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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 21-0401

STATE OF WEST VIRGINIA *ex rel.*
STATE OF WEST VIRGINIA,

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Petitioner,

v.

THE HONORABLE DAVID W. HUMMEL, JR.,
Chief Circuit Court Judge of the Circuit Court of Marshall County, West Virginia,
and MICHAEL DANIEL BOWMAN,
Criminal Defendant Below and Party in Interest,

Respondents.

EMERGENCY PETITION FOR A WRIT OF PROHIBITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Rules

Statutes

I. QUESTIONS PRESENTED

Should this Court issue a writ to prohibit the Circuit Court of Marshall County, West Virginia, from dismissing criminal indictments with prejudice, and voiding, nullifying, vacating, and expunging criminal convictions when (1) any alleged defects in the grand jury proceeding were rendered harmless by the petit jury's guilty verdicts; (2) the defendant below failed to raise, and, therefore, waived, any claims regarding alleged defects in the grand jury proceeding; (3) the circuit court *sua sponte* raised issue with the grand jury proceeding and granted impermissible relief; and (4) willful, intentional fraud in the grand jury proceeding was neither alleged by the defendant below nor found by the circuit court?

II. INTRODUCTION

The State of West Virginia seeks a writ of prohibition with respect to the circuit court's April 28, 2021 Order dismissing Respondent Michael Bowman's indictments in Case Nos. 15-F-59 and 15-F-60 with prejudice (*see* App. 193–206), as well as the circuit court's April 28, 2021 Administrative Order granting Bowman's Motion to Quash Indictments with prejudice; nullifying, voiding, vacating, and expunging Bowman's criminal convictions; withdrawing the criminal trial verdict; vacating the requirement that Bowman register as a sex offender; vacating the order of Bowman's supervised release; and releasing Bowman from incarceration (App. 207–08).

As explained in its corresponding Motion for Emergency Relief, the State of West Virginia requests emergency relief in light of the circuit court's recent scheduling of two hearings for Wednesday, May 19, 2021, in Case Nos. 15-F-90 (Defendant Jacob Myers) and 15-F-95 (Defendant Victoria Mae Rollins). (*See* App. 214, 219.) On information and belief, it is the State's understanding that the May 19, 2021 hearings were scheduled by the circuit court following its

own review of the grand jury transcripts in those unrelated matters. It is the State's informed belief that the circuit court will rely on its same rationale employed in the instant matter to provide relief to the defendants in Case Nos. 15-F-90 and 15-F-95 by nullifying, voiding, vacating, and expunging the convictions. In other words, just as it did in the instant matter, the circuit court will exceed its legitimate powers in Case Nos. 15-F-90 and 15-F-95 by *sua sponte* ordering the same improper and legally unavailable forms of relief. The State's request for emergency relief is also based on the safety and welfare of the victims in the instant case, as they currently do not have legal protection against their assailant, Michael Bowman.

III. STATEMENT OF THE CASE

On November 10, 2015, a Marshall County grand jury returned two criminal indictments against Respondent Michael Daniel Bowman. (*See* App. 1, 6, 26–38.) The indictments charged various counts of sexual abuse by a parent, guardian, custodian, or person in a position of trust; first degree sexual abuse; first degree sexual assault; child abuse resulting in bodily injury by a parent, guardian, or custodian; and second degree sexual assault against minor victims "E.W." and "H.S." (*See* App. 26–38; *see also State of West Virginia v. Bowman*, No. 17-0698, 2018 WL 6131290, at *1 (W. Va. Supreme Court, Nov. 21, 2018) (memorandum decision).) In total, thirteen counts were alleged. (*See* App. 26–38.) On May 19, 2017, Bowman proceeded to trial by jury.[1] *Bowman*, 2018 WL 6131290, at *1.

During trial, the State dismissed four criminal charges that "it believed it could no longer prove." *See id.* at *3. These included "two sexual abuse by a parent, guardian or custodian charges; one first-degree sexual abuse charge; and one first-degree sexual assault charge." *Id.* at

[1] The matters proceeded in Marshall County Circuit Court Case Nos. 15-F-59 and 15-F-60.

*2. All four of the dismissed charges arose from the indictment in Case No. 15-F-59, relating to Bowman's offenses against E.W. (*Compare* App. 26–38, *with* App. 42–43.)

On June 6, 2017, the jury returned its verdicts. (*See* App. 42–43.) With respect to the crimes against E.W.,

> the jury found [Bowman] guilty of one count each of sexual abuse by a custodian, first-degree sexual abuse, and first-degree sexual assault. The jury acquitted [Bowman] of one count of sexual abuse by a custodian and the count of child abuse resulting in bodily injury. With respect to the charges concerning H.S., the jury found [Bowman] guilty of two counts of first-degree sexual abuse and acquitted him of the remaining first-degree sexual abuse and second-degree sexual assault counts.

Bowman, 2018 WL 6131290, at *2. Via the circuit court's July 20, 2017 Sentencing Order, Bowman was "sentenced . . . to consecutive terms of incarceration that resulted in an effective sentence of not less than twenty-eight nor more than seventy years." *Id.* at *3; *see also* App. 52–57. He was also ordered, following release from incarceration, to serve a fifty-year period of supervised release and required to register as a sex offender "for the remainder of his lifetime." (App. 56.) Thereafter, Bowman appealed his convictions to this Court, alleging that "that the circuit court should have declared a mistrial when the State dismissed [some of the] counts [in the indictments] 'midway through its case[.]'" *Bowman*, 2018 WL 6131290, at *3. This Court "f[ou]nd no error in the circuit court's refusal to declare a mistrial," and affirmed Bowman's convictions and sentence. *See id.* at *3–4.

Approximately one month after this Court's denial of Bowman's direct appeal, Bowman went on to file various petitions for writs of habeas corpus (*see* App. 10–11, 58–86), a Motion to Quash Indictments (App. 11, 101–04), a Motion for Summary Judgment (App. 11, 105–10), and a Motion for Arrest of Judgment (App. 10, 111–13).[2] On April 13 and 14, 2021, the circuit court

[2] These petitions and motions were filed in Marshall County Circuit Court Case No. 18-C-264.

held a hearing on Bowman's Fifth Amended Petition for Writ of Habeas Corpus Ad Subjiciendum, Motion for Arrest of Judgment, Motion to Quash Indictments, and Motion for Summary Judgment.[3] (*See* App. 114–16, 193–94; *see also* App. 167.) Bowman's argument involved the alleged missing signature of the grand jury foreperson on the criminal indictments. (*See* App. 111–13, 116–18; *see also* App. 101–04, 105–10.) Bowman contended that West Virginia Code § 62-9-1 requires a foreperson to sign—not initial—his or her name on the true bill of indictment. (*See* App. 116–18, 156–57; *see also* App. 101–13.) The circuit court correctly rejected this argument, finding that the signed initials of a grand jury foreperson is sufficient. (*See* App. 121 ("As to whether the scribble of initials constitutes a person's signature, I would suggest it does."), 196 ("The Court then deemed the signature examination as a non-issue.").)

The circuit court, however, did not conclude the hearing following its finding of a proper signature on the true bills of indictment. Rather, the circuit court, after "review[ing] the Grand Jury transcript in its entirety in preparation [for] the hearing," *sua sponte* raised issue with the "presentation of Mr. Bowman's case to the Grand Jury" and advised it found "fatal flaws." (App. 195; *see also* App. 159–60.) The circuit court advised that the State's witness, Investigator Westfall, who testified during the grand jury proceeding "went far afield, I do believe, and made inflammatory, grossly reckless statements to the grand jury." (App. 161.) The circuit court specifically noted, and condemned, Investigator Westfall's testimony that, following a preliminary hearing in magistrate court, Bowman's case was bound over to the grand jury. (*See* App. 161.) The circuit court also took issue with Investigator Westfall's testimony that Bowman was "in jail and . . . on a very high cash bond" based on the magistrate's finding that "he was a danger to young

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[3] The April 2021 hearing was originally set on Bowman's "Motion for Arrest of Judgment and 'issues related in any way to [Bowman's] allegations in . . . Civil Action [No. 18-C-264] that the November 15, 2015 indictment was not signed by the Grand Jury Foreperson.'" (App. 193.)

people if allowed out of jail," as well as Investigator Westfall's comment that he "hate[d] talking about [Bowman]" and Westfall's statements regarding "other incidents that [were] being investigated in Ohio County." (*See* App. 162.) In addition, the circuit court voiced its concern regarding the State's failure to instruct the grand jury on the elements of the charged crimes. (*See* App. 163–64.) At the conclusion of the first half of the hearing on April 13, 2021, the circuit court ordered the parties to return the following morning, noting that, in the interim, it would perform "further research as to whether [it was] going to dismiss the indictment with or without prejudice." (App. 164.)

The parties returned the following morning.[4] (*See* App. 167.) At that time, the circuit court denied Bowman's Motion for Arrest of Judgment and Motion for Summary Judgment, but advised that the Motion to Quash Indictments "remain[ed] open." (App. 171.) The circuit court went on to advise the parties that, in light of the "inflammatory" testimony provided by Investigator Westfall and the State's failure to instruct the grand jury as to the elements of the charged offenses, it was dismissing both indictments with prejudice. (*See* App. 188–90.)

On April 28, 2021, the circuit court entered its Order dismissing Bowman's indictments in Case Nos. 15-F-59 and 15-F-60 with prejudice. (*See* App. 193–206.) In support of its ruling, the circuit court referenced "needless, inflammatory, and outrageous conduct by the prosecutor and her investigator" (App. 200), "unacceptable bias" (App. 202), "grossly reckless statements and testimony" (App. 195), and the State's failure to instruct the grand jury on the elements of the law (*see* App. 200, 201). On that same date, in an effort "to make it clear and to direct the Circuit Clerk and the Magistrate Clerk to treat the case as though Defendant, Michael Daniel Bowman, was never convicted," the circuit court entered its Administrative Order. (App. 207.) The

[4] The morning of April 14, 2021.

Administrative Order granted Bowman's Motion to Quash Indictments with prejudice, ordered his convictions "null and void" and "vacated and expunged," withdrew the criminal trial verdict "as if it had never occurred," vacated the requirement that Bowman register as a sex offender, vacated the order of supervised release, and released Bowman from incarceration. (App. 207–08 (capitalization altered).) The Administrative Order was entered *nunc pro tunc* as of April 14, 2021. (App. 208.) Bowman was released from the custody of the West Virginia Division of Corrections and Rehabilitation on that date.

The State now moves for emergency relief, seeking a writ of prohibition with respect to the circuit court's April 28, 2021 orders.

IV. SUMMARY OF ARGUMENT

The State meets the criteria for awarding a writ of prohibition. The material facts are undisputed and this matter presents purely legal questions, which should be answered in the affirmative. The Circuit Court of Marshall County, West Virginia, exceeded its legitimate powers and deprived the State of valid convictions by granting Michael Bowman's Motion to Quash Indictments, ordering his convictions "null and void" and "vacated and expunged," vacating the requirement that he register as a sex offender, vacating the order of his supervised release, and releasing him from incarceration. The circuit court erred in granting the Motion to Quash Indictments for the following reasons.

First, the petit jury's guilty verdicts against Bowman rendered any alleged defects in the grand jury proceeding harmless. *See United States v. Mechanik*, 475 U.S. 66, 71–73 (1986). Next, by failing to raise any objection to the grand jury proceeding prior to trial, Bowman waived any claim of defects in the grand jury process. *See State v. Bongalis*, 180 W. Va. 584, 589–90, 378 S.E.2d 449, 454–55 (1989). As such, the circuit court exceeded its legitimate powers by *sua sponte*

raising issue with the grand jury proceeding and granting impermissible relief. Finally, Bowman did not allege, and the circuit court did not find, "willful, intentional fraud" in the grand jury proceeding and, therefore, the circuit court did not have the authority "to go behind [the] indictment to inquire into the evidence considered by the grand jury, either to determine its legality or its sufficiency." *See* Syllabus, *Barker v. Fox*, 160 W. Va. 749, 238 S.E.2d 235 (1977).

Accordingly, because the circuit court "exceeded its legitimate powers in overturning and depriving the State of . . . valid conviction[s] by setting aside [Bowman's] conviction[s]" and expunging the same, a writ of prohibition is proper and should issue. *See State ex rel. Games-Neely v. Yoder*, 237 W. Va. 301, 312, 787 S.E.2d 572, 583 (2016).

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State does not request oral argument in this case. The law is well settled, and valid jury convictions were incorrectly vacated based on an incorrect application of clear legal precedent. Therefore, oral argument is unnecessary to aid this Court in its consideration of the questions presented. In addition, the State makes no request for oral argument due to the emergency nature of the requested relief.

VI. ARGUMENT

A. Relief in prohibition is appropriate.

This Court has advised that

> [t]he State may seek a writ of prohibition in [the Supreme Court of Appeals of West Virginia] in a criminal case where the trial court has exceeded or acted outside of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction.

Syl. Pt. 1, in part, *State ex rel. Games-Neely v. Yoder*, 237 W. Va. 301, 787 S.E.2d 572 (2016) (internal quotation and citation omitted).

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

State ex rel. State v. Wilson, 239 W. Va. 802, 805, 806 S.E.2d 458, 461 (2017) (internal quotation omitted) (quoting Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996)).

As detailed below, in light of the circuit court's Order dismissing Bowman's indictments, ordering Bowman's convictions "null and void" and "vacated and expunged,"[5] vacating the requirement that Bowman register as a sex offender and the order of his supervised release, and releasing Bowman from incarceration, the circuit court "exceeded its legitimate powers" and "depriv[ed] the State of . . . valid conviction[s]." *See State ex rel. Games-Neely*, 237 W. Va. at 312, 787 S.E.2d at 583 (finding "the State . . . entitled to relief in prohibition" because "the circuit court exceeded its legitimate powers in overturning and depriving the State of a valid conviction by setting aside [the defendant's] conviction and granting him a new trial").

The State has no other adequate means to obtain relief; direct appeal is unavailable. *See, e.g.*, *State v. Walters*, 186 W. Va. 169, 171–72, 411 S.E.2d 688, 690–91 (1991).[6] Thus, if relief in

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[5] App. 207 (capitalization altered).

[6] As this Court held in Syllabus Point 1 of *State v. Jones*, "Our law is in accord with the general rule that the State has no right of appeal in a criminal case, except as may be conferred by the Constitution or a statute." 178 W. Va. 627, 363 S.E.2 513 (1987). In West Virginia, "the State may appeal to this Court in a criminal case if (1) the case relates to the public revenue, or if (2) an indictment is held to be 'bad or insufficient' by the order of a circuit court." *Walters*, 186 W. Va.

prohibition is not granted, the State of West Virginia "will be damaged [and] prejudiced in a way that is not correctable on appeal." *See* Syl. Pt. 4, in part, *State ex rel. Hoover*, 199 W. Va. 12, 483 S.E.2d 12. In addition, as explained below, the circuit court's "order is clearly erroneous as a matter of law." *See id.* Furthermore, although the clear legal error of the circuit court is not at this very moment "oft repeated," it will soon be. *See id.* As explained more fully in the State's Motion for Emergency Relief, the circuit court recently scheduled two hearings for Wednesday, May 19, 2021, and it is the State's informed belief that the same, improper relief will be awarded by the circuit court in those matters. It is also the State's informed belief that the circuit court is currently reviewing all grand jury transcripts from the November 2015 term and will continue to grant improper relief in a total of approximately forty-two matters, notwithstanding the fact that lawful and proper convictions were previously secured via jury trials or knowing, intelligent, and voluntary guilty pleas in those cases. (*See* App. 188–89.) Accordingly, relief in prohibition is appropriate.

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at 171, 411 S.E.2d at 690 (internal citations omitted). A "bad or insufficient" indictment is construed "in the traditional sense," such "that there was a failure *substantively* to charge a crime." *See id.* at 172, 411 S.E.2d at 691 (emphasis in original); *see also* Syl. Pt. 1, *State v. Zain*, 207 W. Va. 54, 528 S.E.2d 748 (1999) ("An indictment is considered bad or insufficient pursuant to West Virginia Code § 58-5-30 (1998) (Supp.1999) when within the four corners of the indictment it: (1) fails to contain the elements of the offense to be charged and sufficiently apprise the defendant of what he or she must be prepared to meet; and (2) fails to contain sufficient accurate information to permit a plea of former acquittal or conviction."). Here, the circuit court did not grant relief based on its finding that the indictment itself was insufficient in that it failed "substantively to charge a crime." *See Walters*, 186 W. Va. at 172, 411 S.E.2d at 691. Rather, the circuit court granted relief based on its finding of "fatal flaws in the presentation of Mr. Bowman's case to the Grand Jury." (App. 195 (internal quotation omitted); *see also* App. 160.) Therefore, direct appeal is not an avenue of relief available to the State.

B. The petit jury's guilty verdicts against Bowman rendered any alleged defects in the grand jury proceeding harmless. Therefore, because the circuit court exceeded its legitimate powers and deprived the State of valid convictions, the State is entitled to relief in prohibition.

On June 6, 2017, the petit jury convicted Bowman on Counts One, Five, and Seven as alleged in the indictment in Case No. 15-F-59,[7] and on Counts One and Two as alleged in the indictment in Case No. 15-F-60.[8] (App. 42–43.)

"It is well settled that a guilty verdict at trial remedies any possible defects in the grand jury indictment." *State v. Shanton*, No. 16-0266, 2017 WL 2555734, at *5 (W. Va. Supreme Court, June 13, 2017) (memorandum decision) (internal quotation omitted) (quoting *United States v. Lombardozzi*, 491 F.3d 61, 80 (2d Cir. 2007)). In *United States v. Mechanik*, the Supreme Court of the United States held that "the societal costs of retrial after a jury verdict of guilty are far too substantial to justify setting aside the verdict simply because of an error in the earlier grand jury proceedings." 475 U.S. 66, 73 (1986). In support of this holding, the Supreme Court of the United States advised:

> We cannot accept the Court of Appeals' view that a violation of Rule 6(d)[9] requires automatic reversal of a subsequent conviction regardless of the lack of prejudice. Federal Rule of Criminal Procedure 52(a) provides that errors not affecting substantial rights shall be disregarded. *We see no reason not to apply this provision to errors, defects, irregularities, or variances occurring before a grand jury just as we have applied it to such error occurring in the criminal trial itself.*
>
> The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; *victims may be asked to relive their disturbing experiences.* The [p]assage of time,

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[7] Counts One, Five, and Seven in Case No. 15-F-59 alleged sexual abuse by a parent, guardian, custodian, or person in a position of trust; first degree sexual abuse; and first degree sexual assault. (App. 26, 30, 32; *see also* App. 42.)

[8] Counts One and Two in Case No. 15-F-60 alleged first degree sexual abuse. (App. 35–36; *see also* App. 43.)

[9] Rule 6(d) of the Federal Rules of Criminal Procedure.

> erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. *Thus, while reversal may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution, and thereby cost society the right to punish admitted offenders.* Even if a defendant is convicted in a second trial, the intervening delay may compromise society's interest in the prompt administration of justice and impede accomplishment of the objectives of deterrence and rehabilitation. These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. *But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial.*
>
> We express no opinion as to what remedy may be appropriate for a violation of Rule 6(d) that has affected the grand jury's charging decision and is brought to the attention of the trial court *before* the commencement of trial. We hold only that however diligent the defendants may have been in seeking to discover the basis for the claimed violation of Rule 6(d), *the petit jury's verdict rendered harmless any conceivable error in the charging decision that might have flowed from the violation.* In such a case, *the societal costs of retrial after a jury verdict of guilty are far too substantial to justify setting aside the verdict simply because of an error in the earlier grand jury proceedings.* The judgment of the Court of Appeals is therefore reversed to the extent it set aside the conspiracy convictions and dismissed the indictment, but is otherwise affirmed.

Mechanik, 475 U.S. at 71–73 (emphases added) (footnote added) (internal quotations and citations omitted); *see also United States v. Masiarczyk*, 1 F. App'x 199, 213 (4th Cir. 2001) ("[B]ecause the petit jury subsequently convicted [defendants] beyond a reasonable doubt, any error in their grand jury proceedings is harmless.").

As addressed below, prior to the return of the petit jury's guilty verdicts against him, Bowman challenged neither the indictments nor the grand jury proceeding. Accordingly, in light of his criminal trial and the jury's guilty verdicts, any alleged defects in the grand jury proceeding are rendered harmless. Therefore, the circuit court erred in dismissing the indictments and in otherwise awarding Bowman his requested relief.

C. The circuit court erred in *sua sponte* granting relief.

Prior to trial, Bowman did not raise issue with the grand jury proceeding or the validity of the indictments against him. (*See* App. 1–9, 39–41, 44–47, 48–51.)[10] This Court has held that failure to raise objection to a grand jury proceeding prior to trial constitutes a waiver of that claim. *See* Syl. Pt. 4, *State v. Bongalis*, 180 W. Va. 584, 378 S.E.2d 449 (1989) ("Challenges to an indictment based on irregularities during grand jury deliberations must be raised under Rule 12(b)(2) of the West Virginia Rules of Criminal Procedure prior to trial."). Indeed, in *Bongalis*, this Court held that even when a motion to dismiss the indictment is timely filed, if the defendant "fail[s] to press for a ruling on the motion prior to trial,"[11] the claim is waived:

> [W]e have concluded that where trial counsel has filed a motion under Rule 12 [of the West Virginia Rules of Criminal Procedure], the failure to press for a ruling on the motion prior to trial amounts to a waiver of the objections contained in the motion. Other courts have reached a similar conclusion. In this case, a motion was filed on July 7, 1985, complaining in general about prejudicial remarks made by Deputy Sheriff Rose about the defendant to the grand jury in response to their questions. However, the record does not disclose that the motion was ever brought on for hearing before the trial court. In view of the foregoing law, we find this point to have been waived.

Id. at 589–90, 378 S.E.2d at 454–55 (internal citations omitted). Because Bowman waived his claim regarding alleged defects in the grand jury proceeding, the circuit court erred in *sua sponte* raising issues with the same and granting relief.

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[10] Bowman's trial began on May 19, 2017, and concluded on June 6, 2017. *See Bowman*, 2018 WL 6131290, at *1; App. 42–43. The criminal docket sheets for Case Nos. 15-F-59 and 15-F-60 do not show any motion to dismiss the indictments until after the return of the jury's verdicts, when Bowman filed his Motion to Dismiss Count I of the Indictment on June 19, 2017. (*See* App. 4, 9, 44–47.) This motion argued for dismissal based on *ex post facto* grounds in light of a "legislative enactment [that] occurred post-offense." (App. 44.) It did not raise issue with the grand jury proceeding. The other Motion to Dismiss shown on the docket sheets (*see* App. 3, 6), which was filed prior to trial, argued for dismissal of the charges based on the State's alleged failure to disclose *Brady* material (*see* App. 39–41). That motion also did not raise issue with the grand jury proceeding.

[11] *Bongalis*, 180 W. Va. at 589–90, 378 S.E.2d at 454–55.

In addition, the circuit court's rationale for granting relief based on the State's failure to instruct the grand jury on the law (*see* App. 200) ignores an innate role of the trial court. In *State ex rel. Knotts v. Watt*, this Court advised, "A prosecutor before the grand jury performs a limited role. The circuit judge instructs the grand jury on the elements of the various crimes that are presented to it." 186 W. Va. 518, 522, 413 S.E.2d 173, 177 (1991); *see also State ex rel. Hamstead v. Dostert*, 173 W. Va. 133, 140, 313 S.E.2d 409, 416–17 (1984) ("The primary means by which a trial court fulfills its responsibility to insure fairness in grand jury proceedings is through its instructions to grand jurors on their purpose, function, and the procedures to be followed governing their deliberations and determinations."). Although the State is permitted to instruct the grand jury with "court supervised instructions," *see* Syl. Pt. 2, in part, *State ex rel. Miller v. Smith*, 168 W. Va. 745, 285 S.E.2d 500 (1981), it is still within the province of the trial court to instruct the grand jury on the applicable law. Therefore, the circuit court's finding in this regard should not have played any factor in its grant of relief.

Finally, the circuit court exceeded its legitimate powers by *sua sponte* ordering expungement of Bowman's criminal convictions.[12] West Virginia Code § 61-11-25 governs the expungement of criminal records for those against whom charges have been dismissed. Section 61-11-25 provides, in pertinent part:

> (a) Any person who has been charged with a criminal offense under the laws of this state and who has been found not guilty of the offense, or against whom charges have been dismissed, and not in exchange for a guilty plea to another offense, may file a civil petition in the circuit court in which the charges were filed to expunge all records relating to the arrest, charge or other matters arising out of the arrest or charge . . . : *Provided, further, That any person who has previously been convicted of a felony may not file a petition for expungement pursuant to this section.*
>
> . . . .

[12] Via the circuit court's April 28, 2021 Administrative Order, it not only vacated Bowman's criminal convictions, but also ordered them "expunged." (App. 207 (capitalization altered).)

> (b) The expungement petition *shall be filed not sooner than sixty days following the order of acquittal or dismissal by the court*. Any court entering an order of acquittal or dismissal shall inform the person who has been found not guilty or against whom charges have been dismissed of his or her rights to file a petition for expungement pursuant to this section.
>
> (c) Following the filing of the petition, the court may set a date for a hearing. If the court does so, it shall notify the prosecuting attorney and the arresting agency of the petition and provide an opportunity for a response to the expungement petition.
>
> (d) If the court finds that there are no current charges or proceedings pending relating to the matter for which the expungement is sought, the court may grant the petition . . . .

W. Va. Code § 61-11-25 (emphases added).

Pursuant to § 61-11-25, the criminal defendant, "not sooner than sixty days following the order of acquittal or dismissal by the [circuit] court," must initiate the expungement proceeding. *See* W. Va. § 61-11-25(b). That did not occur in this case. At no point did Bowman seek expungement of his criminal convictions, and, as a result, the State was not provided with an opportunity to respond. *See* W. Va. Code § 61-11-25(c). Moreover, and quite notably, Bowman has a criminal history that includes felony convictions. (App. 210–211.) Therefore, based on the express language of the statute, he is prohibited from filing a petition for expungement. *See* W. Va. Code § 61-11-25(a). Accordingly, because the circuit court wholly disregarded the procedure provided under § 61-11-25, and because, given Bowman's prior felony convictions, expungement under § 61-11-25 is not available, the circuit court exceeded its legitimate powers by *sua sponte* expunging Bowman's criminal convictions.

D. Bowman did not allege, and the circuit court did not find, willful, intentional fraud in the grand jury proceeding. Therefore, the circuit court exceeded its legitimate powers by going behind the indictments and inquiring into the evidence considered by the grand jury to determine the indictments' legality and sufficiency.

In its order dismissing Bowman's indictments with prejudice, the circuit court found "fatal flaws in the presentation of Mr. Bowman's case to the Grand Jury." (App. 195 (internal quotation omitted).) Specifically, the circuit court noted the State's failure to instruct the grand jury as to the law to be applied and the "needless, inflammatory, and outrageous conduct by the prosecutor and her investigator, [which] created an unlawful bias fully intended to sway the Grand Jurors to find true bills." (App. 200.)

> This Court has long held that "[e]xcept for willful, intentional fraud the law of this State does not permit the court to go behind an indictment to inquire into the evidence considered by the grand jury, either to determine its legality or its sufficiency." Syl., *Barker v. Fox*, 160 W. Va. 749, 238 S.E.2d 235 (1977). Furthermore, "[t]his Court reviews indictments only for constitutional error and prosecutorial misconduct." *State v. Adams*, 193 W. Va. 277, 284, 456 S.E.2d 4, 11 (1995).

State v. Mullins, No. 12-1460, 2013 WL 5676803, at *3 (W. Va. Supreme Court, Oct. 18, 2013) (memorandum decision); *accord* Syl. Pt. 1, *State v. Spinks*, 239 W. Va. 588, 803 S.E.2d 558 (2017) (quoting *Barker*).

Bowman did not allege, and the circuit court did not find, "willful, intentional fraud" by the State or its witness. *See* Syl. Pt. 1, *Spinks*, 239 W. Va. 588, 803 S.E.2d 558 (internal quotation and citation omitted). In fact, to this day, other than his claim that the indictments were not properly signed by the grand jury foreperson, Bowman has not submitted *any* filing to, or raised *any* claim with, the circuit court alleging willful, intentional fraud in the grand jury proceeding. Accordingly, the circuit court exceeded its legitimate powers in "go[ing] behind [the] indictment[s]

. . . [and] inquir[ing] into the evidence considered by the grand jury, . . . to determine [the indictments'] legality . . . [and] sufficiency." *See id.* (internal quotation and citation omitted).

VII. CONCLUSION

In light of the foregoing, the State seeks emergency relief and requests the immediate issuance of a writ of prohibition.

STATE OF WEST VIRGINIA,
By Counsel

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VERIFICATION

State of West Virginia, Kanawha County, to-wit:

I, Karen C. Villanueva-Matkovich, Deputy Attorney General and counsel for the Petitioner named in the foregoing ***Emergency Petition for a Writ of Prohibition***, being duly sworn, state that the facts and allegations contained in the Emergency Petition are true, except insofar as they are stated to be on information, and that, insofar as they are stated to be on information, I believe them to be true.

Karen C. Villanueva-Matkovich

Taken, sworn to, and subscribed before me this 17th day of May 2021.

[SEAL]

Official Seal
Notary Public, State of West Virginia
Lori D Nichols
130 A Woodland Dr
Nitro WV 25143
My Commission Expires Feb. 3, 2024

Lori D. Nichols
Notary Public

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 21-_____

STATE OF WEST VIRGINIA *ex rel.*
STATE OF WEST VIRGINIA,

***Petitioner*,**

v.

THE HONORABLE DAVID W. HUMMEL, JR.,
Chief Circuit Court Judge of the Circuit Court of Marshall County, West Virginia,
and MICHAEL DANIEL BOWMAN,
Criminal Defendant Below and Party in Interest,

***Respondents*.**

CERTIFICATE OF SERVICE

I, Karen C. Villanueva-Matkovich, counsel for Petitioner, hereby certify that on May 17, 2021, I served the foregoing ***"Emergency Petition for a Writ of Prohibition"*** on the below-listed parties in interest, to whom, if issued, a Rule to Show Cause should be served, by depositing true and accurate copies of the same in the United States mail, postage prepaid. In accordance with West Virginia Rule of Appellate Procedure 29(c), I further certify that the associated ***"The State of West Virginia's Motion for Emergency Relief"*** and ***"Appendix"*** were provided to the opposing parties contemporaneously with filing as noted below.

Hon. David W. Hummel, Jr.
Chief Circuit Court Judge
Marshall County Courthouse
600 Seventh Street
Moundsville, WV 26041
Served via electronic mail and 1st class postage pre-paid mail

Michael Daniel Bowman
2300 7th Street
Trailer 29
Moundsville, WV 26041
Served via overnight, certified mail, 1st class postage pre-paid mail, and hand delivery by the Marshall County Sheriff's Department

Karen C. Villanueva-Matkovich
Deputy Attorney General