ORIGINAL

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex. rel.
State of West Virginia,

Petitioner,

v.

Supreme Court No. 21-0401

THE HONORABLE DAVID W. HUMMEL, JR.,
Judge of the Circuit Court of Marshall County,
And MICHAEL DANIEL BOWMAN,

Respondents.

RESPONDENT BOWMAN'S RESPONSE BRIEF OPPOSING THE PETITION FOR WRIT OF PROHIBITION

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QUESTION PRESENTED

Petitioner State of West Virginia raises four questions presented. Per WVRAP 16(d) and 10(d), Respondent does not "specifically restate" them, and instead reframes the issue before the Court as follows:

A witness with no first or secondhand knowledge of the facts told grand jurors that Respondent was a pedophile, alluded to uncharged crimes in other counties, and implied that since a magistrate already found probable cause to jail him, the grand jury should find probable cause to indict.

Are courts in this state without authority to deter prosecutors from obtaining indictments through misconduct, and covering up their malfeasance by using "cutout" witnesses to render grand jury transcripts undiscoverable?

STATEMENT OF THE CASE

A former prosecutor committed egregious misconduct to obtain an indictment,[1] covered it up,[2] and—thankfully—got caught.[3] The State does not defend the actions of the former Marshall County Prosecutor. It instead argues that because she shielded her misconduct from discovery until after trial, the prosecutor's "flagrant misuse of power"[4] cannot be reviewed by the courts.[5] This utter unaccountability to a coequal branch of government is intolerable. Conviction may render harmless evidentiary mistakes, but not willful misconduct calculated to bias grand jurors and subvert the Indictment Clause of the West Virginia Constitution.[6] Prosecutors are not above the law, and courts have the authority to check their behavior and craft case-specific remedies to deter future bad acts.

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[1] *See e.g.* A.R. 202–03.
[2] A.R. 195; W. Va. R. Crim. P. 16(a)(3) and 26.2 (defendant not entitled to transcript of grand jury witness who does not testify at trial).
[3] A.R. 205.
[4] *Id.*
[5] Petr.'s Br. 6–7.
[6] *Compare* Syl. Pt. 5, *State ex rel. Pinson v. Maynard*, 181 W. Va. 662, 383 S.E.2d 844 (1989) *with* Syl. Pt. 2, *State ex rel. Knotts v. Watt*, 186 W. Va. 518, 413 S.E.2d 173 (1991) (other evidence may render harmless a factually insufficient indictment, but not if prosecutorial misconduct "substantially influenced the grand jury's decision to indict.").

a. The grand jury indicted Respondent for thirteen counts. A jury convicted him of five.

In 2015, a Marshall County grand jury indicted Respondent for thirteen counts related to an alleged pattern and practice of child sexual abuse.[7] Respondent requested a transcript of the grand jury testimony,[8] but the State did not produce one.[9] Grand jury proceedings are secret.[10] Defendants may ask permission to inspect grand jury transcripts if they already know of grounds to dismiss,[11] or seek discovery of grand jury witness statements if they later testify in open court.[12] Neither condition applied, the State declined to provide a transcript,[13] and only those present knew what transpired in the grand jury room.[14]

Respondent adamantly maintained his innocence[15] and the case proceeded to trial where the defense contended that complainant E.W. manufactured all the allegations.[16] After beginning its case in chief, the State realized it had an evidentiary problem.[17] Whatever evidence it had presented to the grand jury, it no longer believed it could support four of the thirteen counts and moved to dismiss them.[18]

After a trial that turned on credibility, the jury delivered a mixed verdict and convicted Respondent for five of the remaining counts but acquitted him of four others.[19] The court ran the sentences consecutively for a cumulative 28 to 70 years in prison.[20] Respondent appealed, and this Court affirmed his conviction.[21]

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[7] A.R. 1.
[8] Resp.'s Supplemental Appendix at 230, 232.
[9] *See* A.R. 194 (testimony first transcribed during the habeas at the State's request).
[10] W. Va. R. Crim. P. 6(e)(2).
[11] W. Va. R. Crim. P. 6(e)(3)(C)(ii).
[12] *See* W. Va. R. Crim. P. 16(a)(3) and 26.2.
[13] *See* A.R. 194.
[14] *See* W. Va. R. Crim. P. 6(d).
[15] *See* A.R. 199.
[16] *See State v. Bowman*, No. 17-0698, 2018 WL 6131290, at *3 (W. Va. Nov. 21, 2018) (memorandum decision).
[17] *Id.* at *2.
[18] *Id.*
[19] *Id.* at *2–*3.
[20] *Id.*
[21] *Id.* at *4.

b. Respondent filed a habeas petition alleging fraud and misconduct occurred in the grand jury. The new prosecutor requested a transcript to respond.

Pro se, Respondent filed numerous petitions and motions to exonerate himself.[22] His actions culminated in a "Fifth Amended Petition for Writ of Habeas Corpus," which, despite the name, is Respondent's first habeas for purposes of *Losh v. McKenzie*.[23] He argued in part that the State engaged in fraud and misconduct in the grand jury proceedings and that the prosecutor rather than the foreperson signed the indictment.[24]

A new elected prosecutor who did not participate in the grand jury responded to the habeas petition and denied any misconduct.[25] To prepare for the omnibus hearing, he sought a transcript of the grand jury proceedings.[26] The State moved the court to take judicial notice of limited portions of the transcript.[27] Respondent—again pro se—did not object to the court taking judicial notice but requested access to the full transcript.[28] The court granted the motion, reviewed the entire transcript itself, and found the contents disturbing.[29]

c. The grand jury transcript revealed prosecutorial misconduct "troubling to say the least."[30]

The transcript showed that the former elected prosecutor called a single witness to testify.[31] This witness was not the investigating officer; he did not work for the police at all.[32] Rather, he was a private investigator hired by the prosecutor's office and who was thus employed and paid by the person ostensibly examining him.[33]

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[22] A.R. 194.
[23] *See* Syl. Pt. 1, *Losh v. McKenzie*, 166 W. Va. 762, 277 S.E.2d 606 (1981).
[24] A.R. 193.
[25] A.R. 195.
[26] *Id.*
[27] A.R. 194–95.
[28] A.R. 195.
[29] *Id.*
[30] A.R. 200.
[31] A.R. 13; A.R. 195.
[32] A.R. 195; A.R. 204.
[33] A.R. 204.

The prosecutor invited her agent to testify via narrative.[34] It does not appear that the investigator interviewed witnesses.[35] Instead he summarized police reports compiled by actual officers.[36] He and the prosecutor characterize his testimony as a "summary," rather than establishing facts to show probable cause for each offense.[37] The investigator only described two sexual acts against E.W., but the indictment claimed eight counts.[38]

The transcript also shows that the prosecutor did not engage in "court supervised instruction[]"[39] Per the usual charge, the court instructed the newly empaneled grand jurors to apply the facts to the law, and in its supervisory capacity left it to the prosecutor to instruct on what elements jurors must find for each offense.[40] But instead of telling jurors the proper bases for indicting, the prosecutor stood silent as her employee delved into improper bases.[41] She did not intervene when her employee alluded to other complainants and other allegations in other counties.[42] The investigator—who was not a psychologist—opined that Respondent was a pedophile grooming victims.[43] The investigator further told grand jurors to expect more allegations in the future.[44]

The investigator told the grand jury that a magistrate already found probable cause.[45] He said the magistrate found Respondent to be so dangerous that he set a high bond to keep him in jail, and the grand jurors must now decide whether to indict him.[46] He concluded by expressing his personal disgust before the grand jurors deliberated: "Are there any questions about [Respondent]? Thanks because I hate talking about this guy."[47]

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[34] A.R. 13.
[35] *See* A.R. 17–23.
[36] *Id.*
[37] A.R. 13; A.R. 19.
[38] A.R. 13–15; A.R. 17–18.
[39] Syl. Pt. 1, *State v. Pickens*, 183 W. Va. 261, 395 S.E.2d 505 (1990); A.R. 200; *see also* A.R. 13–24.
[40] A.R. 162–64.
[41] A.R. 201; *see also* A.R. 17–23; A.R. 161–64.
[42] A.R. 19; A.R. 22.
[43] A.R. 19–21.
[44] A.R. 22.
[45] *Id.*
[46] *Id.*
[47] A.R. 23.

d. The court granted habeas relief, dismissed the indictment with prejudice, and expunged Respondent's record both reflecting the State's violation of his rights and the need to deter the State from further misconduct.

The habeas court found this transcript "troubling to say the least."[48] Though the transcript did not substantiate Respondent's claimed misconduct, the court nonetheless found "fatal flaws" in the former prosecutor's presentation.[49]

It faulted the witness's narrative testimony[50] and the prosecutor's failure to instruct grand jurors upon the proper basis to indict.[51] It found that in the absence of instruction, the grand jury was incapable of applying the law to the facts and could not legitimately complete its task.[52]

The court further faulted the prosecutor for allowing its witness to make "inflammatory, grossly reckless statements[.]"[53] It found that "the needless, inflammatory, and outrageous conduct by the prosecutor and her investigator, created an unlawful bias fully intended to sway Grand Jurors to find true bills on multiple sex charges against [Respondent], without first examining any law, let alone pertinent law, and evidence necessary to substantiate a violation thereof."[54]

On this record, the court affirmatively found that "the Grand Jury could *not* have known that the elements had been met[,]"[55] and that left only improper bases for indictment. "Alarmingly, one thing the investigator did 'instruct' the grand jurors about, was the fact that the Magistrate had already found probable cause ... and that new charges

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[48] A.R. 200.
[49] A.R. 195.
[50] *Id.*; A.R. 202.
[51] A.R. 200.
[52] A.R. 200-01.
[53] A.R. 195.
[54] A.R. 200.
[55] A.R. 201 (*emphasis altered*).

were likely 'forthcoming[.]"[56] It found these statements "highly prejudicial."[57] Such instruction communicated one thing: "if the magistrate already found probable cause in this case then so should you."[58]

And the court found that this misconduct was purposeful: "The statements made by the investigator only had one purpose. That purpose was to improperly influence the Grand Jurors to sign the pre-printed indictment forms."[59] It further found that "There was no attempt to let the Grand Jury exercise discretion and apply the law. The only attempt that was being made was to improperly create a bias in their minds without any regard to the law or the facts[.]"[60]

The court ruled that the former prosecutor violated the constitution and that dismissal with prejudice was an appropriate remedy since the prosecutor's purposeful actions both prejudiced Respondent and violated the "public interest in fair administration of justice."[61] The court found that the prosecutor's "flagrant and egregious"[62] misconduct called into question the validity of past convictions and aroused fear that the Marshall County Prosecutors Office would continue to engage in grand jury misconduct in the future.[63] Anything less than dismissal with prejudice would be an insufficient deterrent against the office's "flagrant misuse of power."[64] It further found that the extraordinary circumstances presented by this case justified the court in expunging the charges from Respondent's record.[65] "This action is so egregious and pre-meditated crossing a line of ethical conduct which cannot be ignored."[66]

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[56] A.R. 202.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] A.R. 203.
[62] A.R. 205.
[63] A.R. 204–05.
[64] A.R. 205.
[65] A.R. 207–08.
[66] A.R. 204.

SUMMARY OF ARGUMENT

The State makes no effort to defend misconduct that the circuit court described as "flagrant and egregious[.]"[67] Rather, it asks this Court to ignore the prosecutor's malfeasance because she was so good at it. By using a cutout witness who would never testify at trial, the prosecutor ensured no one could pierce the grand jury's veil of secrecy pretrial. If the State is right that a later conviction renders harmless a prosecutor's flagrant and purposeful efforts to bias grand jurors and conceal any record from discovery, it is unclear what interests the Indictment Clause of the West Virginia Constitution even protects.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

It should be well-settled that intentional prosecutorial misconduct, aimed at biasing a grand jury to base its decision upon impermissible factors rather than the evidence, is unacceptable.[68] However, prosecutorial misconduct of this magnitude is uncommon—or at least rarely discovered—and it is of considerable public concern. The Court may desire a Rule 20 oral argument and signed opinion to guide lower courts and prosecutors.

ARGUMENT

The petition hinges upon a fundamental misconception. This Court has long acknowledged two kinds[69] of grand jury challenges: those that allege insufficient evidence, and those that allege other fatal flaws.[70] Here, the court found "flagrant and egregious"[71] malfeasance, which belongs to the second category.[72] But the State's entire misplaced argument presumes a mere sufficiency challenge.[73]

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[67] A.R. 205.
[68] *See* Syl. Pt. 3, *State ex rel. Miller v. Smith*, 168 W. Va. 745, 285 S.E.2d 500 (1981).
[69] There is a third—structural problems—but they are rare and not here relevant. *Knotts*, 186 W. Va. at 519.
[70] *See supra* at n. 6.
[71] A.R. 205.
[72] *See supra* n. 6; *cf. State v. Barnhart*, 211 W. Va. 155, 160, 563 S.E.2d 820, 825 (2002) (per curiam) (reversing criminal conviction where grand jury was biased against the defendant).
[73] *See* Petr.'s Br. 6–7.

I. The prosecutor's intentional, egregious conduct, aimed at subverting the West Virginia Constitution's Indictment Clause, is not harmless.

The State does not contest the circuit court's fact finding that the former Marshall County Prosecutor engaged in "flagrant and egregious"[74] misconduct, or that she intended her "outrageous" malfeasance to bias grand jurors and sway their decision based upon impermissible factors rather than the evidence.[75] Instead, it argues that this misconduct was harmless.[76] When viewed under the proper standard, as the court below did, it was in no sense harmless.

"No person shall be held to answer for [a] felony or other crime, not cognizable by a justice, unless on ... indictment of a grand jury."[77] To fulfill its twin functions of investigating crime and protecting citizens against arbitrary power, a grand jury decides whether the evidence shows probable cause to believe the accused committed the alleged crimes.[78] Where the grand jury indicts upon perjured or misleading testimony, the error is subject to harmless error analysis.[79] *Absent prosecutorial misconduct*, other evidence presented to the grand jury may cure a proceeding that included fraudulent testimony if discovered pretrial.[80] Post-trial, a valid conviction will generally render harmless any factual insufficiency at the grand jury stage[81] as well as pure technical mistakes.[82]

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[74] A.R. 205.
[75] A.R. 200.
[76] Petr.'s Br. 10–11.
[77] W. Va. Const. Art. III, § 4; *see also* U.S. Const. Amend. V. Although the United States Supreme Court has not incorporated the Fifth Amendment's Indictment Clause against the states, *see Hurtado v. People of State of Cal.*, 110 U.S. 516, 534–35 (1884), this Court often finds cases interpreting the federal Indictment Clause persuasive. *See, e.g.*, *Pinson*, 181 W. Va. at 665; *but see Miller*, 168 W. Va. at 752 (criticizing federal grand jury procedure for straying from the institution's historical role of protecting citizens).
[78] *See Miller*, 168 W. Va. at 751.
[79] *See Pinson*, 181 W. Va. 662 at Syl. Pt. 5.
[80] *See id.* at Syl. Pt. 4.
[81] *State v. Shanton*, No. 16-0266, 2017 WL 2555734, *5 (W. Va. Supreme Court, June 13, 2017) (memorandum decision).
[82] *See U.S. v. Mechanik*, 475 U.S. 66, 70 (1986) (conviction also cures purely technical error with only a "theoretical potential" for prejudice).

A different standard applies in prosecutorial misconduct cases.[83] In addition to the Indictment Clause of the West Virginia Constitution, prosecutorial misconduct also implicates the Fourteenth Amendment Due Process Clause.[84] "A prosecuting attorney can only appear before the grand jury to present by sworn witnesses evidence of alleged criminal offenses, and to render court supervised instructions[.] [She] is not permitted to influence the grand jury in reaching a decision, nor can [she] provide unsworn testimonial evidence."[85] "A prosecuting attorney who attempts to influence a grand jury by means other than the presentation of evidence or the giving of court supervised instructions, exceeds [her] lawful jurisdiction and usurps the judicial power of the circuit court and of the grand jury."[86] Where error occurs other than insufficient evidence, the harmlessness test is whether "the violation substantially influenced the grand jury's decision to indict or if there is grave doubt that the decision to indict was free from the substantial influence of such violations."[87]

West Virginia law thus draws a bright line between indictment challenges based upon insufficient evidence and prosecutorial misconduct.[88] The petition does not recognize this distinction. It predicates its entire argument upon a misplaced assumption that all indictment defects are the same and must be addressed pretrial.[89] This argument is especially misplaced where the prosecutor's misconduct included abusing grand jury secrecy to cover her actions.[90] Due to this oversight, the State fails to raise a colorable error with the decision below.

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[83] *See Pickens*, 183 W. Va. at 264 (reversing conviction where prosecutor engaged in grand jury misconduct).
[84] *See, e.g., Miller v. Pate*, 386 U.S. 1, 7 (1967); *see also* U.S. Const. Amend. XIV; W. Va. Const. Art. III, § 10.
[85] *Miller*, 168 W. Va. 745 at Syl. Pt. 2.
[86] *Id.* at Syl. Pt. 3.
[87] *Knotts*, 186 W. Va. 518 at Syl. Pt. 2; *see also Bank of Nova Scotia v. U.S.*, 487 U.S. 250, 256 (1988).
[88] *See Pinson*, 181 W. Va. 662 Syl. Pt. 4.
[89] *See* Petr.'s Br. 6–7.
[90] *See infra* at 12–13.

The State argues that Respondent's subsequent conviction cured the problems occurring in the grand jury proceeding,[91] but this is the incorrect standard for harmlessness.[92] The distinction between sufficiency and misconduct challenges is important, and beyond its roots in the law,[93] also makes intuitive sense. In a trial, the jury must find guilt beyond a reasonable doubt.[94] This is a much higher burden than the grand jury's probable cause standard.[95] So if the only problem is that the grand jury evidence was lacking, post-conviction remand for a new grand jury presentation is nonsensical.

But this reasoning only applies when the error concerns the evidence.[96] The court below found that the prosecutor and her agent purposefully sought to bias grand jurors to manufacture indictments based upon factors other than the evidence.[97] It found that *regardless* of the evidence, the prosecutor's malfeasance made the grand jury's task of applying law to facts impossible and that only impermissible factors like bias could have driven the body's decision.[98] The trial evidence has no bearing on this problem, and thus cannot render it harmless.[99]

The State also argues that the court did not find "willful, intentional fraud," a purported prerequisite to examining grand jury proceedings.[100] First, the State's definition of fraud is overly narrow. The court below was quite clear that the prosecutor and her agent-witness purposefully biased grand jurors to deliver true bills based upon impermissible factors—findings the State does not challenge.[101] And second, the State again mistakes

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[91] Petr.'s Br. 10–11.
[92] *Compare Pinson*, 181 W. Va. 662 at Syl. Pt. 5 *with Knotts*, 186 W. Va. 518 at Syl. Pt. 2.
[93] *See id.*
[94] *See In re Winship*, 397 U.S. 358, 361 (1970).
[95] *See Pinson*, 181 W. Va. at 665.
[96] *See Knotts*, 186 W. Va. 518 at Syl. Pt. 2; *see also Bank of Nova Scotia*, 487 U.S. at 256.
[97] A.R. 200–01.
[98] *Id.*
[99] *See Knotts*, 186 W. Va. 518 at Syl. Pt. 2; *see also Bank of Nova Scotia*, 487 U.S. at 256; *cf. Vasquez v. Hillery*, 474 U.S. 254, 260 (1986) (rejecting argument that conviction cured a grand jury constituted in such a way as to be biased against the defendant).
[100] Petr.'s Br. 15–16.
[101] *E.g.* A.R. 200–01.

this for a sufficiency challenge. Its claimed requirement reflects the general rule that incorrect evidence will not void an indictment.[102] Perjured, not merely mistaken, testimony represents an exception: "Except 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."[103] The court below was not concerned with the sufficiency of the evidence or whether the State obtained it lawfully. The court was concerned with "continued, flagrant and egregious" malfeasance designed to bias grand jurors.[104] Rather than using the State's incorrect standard, the court below correctly found that the former prosecutor engaged in misconduct that prejudiced Respondent irrespective of the evidence's sufficiency.[105] She and her agent-witness purposely sought to divert grand jurors away from the evidence to instead indict Respondent based upon impermissible factors.[106]

The State argues that the prosecutor did not err by failing to instruct jurors on the law because the court could have done so,[107] but ignores that the court delegated that task to the prosecutor.[108] As a practical matter, when a grand jury convenes to hear dozens or hundreds of cases,[109] the court cannot instruct on every felony offense in West Virginia. Rather, the court gives a general charge[110] explaining that jurors must find probable cause to believe every element of the alleged offense,[111] and that the prosecutor is authorized "*to present court-approved instructions to you that relate to the essential elements of the offenses under investigation.*"[112] The State's argument is mistaken about how grand juries work.

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[102] *See State v. Adams*, 193 W. Va. 277, 284, 456 S.E.2d 4, 11 (1995).
[103] Syl. Pt. 1, *State v. Spinks*, 239 W. Va. 588, 803 S.E.2d 558 (2017) (*emphasis added*).
[104] A.R. 205.
[105] A.R. 199.
[106] A.R. 200.
[107] Petr.'s Br. 13.
[108] A.R. 162–64.
[109] *See* A.R. 1 (Based upon his case number, 15-F-59, Respondent's was the 59th presentation in 2015).
[110] *See* A.R. 162–64.
[111] A.R. 163.
[112] A.R. 162 (*emphasis added*).

The State also misreads the court's analysis and confuses the error with the harm. The court did not find the lack of instruction to be an independent error; the error was the prosecutor's outrageous malfeasance.[113] The prosecutor "usurp[ed] the judicial power of the circuit court and of the grand jury[]" by biasing jurors against Respondent rather than empowering them to evaluate any evidence.[114]

Turning to prejudice, the court had to decide whether "the violation substantially influenced the grand jury's decision to indict or if there is grave doubt that the decision to indict was free from the substantial influence of such violations."[115] The court found that it did—in part because without instruction as to the law, grand jurors could not evaluate whether Respondent violated the law.[116] Unable to apply facts to law, grand jurors could only indict based upon bias, thus establishing prejudice.[117] The State's misreading of the record vitiates its argument.

II. The State overlooks that the prosecutor's malfeasance prevented Respondent from discovering the misconduct pretrial.

The State also argues that Respondent waived this issue because he did not challenge the grand jury misconduct pretrial.[118] It again relies upon its misplaced presupposition that all indictment errors are sufficiency challenges.[119] More remarkable than that, though, the State's strict raise-pretrial-or-else stance entails a troubling implication: if prosecutors conceal their malfeasance long enough, they get a pass. The State misses the full extent of the former prosecutor's misconduct, which not only ensured an indictment (based upon impermissible factors) but also prevented the defense from discovering the malfeasance until the new prosecutor inadvertently exposed it.

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[113] *E.g.* A.R. 200–01.
[114] *Miller*, 168 W. Va. 745 at Syl. Pt. 3; *see also Pickens*, 183 W. Va. at 264.
[115] *Knotts*, 186 W. Va. 518 at Syl. Pt. 2; *see also Bank of Nova Scotia*, 487 U.S. at 256.
[116] A.R. 200–01.
[117] *See* A.R. 201–03.
[118] Petr.'s Br. 12.
[119] *See id.* (relying upon *State v. Bongalis*, 180 W. Va. 584, 378 S.E.2d 449 (1989)).

The State overlooks that Respondent requested a grand jury transcript pretrial,[120] but the former prosecutor's use of an in-house investigator rendered it undiscoverable.[121] Court reporters do not prepare transcripts until there is a basis for doing so.[122] And defendants have no right to grand jury testimony until after the witness testifies in open court and is subject to cross-examination.[123] But here, the grand jury witness would never testify at trial.[124] He had no first or even secondhand knowledge of the allegations. He served as a cutout so that other witnesses, who had investigated the case, would not testify at the grand jury stage. Thus, the State had no obligation to disclose grand jury testimony,[125] and it did not do so until the State believed it would help its own case.[126]

If not for the new prosecutor's request, the former prosecutor's malfeasance would have remained hidden—not due to Respondent's inaction, but due to the former prosecutor's machinations. The State's argument that the court cannot redress the prosecutor's misconduct because she succeeded in hiding her malfeasance is unpersuasive.

III. The circuit court appropriately found extraordinary circumstances justified its remedy to deter the Marshall County Prosecutors Office from further malfeasance.

Severable from whether the circuit court had authority to redress the former prosecutor's "flagrant and egregious" malfeasance,[127] the State takes issue with the court's decision to expunge Respondent's record, arguing that no statute authorized it to do so.[128] However, its argument misses a crucial point. This Court has ruled that courts have discretion to expunge records on their own inherent authority.[129]

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[120] Resp.'s Supplemental Appendix at 230, 232.
[121] *See* W. Va. R. Crim. P. 16(a)(3) and 26.2.
[122] A.R. 196–97.
[123] *See* W. Va. R. Crim. P. 16(a)(3) and 26.2.
[124] *See* WVRE 602.
[125] *See U.S. v. Borelli*, 336 F.2d 376, 391 (2d Cir. 1964).
[126] A.R. 195.
[127] A.R. 205.
[128] Petr.'s Br. 13–14.
[129] *See In re A.N.T.*, 798 S.E.2d 623, 626 (W. Va. 2017).

"There are two bases for judicial expungement of criminal records: statutory authority *and the inherent power of the courts.*"[130] When presented with "extraordinary circumstances," a circuit court may order expungement.[131] Expungement is a limited remedy in that records still exist, merely under seal.[132] This Court will only reverse a circuit court's finding of extraordinary circumstances if the lower court abused its discretion.[133]

Here, the State does not argue that the court below abused its discretion, that the circumstances were run-of-the-mill, or otherwise contest whether the prosecutor's outrageous misconduct justified extraordinary relief. It only argues that without statutory authorization, the court was without power to grant expungement no matter how compelling the reason.[134] Simply put, the State is mistaken as a matter of law.[135]

And here, the court did not abuse its discretion because the prosecutor's malfeasance is an extraordinary circumstance. The court found that the prosecutor and her agent intentionally sought to bias the grand jury.[136] Their actions were an afront to the West Virginia Constitution and the protection the grand jury mechanism is supposed to provide.[137] Worse, the court found that this was likely part of a continuing pattern that may have tainted other convictions as well.[138] And without the new prosecutor's motion, this and any future misconduct could have escaped review forever.

Under these extraordinary circumstances, the circuit court did not abuse its discretion by finding expungement appropriate to fully vindicate Respondent's constitutional rights, and necessary to deter future misconduct to protect the public interest. The for-

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[130] *A.N.T.*, 798 S.E.2d at 626 (*emphasis added*).
[131] *See id.* at Syl. Pt. 2.
[132] *See* W. Va. Code § 61-11-25; *see also Mullen v. State, Div. of Motor Vehicles*, 216 W. Va. 731, 733, n. 2, 613 S.E.2d 98, 100, n. 2 (2005).
[133] *See A.N.T.*, 798 S.E.2d at 626.
[134] Petr.'s Br. 13–14.
[135] *See A.N.T.*, 798 S.E.2d at Syl. Pt. 2.
[136] *E.g.* A.R. 205.
[137] *See id.*
[138] A.R. 205–06.

mer prosecutor abused the grand jury's secrecy to obtain indictments based upon bias rather than evidence.[139] The public must be able to trust that the grand jury, as a historical and constitutional institution, can independently fulfill its twin duties to protect society both from crime and prosecutorial overreach.[140] This is the interest the circuit court sought to vindicate,[141] and it is worthy of this Court's protection as well.[142]

CONCLUSION

The State seeks a writ of prohibition out of concern that the habeas court uncovered an egregious instance of misconduct and is now investigating whether the former prosecutor's misconduct tainted other convictions as well.[143] But the State is supposed to occupy a quasi-judicial role.[144] It should not seek to inhibit the court. To seek justice, it should offer its assistance.[145]

Respondent therefore requests that the Court deny the writ and dismiss the State's appeal as moot.

Respectfully submitted,
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[139] *See Miller*, 168 W. Va. 745 at Syl. Pt. 3.
[140] *See id.* at 751–52.
[141] A.R. 199.
[142] *See Miller*, 168 W. Va. at 752.
[143] Petr.'s Br. 9.
[144] Syl. Pt. 3, *State v. Boyd*, 160 W. Va. 234, 233 S.E.2d 710 (1977).
[145] *Cf. Matter of Investigation of W. Virginia State Police Crime Lab'y, Serology Div.*, 190 W. Va. 321, 322, 438 S.E.2d 501, 502 (1993).

CERTIFICATE OF SERVICE

I, Matthew D. Brummond, counsel for Petitioner, Michael Daniel Bowman, do hereby certify that I have caused to be served upon the counsel of record in this matter a true and correct copy of the accompanying "*Respondent Bowman's Response Brief Opposing the Petition for Writ of Prohibition*" and "*Respondent's Supplemental Appendix Record*" to the following:

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