8\) Id.
\(^9\) Id.
\(^10\) Id. at 84-85; see State v. Walls, 294 S.E.2d 272 (W. Va. 1982) (procedure where a mandatory preliminary hearing has not been held in regard to evidentiary matters whose admissibility is ordinarily challenged on constitutional grounds is to remand for conducting such a hearing).
\(^11\) Ehtesham, 309 S.E.2d at 85.
\(^12\) Id.
Later, a lineup consisting of the defendant and eight men from the jail population was conducted. Three witnesses identified the defendant as the perpetrator of the crimes. The lineup was conducted without notice to defense counsel. An in camera hearing was held at trial regarding the identification. Two of the witnesses were permitted to testify as to their out-of-court identification of the defendant. These witnesses also made an in-court identification. Defendant contended that the admission of testimony relating to the out-of-court identification constituted reversible error.

The United States Supreme Court and the West Virginia Supreme Court of Appeals have clearly established that once a defendant has expressed a desire to be represented by counsel, a subsequent police-initiated lineup in absence of counsel violates the defendant’s constitutional rights. The admission at trial of testimony concerning an out-of-court identification conducted in such a manner constitutes reversible error unless the admission of the evidence is shown to be harmless error. Consequently, it was error for the two witnesses in this case to testify at trial about their out-of-court identification. The West Virginia court found the erroneous admission was harmless error, however, since an independent in-court identification was made at trial with a high degree of certainty and uncontradicted by two witnesses who did not view the lineup. These factors and other evidence dictated the conclusion that the erroneous admission of the out-of-court identification testimony was merely cumulative of other overwhelming evidence; the improper admission was found to be harmless beyond a reasonable doubt.

Defendant’s second principal assignment of error related to the trial court’s refusal to permit his court-appointed attorney to withdraw. On the eve of the trial, the defendant’s court-appointed attorney filed a motion to withdraw from the case. The motion alleged a complete breakdown of communications between counsel and defendant. The supreme court has ruled in the past that before a defendant is entitled to appointment of new counsel, it is incumbent upon the defendant to show good cause for the withdrawal of the court-appointed lawyer. Good cause may be demonstrated by a conflict of interest, a complete breakdown of communication after good faith efforts to continue, or an irreconcilable conflict that may lead to an unjust verdict. However, the preeminent condition precedent to an objection to appointed counsel is a showing of good faith.

94 United States v. Wade, 388 U.S. 218 (1967); State v. Gravely, 299 S.E.2d 375 (W. Va. 1982) (A pretrial identification at a police-initiated lineup, subsequent to an expression by defendant to be represented by counsel and conducted absent counsel, constitutes a violation of defendant’s rights under the sixth amendment to the Constitution and art. III, § 14 of the West Virginia Constitution.).
95 Gravely, 299 S.E.2d 375.
96 Sheppard, 310 S.E.2d at 182-83.
97 Id. at 183.
99 Id. at 668.
100 Id.
The trial court conducted a hearing on the motion during which the defendant explained that he did not trust his attorneys to represent him because they had failed to file motions on his behalf or to provide him with documents he had requested. He also alleged that one of the attorneys was a friend of the assistant prosecutor. The circuit court found no basis for these contentions since the defendant did not specify which motions counsel failed to make and the documents not provided to him related to a matter already decided. The circuit court inquired into co-counsel's relationship with the assistant prosecutor and found that although the two were friends, this created no interference with counsel's representation of defendant. Moreover, it appeared these motions were not made in good faith but, instead, suggested a deliberate attempt to delay trial.

The supreme court would not say, based upon the record, that an abuse of discretion occurred by the trial court's refusal to allow the attorneys to withdraw. The court found that the defendant's complaints about counsel's performance were not sufficiently serious to warrant removal inasmuch as a disagreement over tactics or mere dissatisfaction with the services of court-appointed counsel does not, by itself, entitle the defendant to the appointment of new counsel.

The supreme court stated that, where, on the eve of trial, a defendant deliberately refuses to cooperate with court-appointed counsel and seeks appointment of new counsel as a means of delaying the proceedings, the defendant's objection to court-appointed counsel cannot be said to be made in good faith and such a request may be denied. Examining the facts of the case, the court noted that during the sixteen months of representation by his court-appointed counsel defendant had expressed dissatisfaction with this attorney on only one prior occasion nearly eight months before. Hence, the court could not find that the trial court had abused its discretion in holding that the defendant's actions were staged only to create a delay.

Defendant's third principal assignment of error was the court's refusal to allow him to represent himself at trial. Prior to jury selection, an in camera hearing was held during which the defendant raised objections to his court-appointed counsel and asserted his desire to represent himself. The trial court refused his request.

It has generally been recognized that defendant's right to assistance of counsel in criminal prosecutions implicitly gives rise to the correlative right to waive counsel

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101 Sheppard, 310 S.E.2d at 184.
102 Id. at 185.
103 Id. at 183-84.
104 Id. at 184. (At a competency hearing on August 9, 1979, appellant complained that his counsel had failed to provide him with requested documents or to secure access to the county law library for him. The supreme court found that appellant was not seriously considering requesting other counsel at that time but using the threat to do so to obtain documents and access to the law library.).
105 Id. at 185.
and proceed pro se. However, this is not an absolute right. Its exercise is subject to restrictions designed to protect fundamental rights guaranteed by the Constitution and to insure the orderly administration of the judicial process.

The supreme court summed up the circumstances where a defendant may invoke his right to proceed pro se as follows:

[A] defendant in a criminal proceeding who is mentally competent and sui juris, has a constitutional right to appear and defend in person without the assistance of counsel, provided that (1) he voices his desire to represent himself in a timely and unequivocal manner; (2) he elects to do so with full knowledge and understanding of his rights and of the risks involved in self-representation; and (3) he exercises the right in a manner which does not disrupt or create undue delay at trial.

Under this standard, once a defendant expresses a timely and unequivocal desire to represent himself, the trial court must conduct an inquiry to determine whether an accused has knowingly and intelligently elected to proceed without counsel. In this case defendant's request was tendered the morning of trial, raising a question as to its timeliness. Under these circumstances, the supreme court could not say the trial court abused its discretion. Even if the request was held to be timely, the demand could not be characterized as unequivocal since the defendant, although seeking to proceed pro se, clearly indicated that he had no intention of waiving his right to the assistance of counsel. The court found no error in the refusal to allow the defendant to proceed without counsel at trial, and noted that an extensive inquiry into the demand was unnecessary.

The defendant then asserted that this right of self-representation was violated by the trial court's refusal to permit him to address the jury as co-counsel. This request was made after his pro se demand was denied. While the defendant has a constitutional right to represent himself without the assistance of counsel, he does not have a correlative right to appear as co-counsel. Permitting an accused who is represented by counsel to appear as co-counsel by examining witnesses or addressing the jury is a matter within the discretion of the trial court, and no abuse of that discretion was found in this case. At the close of the State's case, the defendant made a request to dismiss the defense witnesses and asked that he be

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108 Id. at 835.
109 Sheppard, 310 S.E.2d at 189.
110 Id. at 189-90.
111 Id. at 190.
112 Id.
113 Id.
114 Id. at 190-91.
permitted to take the stand to inform the jury of his reasons for not putting on a defense. However, because he did not want to be subjected to cross-examination, the court properly refused his request.

VI. Plea Bargaining


The standards for accepting or rejecting a plea agreement and for dismissal of criminal charges by a circuit judge were scrutinized recently by the West Virginia Supreme Court of Appeals in Myers v. Frazier. The double jeopardy consequences in a plea bargaining situation were also addressed. The principles espoused in the court’s opinion written by Justice Miller provide criteria to guide a circuit court judge in determining whether to accept or reject a plea agreement. Furthermore, through its decision, the supreme court imposes a duty upon the prosecuting attorney to disclose specific reasons for entering into the plea agreement or for dismissing any charges.

Annetta Myers, as a concerned citizen and resident of Fayette County, West Virginia, sought to have three Fayette County deputy sheriffs tried on charges of sexual assault, false swearing, and related offenses. Deputies Leland Dempsey, Dave Brown, and Rick Pennington allegedly forced a twenty-four year old woman to perform oral sex on each of them at her trailer while they were on duty and in uniform. After an investigation was commenced, a special prosecutor orally agreed to grant immunity to Pennington in return for his cooperation in prosecuting Dempsey and Brown. After being indicted, Dempsey and Brown, through their attorneys, negotiated agreements with the special prosecutor. Dempsey agreed to plead nolo contendere to a false swearing count, and the other counts were to be dismissed with prejudice. Brown agreed not to be a county or city police officer in Fayette County for a period of five years in return for the dismissal with prejudice of the charges against him. The trial judge orally accepted both proposed agreements and sentenced Dempsey to five years probation and fined him $1,000.00.

Ms. Myers then sought a writ of prohibition to prohibit the trial judge from entering an order accepting the agreements with Dempsey and Brown and to prohibit the entry of an order granting immunity to Pennington. Ms. Myers further sought a writ of mandamus compelling the special prosecutor to withdraw his immunity promise to Pennington and to prosecute the three deputies. The court reviewed extensively the plea bargaining procedure before rejecting the petition on the issue of standing.

The plea bargaining process is governed by rule 11 of the West Virginia Rules of Criminal Procedure. The procedural requirements of the rule are designed to bring negotiations out in the open and on record. Under the standards adopted in rule
power is vested in the circuit court to accept or reject a plea agreement or to defer action upon it until the court obtains a presentence report.\textsuperscript{116} It is also clear under rule 11 that a defendant has no absolute right to enter a nolo contendere plea.\textsuperscript{117} Finally, the rule delineates the procedure to be followed when a court rejects a plea bargain.\textsuperscript{118}

Generally, in exercising its discretion to accept or reject a plea agreement, the court must consider whether it is consistent with the public interest in the fair administration of justice.\textsuperscript{119} Specifically, our court in \textit{Myers} sets out a public policy standard which includes four considerations, two of which benefit the defendant. First, the plea bargain must be found to have been voluntarily and intelligently entered into by the defendant.\textsuperscript{120} Second, there must be a factual basis for the plea.\textsuperscript{121} The other two considerations include the general public's perception that crimes should be prosecuted and the interests of the victim.\textsuperscript{122} These additional considerations are consistent with the public policy standards which provided support for the Victim Protection Act of 1984 recently adopted by the West Virginia Legislature.\textsuperscript{123}

Taking into consideration these expressed goals, the court in \textit{Myers} suggested that the more obvious and primary guideline for a trial court in determining whether to accept or reject a plea agreement is whether, in light of the entire criminal event and defendant's prior record, "the plea bargain enables the court to dispose of the case in a manner commensurate with the seriousness of the criminal charges and the character and background of the defendant."\textsuperscript{124} To ensure that the trial court competently exercises its discretion, the court concluded that a prosecutor has a duty to inform the trial court of his specific reasons for entering into a plea agreement with a defendant.\textsuperscript{125} By requiring such disclosure the trial judge would be informed of the circumstances of the criminal episode which led to the plea agreement, and the judge would thereby have more complete information to support this determination.

\textsuperscript{116} Rule 11(e)(2) of the West Virginia Rules of Criminal Procedure provides in part: "[T]he court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report."

\textsuperscript{117} Rule 11(b) of the West Virginia Rules of Criminal Procedure provides in part: "A defendant may plead nolo contendere only with the consent of the court."

\textsuperscript{118} See W. VA. R. CRIM. P. 11(e).

\textsuperscript{119} \textit{Myers}, 319 S.E.2d at 789 (citations omitted).

\textsuperscript{120} \textit{Id.} at 790.

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} \textit{Id.}

\textsuperscript{123} \textit{Id.} at 790 n.11. The Victim Protection Act of 1984 is codified at W. VA. CODE § 61-11A-1 to 7 (1984).

\textsuperscript{124} \textit{Myers}, 319 S.E.2d at 791. (This guideline takes into consideration the indirect effect of plea agreements in limiting the sentencing power of the judge; provides for sentences commensurate with the offense and the character of the offender; and takes into account legitimate prosecutorial interests. Moreover, this principle maintains the public confidence in the criminal judicial system.).

\textsuperscript{125} \textit{Id.}
The two agreements in question recommended the dismissal of all criminal charges except for one count of false swearing to which Dempsey pleaded nolo contendere. It has long been held in West Virginia that a prosecutor cannot dismiss criminal charges upon indictment by a grand jury without the consent of the court.\textsuperscript{126} The public interest considerations for accepting or rejecting a plea agreement under rule 11 which were outlined previously in the opinion were held by the court to be equally applicable to the determination of whether dismissal of criminal charges is warranted under rule 48(a).\textsuperscript{127} When recommending dismissal, it is incumbent upon the prosecutor to inform the court of his specific reasons for the recommendation\textsuperscript{128} so that the trial judge can competently decide whether to consent to such dismissal.\textsuperscript{129} General statements by a prosecutor that dismissal of criminal charges would effectuate the efficient and proper administration of justice or that the case is not likely to be successful were not considered specific reasons which will support that dismissal.\textsuperscript{130} Furthermore, the court interpreted rule 48(a) to require a written order from the judge before prosecution is terminated;\textsuperscript{131} hence, a dismissal of the charges against Dempsey and Brown had not been effectuated since the dismissals had only been orally approved.\textsuperscript{132} Approval by the judge of a written order dismissing any charges should be carried out with reference to the public policy standards and procedures set out in the opinion.

A claim by Dempsey that the double jeopardy bar prohibited further consideration of his plea was rejected by the court.\textsuperscript{133} This claim was raised on the ground that a sentence had been orally pronounced. The jeopardy consequences in a plea bargaining situation have not been analyzed in this jurisdiction. Although some courts have stated that jeopardy attaches once a plea has been accepted by the judge, thereby binding the judge to the agreement,\textsuperscript{134} our court did not believe that jeopardy must attach automatically and irrevocably in every instance in which a plea was accepted. The court cited many factors in reaching the conclusion that jeopardy should not attach upon initial acceptance of a plea. Particular consideration was credited to the inherent differences between the plea bargaining process and the traditional guilt finding ordeal attendant to a trial.\textsuperscript{135} Once a plea bargain is reached, the parties do not come to court in the traditional adversarial posture because both parties seek ratification of the agreement.\textsuperscript{136} The court concluded that


\textsuperscript{127} Myers, 319 S.E.2d at 793.


\textsuperscript{129} Myers, 319 S.E.2d at 793 (footnotes omitted).

\textsuperscript{130} Id. at 794.

\textsuperscript{131} Id. (The words "file a dismissal" were deemed to require a written order.).

\textsuperscript{132} Id.

\textsuperscript{133} Id. at 795.

\textsuperscript{134} See United States v. Cambindo Valencia, 609 F.2d 603, 637 (2d Cir. 1979), cert. denied, 446 U.S. 940 (1980); United States v. Jerry, 487 F.2d 600, 606 (3d Cir. 1973).

\textsuperscript{135} Myers, 319 S.E.2d at 794.

\textsuperscript{136} Id.
"the entry of a nolo contendere or a guilty plea pursuant to a plea bargain and
the oral pronouncement of a sentence by a circuit court does not impose a double
jeopardy bar where defendant has not served any portion of the sentence."137 To
conclude otherwise would be inconsistent with the nature of plea bargaining and
would impede the trial judge's decision on whether the public policy standard was
served by the agreement by precluding him from acting upon additional
information.138 The court noted that to bind a circuit court to a sentence at the
time a plea is accepted and before the sentence is actually executed is in conflict
with the rule permitting a court to increase a previously imposed sentence prior
to the time defendant commences serving it.139

In Myers the court refused to adopt a strict interpretation of rules 11(e)(2)
and (3) of the West Virginia Rules of Criminal Procedure in order to avoid the
jeopardy issue.140 Under a strict semantical reading of rule 11(e)(2), a trial court
that has not deferred accepting the plea agreement is bound by its initial acceptance.
On the contrary, the court stated that a conditional acceptance may serve the interest
of judicial economy by allowing the court to satisfy itself of the agreement's accept-
ability before requesting a presentence report.141 Moreover, the court saw no harm
to the defendant in interpreting rules 11(e)(2) and (3) as not binding the trial court
to its initial acceptance of the plea agreement.142 If the court should later decide
to reject the plea bargain, the defendant has the opportunity to withdraw his plea;143
consequently, the defendant is restored to the position he was in before the agree-
ment was reached. The court held that the special judge was not bound to his in-
itial oral acceptance of the agreements presented by Dempsey and Brown; if upon
further reflection or additional information the judge should decide the agreements
did not promote the public interest in the fair administration of justice, he may
reject them so long as Dempsey could withdraw his plea.144 The court's decision
indicates that under rule 11 a trial judge may accept a plea conditional upon receipt
of the presentence report.

The petitioner's status was that of a resident, taxpayer, and concerned citizen
of Fayette County. Generally, a person who has no interest in a proceeding and
whose rights will not be affected is not entitled to apply for a writ of prohibition.145
The petitioner in Myers sought to prohibit the special circuit judge from entering
any orders accepting the Dempsey and Brown agreements. This action by the cir-

137 Id. at 798.
138 Id.
139 Id. at 797.
140 Id. at 799.
141 Id.
142 Id. at 800.
143 Id. Rule 11(e)(4) of the West Virginia Rules of Criminal Procedure provides in part: "If the
court rejects the plea agreement, the court shall . . . afford the defendant the opportunity to then
withdraw his plea. . . ."
144 Myers, 319 S.E.2d at 800.
145 State ex rel. Linger v. County Court, 150 W. Va. 207, 144 S.E.2d 689 (1965).
circuit judge is ultimately discretionary, and our highest court has stated that "a writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court." The court stressed that the adequacy of the reasons set forth by the special prosecutor for his agreements with Dempsey and Brown should be considered in conjunction with the public policy guideline set out in this opinion before accepting an agreement. However, a writ of prohibition would not properly be issued against the special circuit judge.

A final analysis was made by the court of the petitioner's entitlement to mandamus relief. Petitioner sought a writ of mandamus to compel the special prosecutor to withdraw his promise of immunity from prosecution to Pennington and to proceed to indict Pennington. Ms. Myers also sought to compel the special prosecutor to nullify the agreements with Dempsey and Brown and to proceed with their prosecution. The court recognized that generally, absent some constitutional or statutory grant, a prosecutor possesses no inherent authority to grant immunity from prosecution; hence, petitioner's requested relief by mandamus on this point was denied.

Our supreme court has recognized that the prosecutor has some discretion in the exercise of his or her duties. However, the court's prior decisions support the view that prosecutorial discretion is not absolute or uncontrollable, and the probable cause standard stands as the line of demarcation between prosecutorial duty and prosecutorial discretion. Under the supreme court's view, the prosecutor initially has discretion, but upon a showing of probable cause he has a duty to act. Mandamus will lie only to require the discharge by a public official of a nondiscretionary duty. The court concluded that a person who seeks mandamus to compel prosecution must possess the necessary facts to establish probable cause or stand in some special position such as being the victim or a close relative of the victim if the victim is deceased or unable to assist in the prosecution. Furthermore, any such action must be brought in a circuit court which can make the necessary findings of fact more efficiently than the supreme court. The court

148 Myers, 319 S.E.2d at 801 (The court did not foreclose the right of the victim or the victim's immediate family or persons having particular relevant knowledge of the case from petitioning the circuit court as permitted under W. Va. Code § 61-11A-2 (1984)).
149 Id. at 802. See generally Annot., 4 A.L.R. 4th 1221 (1981).
150 Myers, 319 S.E.2d at 803.
151 State ex rel. Skinner, 278 S.E.2d 624.
153 Myers, 319 S.E.2d at 804.
155 Myers, 319 S.E.2d at 805.
156 Id.
declined to issue mandamus in this case since petitioner did not allege facts bringing her into special standing, and even if special standing had been shown, the matter should have been brought before the trial court.\footnote{Any decision as to further prosecution of Dempsey and Brown must be predicated upon the special judge's action on the tendered agreements. In any prosecution of Pennington, where no charges are pending, the mandamus must be brought before the trial court for a probable cause determination.}  

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