

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, ex rel.
RALPH A. LORENZETTI, JR.,
Prosecuting Attorney for Jefferson County,

Petitioner,

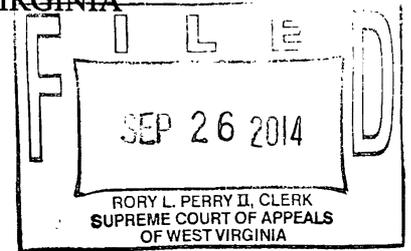
v.

THE HONORABLE DAVID H. SANDERS,
Judge of the Twenty-Third Judicial Circuit, and
ELIZABETH SHANTON,

Respondents.

Docket No. 14-0904

(Case below: 13-F-73, Jefferson County
Circuit Court)



RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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148-CSR-1

155-CSR-7

S.B. 267, 81st Leg., Reg. Sess. (W. Va. 2014)

QUESTIONS PRESENTED

1. Whether the Circuit Court exceeded its legitimate power in dismissing Counts 2 through 54 of the Indictment, each of which charged Defendant Elizabeth Shanton with separate violations of Chapter 12, Article 3, Section 10b of the West Virginia Code?
2. Whether the extraordinary remedy of a writ of prohibition lies for the State to obtain review of an order dismissing an indictment based on the ground of a bad or insufficient indictment?
3. Whether the Circuit Court should have dismissed the entire Indictment against Defendant Elizabeth Shanton, where Count 1 of the Indictment, charging Ms. Shanton with a fraudulent scheme, incorporated Counts 2 through 54 of the Indictment?

STATEMENT OF THE CASE

Subsequent to the filing of the petition for writ of prohibition in this case, the Circuit Court continued the trial until Tuesday, December 9, 2014, and the pre-trial hearing until November 17, 2014.

Respondent Elizabeth Shanton was an employee of Shepherd University and held the position of Dean of Student Affairs. As part of her job description, Ms. Shanton was in charge of planning and producing student events, which included dinners, conferences, special events, and raffles and giveaways. Ms. Shanton was provided with a state-issued purchase card to carry out these duties. For the multiple years that she used the state purchase cards, her purchases were approved by a supervisor.

After many years of use of the purchase card without complaint, her supervisor started requesting additional documentation for her past and future purchases. Ms. Shanton was in the

process or providing such documentation when the Commission on Special Investigations executed a search warrant on her office.

The State of West Virginia then directly indicted Ms. Shanton in a fifty-four (54) count Indictment in April of 2013, charging her with one count of fraudulent schemes, in violation of W. Va. Code § 61-3-24d, and fifty-three (53) counts of unauthorized use of a state purchase card, in violation of W. Va. Code § 12-3-10b.

Following indictment, Ms. Shanton filed three separate motions to dismiss the Indictment, based on insufficiency, unconstitutionality, and lack of jurisdiction. As grounds for dismissal based upon unconstitutionality of the Indictment and charging statute, Respondent argued that the charging statute, W. Va. Code § 12-3-10b, was unconstitutional on its face and as applied, that the charging statute was void for vagueness, was overbroad, violated the Eighth Amendment's prohibition against cruel and unusual punishment, violated Respondent's right to due process in Article III, Section 10 of the West Virginia Constitution and the Fourteenth Amendment of the United States Constitution, violated Respondent's right to equal protection pursuant to the state and federal constitutions, and violated Respondent's right to be free from double jeopardy.

The Jefferson County Circuit Court dismissed Counts 2 through 54 of the Indictment as being in violation of the double jeopardy clauses of the West Virginia and United States Constitutions, and denied dismissal of Count 1 of the Indictment. Because the Circuit Court dismissed the counts on double jeopardy grounds, it did not reach the other questions of constitutionality, insufficiency, and jurisdiction, finding that such issues were moot. The State of West Virginia then filed the instant petition for writ of prohibition.

SUMMARY OF ARGUMENT

Respondent first argues that this Honorable Court should dismiss the petition for writ of prohibition because the State has other adequate remedies available to seek review of the Circuit Court's order dismissing Counts 2 through 54 of the Indictment, namely a direct appeal pursuant to Chapter 58, Article 5, Section 30 of the West Virginia Code. Because the Circuit Court dismissed these counts as being bad, i.e. multiplicitous, and insufficient, the State may appeal the order pursuant to statute, which allows for the appeal of an order dismissing an indictment as "bad or insufficient." Thus, the extraordinary remedy of a writ of prohibition is not available to the State.

Second, Respondent suggests that if this Honorable Court decides to address the petition on its merits, this Court should deny the petition for writ of prohibition because the Circuit Court's order dismissing Counts 2 through 54 of the Indictment is not clearly erroneous as a matter of law and because the State has failed to show that the Circuit Court flagrantly exceeded its legitimate power in dismissing Counts 2 through 54. Respondent argues that Counts 2 through 54, on the face of the indictment, are insufficient as a matter of law. Respondent further argues that the Circuit Court was not clearly erroneous in holding that a violation of Chapter 12, Article 3, Section 10b of the West Virginia Code was a continuing offense and that the State cannot charge Ms. Shanton for multiple violations arising from a single continuing course of conduct. Respondent also argues that insofar as this Court has decided a case subsequent to the filing of the writ of prohibition, which has overturned one of the cases which the Circuit Court relied upon in finding that charging a violation of fraudulent schemes and a violation of Chapter 12, Article 3, Section 10b was multiplicitous, the extraordinary remedy of a writ of prohibition is

not the appropriate method of review.

Third, Respondent argues that the Circuit Court should have dismissed the entire indictment, Counts 1 through 54, and not only Counts 2 through 54. Because the indictment is plainly insufficient on its face and because Count 1 incorporates by reference Counts 2 through 54, the entire indictment should have been dismissed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent¹ Elizabeth Shanton suggests that oral argument is necessary pursuant to Rule 20 of the Rules of Appellate Procedure, if this Court believes that the merits of the dismissal order can be addressed by extraordinary writ, because the question presented involves an issue of first impression regarding the constitutional validity of a statute, Chapter 12, Article 3, Section 10b of the West Virginia Code.

ARGUMENT

I. THE JEFFERSON COUNTY CIRCUIT COURT DID NOT EXCEED ITS LEGITIMATE POWER IN DISMISSING COUNTS 2 THROUGH 54 OF THE INDICTMENT, EACH WHICH CHARGED DEFENDANT SHANTON WITH SEPARATE VIOLATIONS OF CHAPTER 12, ARTICLE 3, SECTION 10b OF THE WEST VIRGINIA CODE

Respondent Shanton argues that the Jefferson County Circuit Court did not exceed its legitimate power in dismissing Counts 2 through 54 of the Indictment, each which charged Ms. Shanton with a violation of Chapter 12, Article 3, Section 10b of the West Virginia Code. First, Ms. Shanton suggests that the remedy of a writ of prohibition is not appropriate in this case

¹ In the Petition for Writ of Prohibition, the Petitioner mistakenly referenced “Respondent” as “affirmatively stat[ing] that oral argument is not necessary.” See Petition for Writ of Prohibition at 6. Petitioner is the party that believes that oral argument is not necessary. Respondent suggests that Rule 20 argument is compelled by the nature of the question presented.

because the State has other adequate means, such as a direct appeal, to obtain the desired relief. Second, Respondent Shanton avers that the Circuit Court's dismissal order is not clearly erroneous as a matter of law. Thus, if this Court considers the Petition on the merits, it should affirm the order of the Circuit Court.

A. The Remedy of a Writ of Prohibition Is Not Available to the State in this Case Because the State Has Other Adequate Means to Take a Direct Appeal of the Circuit Court's Order Dismissing the Indictment as Insufficient

Respondent Shanton suggests to this Court that the remedy of a writ of prohibition is not available in this case because the State has other adequate means to take a direct appeal of the dismissal of Counts 2 through 54 of the Indictment, pursuant to Chapter 58, Article 5, Section 30 of the West Virginia Code.

For the remedy of a writ of prohibition to be available, "the party seeking the writ" must have "no other adequate means, such as direct appeal, to obtain the desired relief." Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). Chapter 58, Article 5, Section 30 of the West Virginia provides the State with a statutory mechanism to take a direct appeal of an order finding an indictment to be bad or insufficient. This code section provides,

Whenever in any criminal case an indictment is held bad or insufficient by the judgment of a circuit court, the state, on the application of the attorney general or the prosecuting attorney, may appeal such judgment to the supreme court of appeals. No such appeal shall be allowed unless the state presents its petition therefor to the supreme court of appeals within thirty days after the entry of such judgment. No such judgment shall finally discharge, or have the effect of finally discharging, the accused from further proceedings on the indictment unless the state fails, within such period of thirty days, to file a petition for appeal with the clerk of the court in which judgment was entered; but after the entry of such judgment or order the accused shall not be kept in custody or required to give bail pending the hearing and determination of the case by the supreme court of appeals. Except as herein otherwise provided, all the provisions of the other sections of this article shall, so far as appropriate, be applicable to a petition for an appeal under this section, and to all subsequent proceedings thereon in the supreme court of appeals in case such appeal is

granted.

W. Va. Code § 58-5-30.

The State cites *State ex rel. State v. Gustke*, 205 W. Va. 72, 516 S.E.2d 283 (1999), for the proposition that a writ of prohibition is the appropriate remedy for the State to challenge a dismissal of the Indictment. However, closer reading of *Gustke* reveals that this holding applies only to cases where an indictment is not dismissed for being bad or for insufficiency. The *Gustke* Court held, “We have previously recognized that prohibition is an appropriate method for the State to challenge the dismissal of an indictment. *State ex rel. Forbes v. Canady*, 197 W.Va. 37, 42, 475 S.E.2d 37, 42 (1996) (‘Although the State does not have the ability to appeal the dismissal of an indictment when it is not bad or insufficient, we recognize that the State is armed with another right of appellate review in the form of prohibition.’).” 205 W. Va. at 76-77, 516 S.E.2d at 287-88. In *Canady*, the case incorporated by reference in *Gustke*, the Court found “that the State has a narrow opportunity to request review of an action of a trial court in a criminal proceeding. The State's right of review is best expressed as being limited to: (1) where the right of appeal is conferred by constitution or statute.” *Canady*, 197 W. Va. at 41, 475 S.E.2d at 41. The *Canady* Court found that the State has a limited right to appeal, conferred by statute under Chapter 58, Article 5, Section 30 of the West Virginia Code, where an indictment is dismissed “as being either bad or insufficient.” *Canady*, 197 W. Va. at 41, 475 S.E.2d at 41. The *Canady* Court, however, found that the indictment at issue that was dismissed for improper joinder is not dismissed for being bad or insufficient. “The intention of the respondent judge was to dismiss the indictment based upon the State's failure to comply with the compulsory joinder rule under 8(a) of the West Virginia Rules of Criminal Procedure, and not upon any defect in the indictment.”

Canady, 197 W. Va. at 41-42, 475 S.E.2d at 41-42. Thus, the *Canady* Court “refused to broaden the definition of ‘bad or insufficient’ beyond its plain and ordinary meaning.” *Canady*, 197 W. Va. at 42, 475 S.E.2d at 42. Thus, the *Canady* Court found no other adequate remedy for the State to pursue and ruled that a writ of prohibition was appropriate in such a case.

Similar to *Canady*, the indictment in *Gutske* was dismissed pursuant to an order granting the suppression of evidence, and was not an order dismissing an indictment as bad or insufficient. *Gutske*, 205 W. Va. at 76, 516 S.E.2d at 287 (“After the circuit court ruled that it would exclude all evidence that had been obtained after Mr. Braverman was stopped by Officer Wigal, based upon its conclusion that the detention by Officer Wigal was illegal and precluded the admission of any evidence flowing therefrom, the State moved for a continuance to seek review by this Court. In response to the State's motion, Mr. Braverman renewed his motion to dismiss the indictment based upon the State's inability to proceed. The circuit court denied the State's motion for a continuance, and granted Mr. Braverman's motion to dismiss.”). Thus, the remedy of a writ of prohibition existed in that case because the State did not have the ability to seek a direct appeal pursuant to Chapter 58, Article 5, Section 30 of the West Virginia Code.

Unlike in *Canady* and *Gutske*, Chapter 58, Article 5, Section 30 of the West Virginia Code is clearly applicable in this case and grants the State the ability to obtain a direct appeal of the dismissal of the Indictment. Counts 2 through 54 of the Indictment were clearly dismissed for being bad and/or insufficient. Thus, the State has an adequate means to obtain direct review of the dismissal order. As such, the extraordinary remedy of a writ of prohibition does not lie in this case.

This Court has explicitly held in the past that the appeal of an order dismissing an

indictment for insufficiency should be by direct appeal, and not by writ of prohibition. “[I]f the adverse ruling involves the sufficiency of an indictment, which can be appealed under W.Va.Code, 58-5-30, there is no need for the State to use prohibition because it has an adequate remedy.” *State v. Lewis*, 188 W.Va. 85, 95, 422 S.E.2d 807, 817 (1992). “Furthermore, where an indictment is dismissed because of a technical defect that the State can remedy by procuring a new indictment, prohibition is not an appropriate remedy. Ordinarily, the dismissal of an indictment does not preclude the State from seeking a reindictment.” *Lewis*, 188 W.Va. at 95 n.16, 422 S.E.2d at 817 n.16. *See also* Syl. Pt. 1, *State ex rel. Maynard v. Bronson*, 167 W. Va. 35, 41 277 S.E.2d 718, 722 (1981) (“Prohibition is not a proper remedy to challenge the dismissal of indictments by a judge of a circuit court acting pursuant to the West Virginia Agreement on Detainers, W.Va.Code, 62-14-1, et seq., where the judge of the circuit court had jurisdiction of the subject matter in controversy, and nothing in the record indicates that the judge exceeded his legitimate powers. W.Va.Code, 53-1-1.”). Thus, in this case, it is clear beyond peradventure that the extraordinary remedy of a writ of prohibition is not available to the State. Here, Counts 2 through 54 were dismissed for being substantively, not procedurally “bad.” In other words, the Circuit Court found that the Indictment was multiplicitous, in violation of Ms. Shanton’s right to be free from double jeopardy. Thus, the State can appeal the ruling, pursuant to Chapter 58, Article 5, Section 30 of the West Virginia Code, and the extraordinary remedy of a writ of prohibition is not appropriate in this case.

Furthermore, Respondent Shanton submits to this Court that this issue is not merely technical and a matter of form rather than substance. The issue presented by the Circuit Court’s ruling, which involves a matter of statutory and constitutional interpretation, and which is a matter

of first impression for this Court, should receive careful and thorough examination by this Court. The briefing process of a direct appeal, which allows the Parties with sufficient time to present the facts and the case law, as well as which allows this Court more time for careful consideration of the issues, is the appropriate process in this case. The writ of prohibition process is simply insufficient to allow for a full and careful consideration of the issues. Thus, the availability of the State to take a direct appeal, rather than seek a writ of prohibition, while technically making the writ of prohibition inappropriate, is also the appropriate remedy as a matter of substance and will allow for this Court to make a thorough and careful examination of issues of first impression regarding statutory interpretation and the constitution.

B. The Circuit Court's Order Dismissing Counts 2 through 54 of the Indictment Was Not Clearly Erroneous as a Matter of Law

Respondent Shanton avers the Jefferson County Circuit Court's order dismissing Counts 2 through 54 of the Indictment was not clearly erroneous as a matter of law. First, Counts 2 through 54 of the Indictment are clearly insufficient in charging violations of Chapter 12, Article 3, Section 10b of the West Virginia Code. Second, the finding that a violation of Chapter 12, Article 3, Section 10b of the West Virginia Code is a continuing offense is not clearly erroneous. Thus, Respondent requests that this Court deny the State's petition for a writ of prohibition.

1. Counts 2 through 54 Are Insufficient as a Matter of Law to Charge Violations of Chapter 12, Article 3, Section 10b of the West Virginia Code

Tellingly, the State's argument on why Counts 2 through 54 are sufficient comprises only approximately two pages of the State's argument. This is because a reading of the charging language of the Indictment compared to the statutory text of Chapter 12, Article 3, Section 10b of the West Virginia Code clearly reveals the insufficiency of Counts 2 through 54. Counts 2

through 54 of the Indictment do not “substantially follow the language of the statute” and do not “fully inform the accused of the particular offense with which [s]he is charged.” *See* Syl. Pt. 3, *State v. Hall*, 172 W.Va. 138, 304 S.E.2d 43 (1983).

Counts 2 through 54 of the Indictment allege that Ms. Shanton committed the offense of Fraudulent or Unauthorized Use of a Purchasing Card, in violation of Chapter 12, Article 3, Section 10b of the West Virginia Code. This code section provides:

It is unlawful for any person to use a state purchase card, issued in accordance with the provisions of section ten-a of this article, to make any purchase of goods or services in a manner which is contrary to the provisions of section ten-a of this article or the rules promulgated pursuant to that section. Any person who violates the provisions of this section is guilty of a felony and, upon conviction thereof, shall be confined in the penitentiary not less than one nor more than five years, or fined no more than five thousand dollars, or both fined and imprisoned.

W. Va. Code § 12-3-10b. Each of these counts allege that on or about a certain date, “Elizabeth Shanton did... unlawfully and feloniously, verify that she did use a state purchase card to make a purchase of goods or services in a manner contrary to the provisions of law, and/or for purchases which were not for official state purposes....” Each count then contains a “To-Wit” section which sets forth the items or services purchased, the date of the purchase, the cost of the purchase, and where no items or services are listed that Ms. Shanton “purchase[d] items for which she never presented an itemized receipt.” For example, Count 3 of the Indictment alleges:

ELIZABETH A. ‘LIBBY’ SHANTON on or about the 18th day of October, 2010, to the 11th day of November, 2010, in the County of Jefferson, State of West Virginia, committed the offense of FRAUDULENT OR UNAUTHORIZED USE OF A PURCHASING CARD, in that said ELIZABETH A. ‘LIBBY’ SHANTON did then and there unlawfully and feloniously, verify that she did use a state purchase card to make a purchase of goods or services in a manner contrary to the provisions of law and/or for purchases which were not for official state purposes, TO-WIT: did purchase plates, colored cutlery, clear mini tongs, clear plastic tumblers, and various color hand towels with her state-issued purchase card from Party City Store # 653 in Fayetteville, North

Carolina, in the amount of \$422.00, on October 18, 2010, at 2:17 p.m., against the peace and dignity of the State of West Virginia in violation of West Virginia Code § 12-3-10b.

See Count 3 of Indictment, A.R. 3.

In comparing the statute with the charges in the Indictment, the charges fail to substantially track the language of the statute in a way that is technically wrong and more importantly linguistically and legally confusing. First, the operative verb in the statute is “use” of a state purchase card. If such “use” is in a manner contrary to other statutory or administrative sections, an offense is committed. Counts 2 through 54 of the Indictment all allege that Ms. Shanton “unlawfully and feloniously” “verified” that she used a state purchase card in a manner contrary to the statutory and administrative provisions. These charges in the Indictment allege that the illegal act was the “verification” and not the use. Technically, it should be clear that using a different verb than the operative verb in a statute renders an indictment insufficient. This is not the case of the State using a synonym of the operative verb. It is not the case of substituting “transfer” or “deliver” for “distribute” or “drove a vehicle” for “operated a vehicle.” The verb “verify” has a very different meaning from the operative verb “use.”

Furthermore, when further parsing out the language of the charges, the use of the term “verify” versus the word “use” completely changes the meaning of the allegations. First, a plain reading of the language of the charge would seem to stand for the proposition that Ms. Shanton admitted that she used a state purchase card to make purchases in a manner contrary to the statutory and administrative provisions. A perfectly reasonable interpretation of the language would be that Ms. Shanton verified that the purchases were illegal in some way. That is not the case. If anything, Ms. Shanton would have verified that the purchases were made according to,

and not contrary to, the statutory and administrative provisions. A second reasonable interpretation of the charge would be that the act of the verification of the purchases was contrary to the statutory or administrative provisions, not the use of the card itself. Either interpretation of the language of the charges fails to substantially track the language of the statute. The only way to track the language of the statute would be to rewrite each of the charges. Thus, the use of an operative verb in the charging language, with a completely different definition than the operative verb of the statute, standing alone renders Counts 2 through 54 insufficient as a matter of law.

Second, and equally important, as to Respondent Shanton's ability to understand what she is charged with and against which she must defend, assuming that the State meant "use" and not "verification," Counts 2 through 54 fail to specify the theory under which the use was "in a manner contrary to the provisions of law and/or for purchases which were not for official state purposes." Inclusion of this specification is absolutely necessary to sufficiently charge a violation of Chapter 12, Article 3, Section 10b, because this statutory section cross-references other statutes and administrative rules in defining what constitutes an offense. Again, the State's writ does not contain any argument as to why such specification is not required.

To see how the omission of this specification renders an indictment insufficient and is prejudicial to Ms. Shanton's ability to understand the nature of the allegations, it is necessary to delve into statutory interpretation. Pursuant to Chapter 12, Article 3, Section 10b, an offense is committed when a state-issued purchase card is used "in a manner which is contrary to the provisions of section ten-a of this article or the rules promulgated pursuant to that section." W. Va. Code § 12-3-10b. Thus, one must look to Chapter 12, Article 3, Section 10a as well as the administrative rules to determine the manner in which Section 10b is alleged to have been

violated. This is where the statutory scheme becomes confusing, referencing a seemingly limitless scope of laws and rules which could be violated.

Under Chapter 12, Article 3, Section 10a of the West Virginia Code, there appear to be several rules that must be followed in making purchases with a state purchase card:

1. The Purchasing Card Program shall be conducted so that procedures and controls for the procurement and payment of goods and services are made more efficient.
2. The program shall permit spending units to use a purchasing card to pay for goods and services.
3. Notwithstanding any other provision of this code to the contrary, a purchasing card may be used to make any payment authorized by the Auditor, including regular routine payments and travel and emergency payments, and such payments shall be set at an amount to be determined by the Auditor.
4. Purchasing cards may not be utilized for the purpose of obtaining cash advances, whether the advances are made in cash or by other negotiable instrument: Provided, That purchasing cards may be used for cash advances for travel purchases upon approval of the Auditor.
5. Purchases of goods and services must be received either in advance of or simultaneously with the use of a state purchasing card for payment for those goods or services.
6. The Auditor, by legislative rule, may eliminate the requirement for vendor invoices and provide a procedure for consolidating multiple vendor payments into one monthly payment to a charge card vendor.
7. Selection of a charge card vendor to provide state purchase cards shall be accomplished by competitive bid. The Purchasing Division of the Department of Administration shall contract with the successful bidder for provision of state purchasing cards.
8. Purchasing cards issued under the program shall be used for official state purchases only.

W. Va. Code § 12-3-10a. Section 10a also provides for the promulgation of purchase card rules by the State Auditor, which have been promulgated in Title 155, Series 7 of the Code of State

Rules. *See* W. Va. Code § 12-3-10a (“The Auditor shall propose rules for promulgation in accordance with the provisions of article three, chapter twenty-nine-a of this code to govern the implementation of the purchase card program.”).

Title 155, Series 7 of the Code of State Rules provides for few hard and fast rules, but instead gives authority for other persons to develop appropriate rules as well as cross-references to other statutes and rules. Section 4.1 of this rule provides that the Director of Operations of the purchase card program “may... require documentation of appropriate accounting and internal control procedures related to Pcard use,” 155-CSR-7.4.1.b, set transaction limits on purchases, 155-CSR-7.4.1.c, “revoke authority to use a Pcard at any level of use if it is determined that a spending unit is in violation of this rule[,]” 155-CSR-7.4.1.g, and “draft letters and memorandum concerning Pcard policies and procedures and changes in the program. 155-CSR-7.4.1.h. This rule further provides that “the Director of Auditing may... “establish the manner of inspection and review of all records and reconciliation of documents associated with Pcard transactions,” 155-CSR-7.4.2.a, “require documentation of appropriate accounting and internal control procedures,” 155-CSR-7.4.2.c, “determine that goods and services purchased are properly received,” 155-CSR-7.4.2.d, “determine if Pcard transactions are in compliance with applicable law, rules and regulations, and policies and procedures and other governing instruments,” 155-CSR-7.4.2.e, “revoke authority to use Pcards at any level of use if it is determined that a spending unit is in violation of this rule,” 155-CSR-7.4.2.f, and “assess and collect penalty fees against spending units for failing to use the Pcard for transactions that qualify for the program....” 155-CSR-7.4.4. This rule also provides that “Pcard Coordinators may restrict usage of the Pcard consistent with the needs of the spending unit.” 155-CSR-7.4.3.a.1. Thus, Title 155, Series 7 now cross-

references three different sets of rules that may be developed by the Director of Operations, the Director of Auditing, and any Pcard Coordinator.

Title 155, Series 7 of the Code of State Rules further provides that, “[t]he provisions of W. Va. Code § 5A-3-1, et seq., and the Purchasing Division Purchasing Rules, 148 CSR 1, apply to purchases made with the Pcard, except where exempt by statute.” 155-CSR-7.5.1. So, in keeping count of the ever expanding rules and regulations that may constitute a violation of Chapter 12, Article 3, Section 10b of the West Virginia Code, a purchase card user must follow the rules set out in W. Va. Code § 12-3-10a; 155-CSR-7, et. seq., W. Va. Code § 5A-3-1, et seq., 148-CSR-1, the policies and procedures of the Director of Operations, the policies and procedures of the Director of Auditing, and the policies and procedures of any Pcard Coordinator.

However, there are even more rules that must be followed. Title 155, Series 7 of the Code of State Rules provides for one actual rule without any cross-reference or delegation of authority. “The Pcard is to be used in the State’s best interest.”² 155-CSR-7.5.2. This rule further provides, that “[a]ny person who uses a Pcard in a manner which violates this rule or the West Virginia Code is guilty of a felony, pursuant to W. Va. Code 12-3-10b.” 155-CSR-7.7.1. Seemingly, this final provision brings the entire West Virginia Code as a source for rules that must be followed.

Without unpacking it further at this point, Chapter 5A, Article 3, Section 1, et. seq., of the West Virginia Code contains fifty-nine (59) sections, each containing there own cross-references

² As was argued in the Circuit Court, what constitutes “the State’s best interest” cannot readily be determined without complete arbitrary enforcement.

and authority to promulgate rules, which must be followed by state purchase card users. Title 148, Series 1 of the Code of State Rules Provides for another fifteen pages of rules that must be followed, which itself contains numerous cross-references and delegation of authority for additional rules. If the whole West Virginia Code is incorporated by reference, Chapter 12, Article 3, et seq., alone contains twenty (20) separate sections that must be followed.

Thus, the ways in which a state-issued purchase card can be used in a manner contrary to the law and rules is seemingly as diverse and numerous as the stars in the universe. While Respondent has alleged that this renders the statute as unconstitutionally vague, at the very least such a seemingly infinite number of ways in which the statute can be violated requires that the State specifically allege the law or rules that were violated in the charging document. To not allege the specific rule that was violated by the use of the purchase card leaves a defendant to guess how the State is alleging that she committed an offense. A sufficient indictment should not, at the very least, leave a defendant guessing as to what the actual violation is.

As an example, if the Court was to look at Count 3 of the Indictment, there is no way to determine the manner in which Ms. Shanton used the purchase card in violation of the provisions of law or administrative rules. Count 3 simply alleges that Ms. Shanton purchased party supplies at a Party City Store. Ms. Shanton is left to guess at the myriad of rules which the State may allege she violated at trial.

Furthermore, Count 3 of the Indictment demonstrates why a court, in this specific case, would need to look to information outside the four corners of the Indictment. In the State's statement of the case section, the State admits that Ms. Shanton's responsibility as the Dean of Student Affairs at Shepherd University included student programming such as "hospitality meals,

events, and giveaways.” Petition for Writ of Prohibition at 4. Buying party supplies would seemingly be a part of Ms. Shanton’s job description. If another state employee was charged with buying party supplies with a state purchase card, the violation of the law may be obvious. For instance, say that a state investigator was charged with purchasing the same party supplies. Such a charge may be sufficient because the purchase of such items would obviously be outside the scope of the duties of a state investigator. However, Ms. Shanton’s position would necessarily entail the purchasing of party supplies in order to carry out her duties. Thus, the theory under which the State is alleging a violation by Ms. Shanton remains unclear and unknowable from the charging language of the Indictment.

Thus, Respondent Shanton suggests that it is clear on the face of the Indictment that Counts 2 through 54 are insufficient as a matter of law to charge violations of Chapter 12, Article 3, Section 10b of the West Virginia Code, and the insufficiency of each count as a matter of law provides an additional reason justifying the dismissal of Counts 2 through 54.

2. The Circuit Court’s Holding that Chapter 12, Article 3, Section 10b Is a Continuing Offense is Not Clearly Erroneous

Respondent Shanton further avers that the Circuit Court’s holding that a violation of Chapter 12, Article 3, Section 10b is a continuing offense, and cannot be charged in multiple counts for a continuing course of conduct, is not clearly erroneous as a matter of law.

The State argues that the plain language of Chapter 12, Article 3, Section 10b is clear and without ambiguity as to whether it is a continuing offense, and thus, the rules of statutory interpretation should not be utilized. However, looking at the text of either the original statute under which Ms. Shanton was charged or at the amended statute, the text does not express a clear

indication of whether the offense is of a continuing nature. Thus, to determine whether the offense is of a continuing nature, a court must necessarily engage the rules of statutory interpretation.

The enacting language of the amended code section clearly and unambiguously supplies the intent of the Legislature— that a violation of § 12-3-10b is a continuing offense. Senate Bill 267 provides, in a paragraph describing the purpose of the bill:

AN ACT to amend and reenact... § 12-3-10b of said code, all relating to fraudulent or unauthorized use of purchasing cards; ensuring that the courts of West Virginia have jurisdiction over fraudulent or unauthorized use of purchasing cards; establishing jurisdiction; and **defining the conduct as a continuing offense.**

S.B. 267, 81st Leg., Reg. Sess. (W. Va. 2014) (emphasis added). The intent of the Legislature could not be clearer than from that statement of purpose.

Further, even if one was to entirely ignore the statement of purpose from the Legislature, as noted by the Circuit Court, the case of *State ex rel. Porter v. Recht*, 211 W. Va. 396, 566 S.E.2d 283 (2002), is directly on point. Looking to the text of the code section, it is clear that the operative verb and unit of prosecution would support a reading that a violation of § 12-3-10b is a continuing offense and that Ms. Shanton can only be charged once for a alleged continuing course of conduct.

The *Porter* Court held that “the analysis of ‘whether a criminal defendant may be separately convicted and punished for multiple violations of a single statutory provision turns upon the legislatively-intended unit of prosecution.’” *Porter*, 211 W. Va. at 393, 566 S.E.2d at 286 (quoting *State v. Green*, 207 W. Va. 530, 534 S.E.2d 395 (2000)). In *Porter*, the Court found that a person charged with the offense of false swearing, in violation of W. Va. Code § 61-

5-2, cannot be charged separately for each individual false statement. The Court argued that the focus on the false swearing statute should not be on the word “any,” but rather the operative verb of the state.

While this Court clearly focused on the singular nature of “any” in reference to the writing required for a forgery in *Green*, it is the act of forgery that is key to the offense, and not the singular versus plural nature of the writings required to commit a forgery. In attempting to extend the reasoning of *Green* to this case, the State completely skirts the issue of the verb used to define the offense of false swearing, choosing instead to focus solely on the statutory inclusion of the term “any.” Yet, it is axiomatic that the operative verb employed in the statute defines the offense, and not the nouns.

Porter, 211 W. Va. at 393, 566 S.E.2d at 286; *see also United States v. Diaz*, 592 F.3d 467 (3d Cir. 2010) (finding that the operative verbs in a statute defined its units of prosecution).

The *Porter* Court continued,

In determining whether the Legislature intended each false statement included in an affidavit, or the entire affidavit as a whole, as the unit of prosecution under the false swearing statute, we must look to the gravamen of the offense of false swearing. Rather than the making of the individual false statements, it is the act of willfully swearing to the truthfulness of those statements while under oath, whether they be singular or multiple in number, that is the essence of the charge of false swearing under West Virginia Code § 61-5-2. Given the mechanics of executing an affidavit, the act of swearing to the veracity of the statement(s) set forth cumulatively within the document occurs after the affidavit, complete with averments, has been prepared for the affiant's signature. While the signature is not the equivalent of the oath, it is the method by which the affiant indicates that he has sworn to the veracity of the statements set forth above his signature.

Porter, 211 W. Va. at 393-94, 566 S.E.2d at 286-87. Further, the Court held, “To aid us in our determination of whether the statutory offense of false swearing permits the State to separately prosecute each false statement set forth in an affidavit, we look to the established principle that unless there is clear legislative intent to permit multiple punishments, all ‘doubt will be resolved against turning a single transaction into multiple offenses.’” *Porter*, 211 W. Va. at 394, 566 S.E.2d at 287 (quoting *State v. Collins*, 174 W. Va. 767, 773, 329 S.E.2d 839, 845 (1984)).

Given the clear language of the statute, which defines the offense in terms of the operative act of swearing falsely and not in terms of the making of each statement, we cannot conclude that the Legislature intended that a single affidavit containing various statements that were falsely sworn to could result in multiple offenses. Accordingly, we hold that an affiant who commits the act of swearing to the veracity of one or more matters set forth in an affidavit may only be charged with a single count of false swearing within the meaning of West Virginia Code § 61-5-2.

Porter, 211 W. Va. at 394-95, 566 S.E.2d at 287-88.

Further, “[o]nce it is determined that the statute defines but a single offense, it becomes proper to charge the different means, denounced disjunctively in the statute, conjunctively in each count of the indictment.” *United States v. Pleasant*, 125 F.Supp.2d 173 (E.D. Va. 2000).

In the instant case, the operative verb is “to use” a state purchase card. W. Va. Code § 12-3-10b. This use encompasses any and all purchases of “goods or services.” It is not a single use of the state purchase card that is an offense, but rather the person’s overall use of the state purchase card, if such use is in a manner contrary to the code or rules.

Further, as held by the Circuit Court, the interpretation of § 12-3-10b as a continuing offense finds support in Syllabus Point 2 of *State v. Jerrome*, 233 W. Va. 372, 758 S.E.2d 576 (2014), where this Court held that in relation to the larceny statute, “When considering whether the theft of several items of property from multiple victims constitutes one larceny under the single larceny doctrine, the controlling factor is whether the separate takings were part of a single scheme or continuing course of conduct.” Here, the State has alleged that Ms. Shanton’s use of the purchase card constituted a continuing course of conduct. Count 1 of Indictment alleges that Ms. Shanton’s use of the purchase card constituted a fraudulent scheme, in violation of Chapter 61, Article 3, Section 24d of the West Virginia Code. Count 1 of the Indictment aggregates the amount of purchases that were made with her purchase card in an unauthorized manner. Thus,

even by the State's own theory, the use of the purchase card constituted a continuing course of conduct. As such, it is clear that charging multiple violations of Section 12-3-10b for a continuing course of conduct violates Ms. Shanton's right to be free from double jeopardy.

Moreover, contrary to the State's argument in the petition, "unless there is clear legislative intent to permit multiple punishments, all 'doubt will be resolved against turning a single transaction into multiple offenses.'" *Porter*, 211 W. Va. at 394, 566 S.E.2d at 287. Thus, if as the State contends there is an "omission of] any reference to the criminal conduct being continuing in character," Petition for Writ of Prohibition at 13, the resolution of any doubt is resolved in favor against turning a single transaction into multiple offenses, rather than resolving doubt by finding that each action is a separate offense.

Respondent Shanton further submits that the Circuit Court's holding and application of *State v. Rogers*, 209 W. Va. 348, 359, 547 S.E.2d 910, 921 (2001) as to Count 1 and Counts 2 through 54 was not clearly erroneous as a matter of law at the time that the Circuit Court made its ruling. Subsequent to the Circuit Court's ruling, this Court decided *State v. Coles*, ___ S.E.2d ___, 2014 WL 4669561 (W. Va. Sept. 18, 2014), in which this Court held:

The Legislature has made clear that the fraudulent scheme offense under W. Va.Code § 61-3-24d (1995) (Repl.Vol.2010) is a separate offense that may be prosecuted in addition to any other offense under the Code. Therefore, double jeopardy principles do not preclude a conviction and sentence for a fraudulent scheme offense in addition to a conviction and sentence for any other offense arising out of the same transaction or occurrence. The decision in *State v. Rogers*, 209 W. Va. 348, 547 S.E.2d 910 (2001), which holds to the contrary, is overruled in its entirety.

Syl. Pt. 4, *State v. Coles*, ___ S.E.2d ___, 2014 WL 4669561 (W. Va. Sept. 18, 2014).

First, the State has not submitted any supplemental argument or authority regarding the

Coles case. The applicability of *Coles* to the instant case remains unargued by the State.³ In fact, in the petition for writ of prohibition, the State does not argue that the application of *Rogers* was incorrect because at the time of the Circuit Court’s order, *Rogers* was still good law.

Second, and most importantly, the State has other remedies available to it, other than a writ of prohibition, to allow the Jefferson County Circuit Court the opportunity to consider the effect of *Coles* on its ruling. At the time of the Circuit Court’s ruling, *Rogers* was still good law. As such, the Circuit Court did not “exceed[] or act[] outside of its jurisdiction” in finding that the State could not prosecute Ms. Shanton for both the offense of fraudulent schemes and a violation of Section 12-3-10b. *See* Syl. Pt. 2, *State ex rel. Sims v. Perry*, 204 W. Va. 625, 515 S.E.2d 582 (1999). If the State believes that the newly-decided *Coles* case would affect the Circuit Court’s order, the State could have and could still file a motion for reconsideration of the ruling. However, the State has not done so. Until the Circuit Court is afforded the opportunity to consider the application of *Coles*, there can be no finding of an abuse of its legitimate powers or an action that was flagrant. Thus, even if *Coles* affects the ruling of the Circuit Court, a petition for a writ of prohibition is not the appropriate mechanism that the State should use.

Finally, Respondent Shanton suggests that *Coles* was incorrectly decided and that *Rogers* should still be good law regarding whether a defendant may be charged with fraudulent schemes and another offense arising out of the same conduct. Ms. Shanton suggests that the Legislature was not clear in declaring the offense of fraudulent schemes to be a separate and distinct offense. The analysis in *Coles* is based exclusively on the provision in Chapter 61, Article 3, Section

³ However, the State did disclose the existence of *Coles* to undersigned counsel subsequent to the filing of the petition for writ of prohibition.

24d(c) that, “a violation of law may be prosecuted under this section notwithstanding any other provision of this code.” Subsection (c) does not provide explicitly that a violation of the fraudulent schemes statute may be prosecuted at the same time as other violations arising out of the same transaction.

Subsection (c) can be contrasted with a clear and unequivocal declaration by the Legislature that an offense is separate and distinct in Chapter 61, Article 8D, Section 5 of the West Virginia Code, which provides, “In addition to any other offenses set forth in this code, the Legislature hereby declares a separate and distinct offense under this subsection...” W. Va. Code § 61-8D-5. This Court has held,

W.Va.Code, 61–8D–5(a) (1988), states, in part: ‘In addition to any other offenses set forth in this code, the Legislature hereby declares a separate and distinct offense under this subsection[.]’ Thus, the legislature has clearly and unequivocally declared its intention that sexual abuse involving parents, custodians, or guardians, W.Va.Code, 61–8D–5, is a separate and distinct crime from general sexual offenses, W.Va.Code, 61–8B–1, et seq. , for purposes of punishment.

Syl. Pt. 6, *State v. Cecil*, 221 W. Va. 495, 655 S.E.2d 517 (2007). The language under subsection (c) of the fraudulent schemes statute is not clear and unambiguous like the language under the sexual abuse by a parent or guardian statute.

Moreover, the fraudulent schemes statute states that a violation of the statute constitutes the offense of larceny. The statute simply allows a court to aggregate the amount of loss involved in the larceny to potentially allow an offense to become a felony where it is continuing in nature. As such, Respondent Shanton suggests that she should not be charged with separate violations of fraudulent schemes and a violation of Chapter 12, Article 3, Section 10b. However, more to the point, this issue has not been briefed by the State or ruled upon by the Circuit Court, and as

such it is unripe for consideration by this Court through a petition for a writ of prohibition.

II. THE CIRCUIT COURT SHOULD HAVE DISMISSED THE ENTIRE INDICTMENT ON OTHER CONSTITUTIONAL GROUNDS

Should this Court decide that it is appropriate to address the Circuit Court's order dismissing Counts 2 through 54 of the Indictment, Ms. Shanton suggests that this Court should consider whether Count 1 of the Indictment should also have been dismissed. Count 1 of the Indictment, alleging a fraudulent scheme, incorporates Counts 2 through 54 of the Indictment, and alleges that the specific fraudulent scheme was the "use of a state purchase card to make purchases of goods and services which purchases which were not for official state purposes." *See* Count 1 of Indictment, A.R. 1. Insofar as Counts 2 through 54 of the Indictment are plainly insufficiently charged as a matter of law, Count 1 is also insufficient because it relies upon the aggregation of the plainly insufficient charges as the alleged fraudulent scheme. Thus, Respondent Shanton suggests that this Court, if it decides this petition on the merits, should affirm the dismissal of Counts 2 through 54, but also order the dismissal of Count 1 of the Indictment as well.

CONCLUSION

Based on the foregoing, Respondent Shanton respectfully requests that this Honorable Court DISMISS the petition for writ of prohibition as the inappropriate remedy for the order of the Circuit Court dismissing Counts 2 through 54 of the Indictment for insufficiency. Assuming *arguendo* that this Court decides it can review the merits of the petition for writ of prohibition, Respondent Shanton respectfully requests that this Honorable Court find that the Circuit Court did not exceed its legitimate power and was not clearly erroneous in dismissing Counts 2 through

54 of the Indictment and DENY the petition for writ of prohibition. Further, Respondent Shanton respectfully requests that this Honorable Court DISMISS Count 1 of the Indictment.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Shawn R. McDermott, do hereby certify that I have served a true copy of the foregoing Response to Petition for Writ of Prohibition upon Assistant Prosecuting Attorney of Jefferson County Brandon C. H. Sims by electronic mail and first class United States Mail to PO Box 729, Charles Town, WV 25414 and bsims@jeffersoncountywv.org on this 25th day of September, 2014.



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