IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-_____

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

***Petitioner*,**

v.

THE HONORABLE SUSAN TUCKER,
Judge, Circuit Court of Monongalia County, West Virginia,
JENNIFER L. and DAVID F.,
Criminal Defendants Below and Party in Interest,

Respondents.

PETITION FOR A WRIT OF PROHIBITION

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QUESTION PRESENTED

Should this Court issue a writ to prohibit the Circuit Court of Monongalia County, West Virginia, from enforcing its November 18, 2022, Order dismissing the criminal indictments in Case Numbers 21-F-312 and 21-F-313 in contravention of statutory law, thus exceeding the court's legitimate powers?

INTRODUCTION

The State of West Virginia seeks a writ of prohibition with respect to the circuit court's November 18, 2022, Order dismissing Respondent Jennifer L.[1] and Respondent David F.'s ("Respondent Defendants") Indictment in Case Number 21-F-312 and 21-F-313. Appendix Record (hereinafter A.R.) 32-34. The Respondent Judge erred in dismissing the indictments based on arguments made in the preliminary hearing, which wholly ignored the evidence presented to support the indictments returned by the grand jury. The Respondent Judge invaded the province of the jury by determining there was insufficient evidence when the record shows there was adequate evidence put before the grand jury to allow this case to go to trial. Furthermore, the Respondent Judge erred in relying on the evidence set forth in an abuse and neglect proceeding and misstating that evidence in support of the dismissal of the indictments. The State has no other remedy at law to correct this injustice and is, thus, entitled to the issuance of a writ of prohibition to prevent the lower court from enforcing its erroneous Order.

STATEMENT OF THE CASE

This case began with a 2020 Petition alleging that Jennifer L. and David F. were abusive and neglectful parents, and seeking the removal of three children from Jennifer L. and David F.'s

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[1] Pursuant to Rule 40 of the West Virginia Rules of Appellate Procedure, the Respondent Defendants will be referred to by their first name and last initials, and the victim children will be referred to as initials to protect the privacy of the minors involved.

custody. A.R. 9. The children had been adopted by the Respondent Defendants several years prior to the filing of the petition, and had been the subject of at least two prior reports to CPS. A.R. 8-10. In March 2021, both parents stipulated prior to adjudication that they "engaged in excessive corporal punishment of [their] children which resulted in physical abuse." *In re A.F.-1,* No. 21-0711, 2022 WL 3949315, at *2 (W. Va. Supreme Court, Aug. 31, 2022) (memorandum decision); *see also In re A.F.-1*, No. 21-0712, 2022 WL 3949414, at *2 (W. Va. Supreme Court, Aug. 31, 2022) (memorandum decision). In August 2021, the parental rights of both parents were terminated. Said terminations were upheld by this Court. *In re A.F.-1*, 2022 WL 3949315, at *11; *In re A.F.-1*, 2022 WL 3949414, at *7.

Each parent was indicted in September 2021 on the same six counts involving adoptive children, A.F. and J.F., as follow: Child Abuse Resulting in Bodily Injury in violation of West Virginia Code § 61-8D-3(a) against A.F.; Child Abuse Resulting in Bodily Injury in violation of West Virginia Code § 61-8D-3(a) against J.F.; Child Neglect Creating Risk of Serious Injury in violation of West Virginia Code § 61-8D-4(c) against A.F.; Child Neglect Creating Risk of Serious Injury in violation of West Virginia Code § 61-8D-4(c) against J.F.; Child Neglect Causing Bodily Injury in violation of West Virginia Code § 61-8D-4(a) against A.F.; and, Child Neglect Causing Bodily Injury in violation of West Virginia Code § 61-8D-4(a) against J.F. A.R. 32-34. Prior to the indictment, both parents were charged in a criminal complaint and had preliminary hearings in magistrate court. Probable cause was found for Respondent David F., but not for Respondent Jennifer L. A.R. 45-46. Thereafter, the State modified some of the charges, and an indictment was returned in September 2021 against both Respondent Defendants. A.R. 32-34, 52.

In October 2021, the Respondent Defendants moved to dismiss the indictments, arguing that at the preliminary hearing stage the State allegedly represented[2] that the element of "bodily injury", which was included in four of the six counts, encompassed "psychological trauma" as proof of bodily injury, but West Virginia law did not support that notion. A.R. 35-39. The Respondent Defendants failed to argue anything in regard to the indictments or the grand jury proceedings. A.R. 35-39. In response, the State argued that the defendants were not charged based solely on psychological harm, but also based on physical abuse perpetrated against the children, including forcing the children to sit on a bucket, rim side up, for up to twelve hours at a time resulting in one child having difficulty using the bathroom and both children admitting the punishment caused physical pain. A.R. 40-42. As to the Child Neglect Creating Risk of Serious Injury counts, the State argued that the defendants left the children in a tent overnight for several days at times creating such a risk, and argued that it was up to a jury to determine whether the facts support a conviction. A.R. 41. Further, the State noted that it intended to present the testimony of Dr. Saar and Barbara Nelson in the criminal case, who would each opine that psychological trauma or emotional abuse can result in physical impairment so as to meet the definition of bodily injury. A.R. 42.

A hearing was held on the motion in November 2021, wherein the Respondent Defendants argued there was no bodily injury in this case and no gross neglect. A.R. 43-67. The Respondent Defendants relied upon the companion abuse and neglect case to support the lack of findings of physical abuse, even specifically noting there was no testimony regarding any type of physical injury in the abuse and neglect case, but failing to mention the admissions of physical abuse by

[2] Although the Respondent Judge asserts that she reviewed the transcript of the proceedings of the preliminary hearing, said transcript does not exist in the court file, nor does the State possess a copy of said transcript. See Docket Sheet, A.R. 1-6.

both the Respondent Defendants. A.R. 45-50. The Respondent Defendants also relied on one of the arguments the State previously made before the magistrate in the probable cause hearing which occurred prior to the indictments. A.R. 45-48. Again, no arguments were made by Respondent Defendants relative to the grand jury proceedings. A.R. 45-50, 55-58.

The State argued that the Respondent Defendants' actions in placing the children outside in a tent overnight created a risk of serious injury even if the children were not injured, and that the question is one for the jury. A.R. 50-51. For the counts requiring injury, as opposed to risk of injury, the State argued that "bodily injury is defined as substantial physical pain, illness, or any impairment of physical condition" and that sitting on the bucket for hours created substantial pain and difficulties with one of the child's bowels. A.R. 51-52. The State also argued that restricting the children's food created an impairment of physical condition. A.R. 54. The court entered an order holding that motion in abeyance. A.R. 68.

In March 2022, the Respondent Defendants filed a motion to exclude testimony and evidence of psychological harm or injury. A.R. 69-72. Once again, the Respondent Defendants hark back to the preliminary hearing argument wherein they alleged the State argued that bodily injury could encompass psychological trauma. A.R. 69-71. The Respondent Defendants argued that testimony regarding psychological injury would be more prejudicial than probative and is irrelevant. A.R. 71. In response, the State argued that bodily injury was clearly supported in the discovery responses, as well as the children's disclosures with regard to both physical injury and psychological trauma resulting in physical impairment or injury. A.R.73-75. The State argued that "the evidence of physical abuse disclosed by the minor children can support all six (6) counts the Defendants are charged with, even if this Court does not consider psychological trauma resulting in physical impairment as bodily injury." A.R. 75. A hearing was held on the motion. A.R. 76-92.

On November 18, 2022, the court entered an order dismissing the indictments against both defendants. A.R. 93-97. The court noted that it had "extensive knowledge of the facts and evidence in this case due to numerous hours of testimony in a companion abuse and neglect case and incorporates the same in its consideration and ruling." A.R. 93. The court found that the State represented to the magistrate in the preliminary hearing that psychological injury could be considered as serious bodily injury under the charged statutes and that this is incorrect pursuant to *State v. Hartshorn*, 175 W.Va. 274, 332 S.E.2d 574 (1985). A.R. 94-95. The court went on to find that

> this Court has heard the State's evidence while presiding over the companion abuse and neglect case and finds that there is no evidence supporting any verdict beyond a reasonable doubt that the Defendants "grossly" neglected their children to the point that the children were at a substantial risk of dying, [or] suffering serious or prolonged disfigurement. More specifically, the State put on a great deal of evidence in the Defendants' abuse and neglect case in its attempt to prove aggravating circumstances, which this Court ruled did not exist. Moreover, there is no evidence that the Defendants exhibited a "clear disregard" for their children's health, safety or welfare.

A.R. 96. All six counts were dismissed. A.R. 97. The State now seeks relief through a writ of prohibition with respect to the circuit court's November 18, 2022, Order.

SUMMARY OF ARGUMENT

The State meets the criteria for awarding a writ of prohibition. The Respondent Judge erred as a matter of law in dismissing the indictments against the Respondent Defendants. The Respondent Judge invaded the province of the jury in judging the sufficiency of the evidence. Further, the Respondent Judge erroneously relied upon arguments made in a preliminary hearing and ignored the evidence set forth before the grand jury which supported all the charges against the Respondent Defendants. Because the circuit court erred as a matter of law and exceeded its

legitimate powers in dismissing the indictments, this Court should issue the requested writ of prohibition.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State does not request oral argument in this case. The law is well settled, and a valid Information and plea agreement were rejected and dismissed 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.

ARGUMENT

I. Relief in prohibition is appropriate.

This Court has held 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 the Indictments in 21-F-312 and -313 the circuit court exceeded its legitimate powers and deprived the State of its right to prosecute the case. *See* Syl. Pt. 1, *State ex rel. Games-Neely*, 237 W. Va. 301, 787 S.E.2d 572.

The State has no other adequate means to obtain relief because direct appeal is unavailable. *See, e.g.*, *State v. Walters*, 186 W. Va. 169, 171–72, 411 S.E.2d 688, 690–91 (1991). As this Court held in Syllabus Point 1 of *State v. Jones*, "[o]ur 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.2d 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. 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 indictments themselves were insufficient in that they failed "substantively to charge a crime." *See Walters*, 186 W. Va. at 172, 411 S.E.2d at 691. Rather, the Respondent Judge dismissed the Indictments based on an erroneous finding that there was no evidence to

support the indictments, by erroneously relying on the evidence presented at the preliminary hearing, and by erroneously relying on the evidence presented through the abuse and neglect proceeding. Therefore, direct appeal is not an avenue of relief available to the State.

Thus, if relief in 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.* Accordingly, relief in prohibition is appropriate.

II. The Respondent Judge erred as a matter of law in dismissing valid indictments in this case. Therefore, because the circuit court exceeded its legitimate powers and deprived the State of a valid prosecution and conviction, the State is entitled to relief in prohibition.

The lower court erred in dismissing the indictments in this case. The standard of review of a motion to dismiss an indictment is *de novo*; "[]h]owever, in addition to the *de novo* standard, where the circuit court conducts an evidentiary hearing upon the motion, this Court's 'clearly erroneous' standard of review is invoked concerning the circuit court's findings of fact." Syl. Pt. 1, *State v. Grimes*, 226 W. Va. 411, 701 S.E.2d 449 (2009). "Most courts hold that as a general rule, a trial court should not grant a motion to dismiss criminal charges unless the dismissal is consonant with the public interest in the fair administration of justice." Syl. Pt. 2, *State v. Holden*, 243 W. Va. 275, 843 S.E.2d 527 (2020) (quotation omitted). As the indictments in this case were supported by adequate facts and a dismissal is not a public issue regarding the fair administration of justice the lower court's dismissal was clearly erroneous, and a writ should issue to cure this error.

A. The evidence presented to the grand jury was sufficient to support the indictments, and the lower court was clearly erroneous in dismissing the indictments, thus invading the province of the jury.

"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." Syl. Pt. 3, *Grimes*, 226 W. Va. 411, 701 S.E.2d 449. In this case, there have been no allegations of fraud in the grand jury proceeding. In fact, the defendant does not reference the grand jury proceedings at all, but, instead, harks back to the preliminary hearing arguments made by the assistant prosecuting attorney and the evidence presented in the abuse and neglect proceeding. A.R. 35-38, 69-71, 77-90. This is legally incorrect. "In reviewing the evidence for sufficiency to support the indictment, the court must be certain that there was significant and material evidence presented to the grand jury to support all elements of the alleged criminal offense." Syl. Pt. 7, *State ex rel. Pinson v. Maynard*, 181 W. Va. 662, 383 S.E.2d 844 (1989). Furthermore, "the State is entitled to every reasonable inference to be drawn from the evidence." *State ex rel. Nelson v. Frye*, 221 W. Va. 391, 396, 655 S.E.2d 137, 142 (2007). The evidence before the grand jury was sufficient to allow this case to go to trial and the Respondent Judge erred in dismissing the indictments.

The Respondent Defendants were indicted pursuant to West Virginia Code § 61-8D-3(a), which states, in pertinent part: "If any parent, guardian or custodian shall abuse a child and by such abuse cause such child bodily injury as such term is defined in section one, article eight-b of this chapter, then such parent, guardian or custodian shall be guilty of a felony. . . ." The Respondent Defendants were also indicted pursuant to West Virginia Code § 61-8D-4(a) and (c) which read:

> (a) If a parent, guardian or custodian neglects a child and by such neglect causes the child bodily injury, as bodily injury is defined in section one, article eight-b of this chapter, then the parent, guardian or custodian is guilty of a felony. . .
> ****

> (c) If a parent, guardian or custodian grossly neglects a child and by that gross neglect creates a substantial risk of death or serious bodily injury, as serious bodily injury is defined in section one, article eight-b of this chapter, of the child then the parent, guardian or custodian is guilty of a felony. . . .

The applicable definitions, referenced above and codified in West Virginia Code § 61-8B-1 are as follow:

> (9) "Bodily injury" means substantial physical pain, illness or any impairment of physical condition.
>
> (10) "Serious bodily injury" means bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ.

The evidence in this case is sufficient to overcome a motion to dismiss the indictments. The children have already made statements regarding the substantial physical pain they endured as a result of the unorthodox discipline in this case. A.R. 8-10. The evidence presented to the grand jury was that the children were made to sleep outside in a tent for extended periods of time as punishment, and were made to sit on the rims of buckets, which left bruising and caused pain. A.R. 18-19, 21-22. When left in the tent, the children would have limited food and no shoes. A.R. 19. The testimony before the grand jury also revealed that A.F. would sit on the rim of a bucket for up to 12 hours, causing physical pain from the bucket cutting into his bottom and causing him to have issues with constipation. A.R. 22. Further, sitting on the bucket caused red marks and bruising. A.R. 22-23. This is ample evidence to overcome the motion to dismiss the indictment, as it shows bodily injury sufficient to send the case to the jury.

The conduct of Respondent Defendants caused bodily injury in the form of pain, bruising, and red marks on the bottoms of two children, as well as the physical pain of sleeping outside in a tent for extended periods. The conduct also created a substantial risk of death or serious bodily injury, as the children would have their food restricted and, again, would be forced to sleep outside

in a tent for extended periods. This evidence supports all the elements of the indicted crimes, and should have resulted in denial of the motion to dismiss.

The Respondent Judge abused her legitimate powers in dismissing the indictment considering the evidence put before the grand jury. This Court has stated the rule "that the validity of an indictment is not affected by the character of the evidence introduced before the grand jury, and an indictment valid on its face is not subject to challenge by a motion to quash on the ground the grand jury considered inadequate or incompetent evidence." *State v. Carter*, 232 W. Va. 97, 101, 750 S.E.2d 650, 654 (2013) (quoting Syl. Pt. 2, *State v. Slie*, 158 W.Va. 672, 213 S.E.2d 109 (1975)). Furthermore, there is a "longstanding rule of law" stating that "courts may not 'look behind' grand jury indictments if 'returned by a legally constituted and unbiased grand jury[.]'" *State v. Adams*, 193 W. Va. 277, 284, 456 S.E.2d 4, 11 (1995) (quoting *United States v. Mills*, 995 F.2d 480, 487 (4th Cir.), *cert. denied* 510 U.S. 904 (1993)). "This includes challenges to 'indictments on the ground that they are not supported by adequate or competent evidence.'" *Carter*, 232 W. Va. at 102, 750 S.E.2d at 655 (quoting *Adams*, 193 W.Va. at 284, 456 S.E. 2d at 11).

The *Carter* Court expanded on this notion of reluctance to disturb the findings of a grand jury, stating that

> It is a well-settled principle of our jurisprudence that "[g]enerally speaking, the finding by the grand jury that the evidence is sufficient is not subject to judicial review." Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure*, I–651 (2d ed.1993). *See also Adams*, 193 W.Va. at 284, 456 S.E.2d at 11("Cases are legion supporting the proposition that a defendant may not challenge a facially valid indictment returned by a legally constituted grand jury on the basis that the evidence presented to the grand jury was legally insufficient.")

232 W. Va. at 102, 750 S.E.2d at 655. To put it succinctly, "circuit courts do not routinely peek behind the vehicle of an indictment to assess evidence presented to the grand jury, doing so only

where fraud exists." *State v. McCoy*, No. 19-0894, 2021 WL 4935749, at *7 (W. Va. Supreme Court, Oct. 13, 2021) (memorandum decision).

This Court has long expressed that "the function of the grand jury [ ] is not to determine the truth of the charges against the defendant, but to determine whether there is sufficient probable cause to require the defendant to stand trial." *State v. Spinks*, 239 W. Va. 588, 602, 803 S.E.2d 558, 572 (2017). Given this purpose, circuit courts do not routinely examine indictments to assess the evidence presented to the grand jury, except in cases of fraud, as this Court noted "[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. Pt. 2, *Pinson*, 181 W. Va. 662, 383 S.E.2d 844. This Court adheres to "[t]he presumption [ ] that every indictment is found upon proper evidence. If anything improper is given in evidence before a grand jury, it can be corrected in the trial before a petit jury." *State v. Clements*, 175 W. Va. 463, 472, 334 S.E.2d 600, 609–10 (1985) (internal citation omitted).

The lower court erred in dismissing the indictment when there was no allegation of fraud in procuring the grand jury indictments. Since there was no allegation of fraud, the court is not to look behind the indictment and determine if the evidence is sufficient to obtain a conviction. Rather, the court is only to determine if there was proper evidence put before the grand jury to obtain the indictment, which undoubtedly there was in this matter.

By ignoring the factual basis of the indictment, the Respondent Judge invaded the province of the jury. "The jury is the trier of the facts and in performing that duty it is the sole judge as to the weight of the evidence and the credibility of the witnesses." Syl. Pt. 2, *State v. Delorenzo*, No. 21-0456, 2022 WL 17038560, at *1 (W. Va. Nov. 17, 2022) (to be published) (citations and quotations omitted). Moreover, "[t]he province of the jury as the trier of fact is fundamental in our

system of jurisprudence." *Goodwin v. Shaffer*, 246 W. Va. 354, 360, 873 S.E.2d 885, 891 (2022) (citations omitted). The court wholly ignores the evidence put before the grand jury in this case, failing to even mention the grand jury evidence and relying solely on arguments before the magistrate prior to the grand jury and in the companion abuse and neglect case.[3] These findings are erroneous as a matter of law, and, thus, a writ should issue against the lower court.

"The judge's role in a trial is to make determinations of law; the jury's role is to make determinations of fact." *State v. Slater*, 222 W. Va. 499, 511, 665 S.E.2d 674, 686 (2008) (Starcher, J., dissenting). Instead, the lower court made factual findings in this case while ignoring the evidence put before the grand jury. This is clear error. "[D]ismisal of [an] indictment is appropriate only 'if it is established that 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 substantial influence of such violations." Syl. Pt. 6, *Pinson*, 181 W. Va. 662, 383 S.E.2d 844 (quoting *Bank of Nova Scotia v. United States,* 487 U.S. 250, 261-62 (1988) (additional citations omitted). Again, the Respondent Defendants never argued that there were any violations before the grand jury, nor did they argue that the decision to indict was in some way influenced by any violations. Thus, the court erred in dismissing the indictments.

Rather than challenging the sufficiency of the evidence before the grand jury, the Respondent Defendants challenged evidence put forth before the magistrate in the preceding preliminary hearing. This, too, is error. "In reviewing the evidence for sufficiency to support the indictment, the court must be certain that there was significant and material evidence presented to the grand jury to support all elements of the alleged criminal offense." Syl. Pt. 7, *State ex rel.*

[3] The lower court erred in its findings regarding the abuse and neglect evidence, which will be discussed in greater depth below.

Pinson v. Maynard, 181 W. Va. 662, 383 S.E.2d 844 (1989). The evidence before the grand jury fully supports the elements of the alleged criminal offense as discussed above.

This Court, relying on precedent from the United States Supreme Court, has condemned the very practice condoned by the Respondent Judge:

> Criminal defendants have frequently sought to challenge the validity of grand jury indictments on the ground that they are not supported by adequate or competent evidence. . . . *Costello [v. United States]*, 350 U.S. [359][] 363–64 [(1956)], . . . *Barker v. Fox,* 160 W.Va. 749, 238 S.E.2d 235 (1977). This contention, however, often runs counter to the function of the grand jury, which is not to determine the truth of the charges against the defendant, but to determine whether there is sufficient probable cause to require the defendant to stand trial. *Bracy v. United States,* 435 U.S. 1301, 1302, 98 S.Ct. 1171, 1172, 55 L.Ed.2d 489 (1978).

Pinson, 181 W. Va. at 665, 383 S.E.2d at 847. The State's only obligation to support the indictment was to present evidence sufficient to require the Respondent Defendants to stand trial. As explained above, all elements of the charged crimes were supported by the evidence put before the grand jury to form the basis of the indictments. The Respondent Judge erred in making an improper sufficiency of the evidence ruling which should be left to the jury; accordingly, a writ should issue in this case.

B. Once the indictments by the grand jury were obtained, any arguments made before the magistrate court in the preliminary hearing were meaningless.

The court was also incorrect in relying upon the arguments made in the preliminary hearing to support dismissal in this case. "A preliminary examination conducted pursuant to Rule 5.1 of the West Virginia Rules of Criminal Procedure serves to determine whether there is probable cause to believe that an offense has been committed and that the defendant committed it." Syl. Pt. 2, in part, *State v. Davis*, 236 W. Va. 550, 782 S.E.2d 423 (2015) (quotation omitted). A preliminary hearing, however, is not required if an indictment is procured. *Id.* at Syl. Pt. 3. Further, "a preliminary hearing is not a federal constitutional mandate." *Id.* at 554, 782 S.E.2d at 427. As the

Davis Court noted, "[b]ecause the grand jury makes the probable cause determination necessary for holding the defendant over for trial, the magistrate no longer needs to address that issue." *Id.* at 556, 782 S.E.2d at 429. Once the grand jury made its probable cause determination based on the presentation showing evidence of physical injury, the State's arguments before the magistrate court were no longer relevant for a sufficieny determination. In fact, had the indictment been procured prior to the preliminary hearing, no preliminary hearing would have been required. *See* Syl. Pt. 2, *State ex rel. Rowe v. Ferguson*, 165 W. Va. 183, 268 S.E.2d 45 (1980). Likewise, if the indictment is returned after only a portion of the preliminary hearing has been completed, the preliminary hearing will not resume. *State v. Patrick S.,* No. 18-0522, 2019 WL 5692294, at *11 (W. Va. Supreme Court, Nov. 4, 2019) (memorandum decision) ("Petitioner was not entitled to a continuation of his earlier preliminary hearing once the State secured an indictment.").

The Respondent Judge erred in failing to rely solely on the evidence presented to the grand jury that resulted in the indictments. An indictment by grand jury is "an alternative means of establishing probable cause." *Rowe*, 165 W. Va. at 186, 268 S.E.2d at 46 (citing *Gerstein v. Pugh*, 420 U.S. 103, 117 (1975)). The *Gerstein* Court found that "an indictment, 'fair upon its face,' and returned by a 'properly constituted grand jury,' conclusively determines the existence of probable cause." 420 U.S. at 118 n. 19 (citing *Ex parte United States*, 287 U.S. 241, 250 (1932)). This Court recently discussed the similar purposes of a grand jury and a preliminary hearing, noting that the purpose of each is to determine if there is probable cause to charge a defendant. *Patrick S.*, No. 18-0522, 2019 WL 5692294, at *11. Thus, after an indictment is properly procured, it becomes unnecessary to even hold a preliminary hearing, and, in this case, what occurred in the preliminary hearing becomes essentially irrelevant. Since the Respondent Judge erred in basing

her dismissal on the preliminary hearing and ignoring the grand jury indictment, a writ is appropriate.

C. The Respondent Judge erred in her reliance on the evidence put forth in the abuse and neglect case, and in utilizing that matter to support dismissal of the indictments.

Finally, the Respondent Judge erred in relying on the companion abuse and neglect case for support in her dismissal of the indictments. The Respondent Judge noted that she had presided over the abuse and neglect case and found "no evidence" to support "any verdict beyond a reasonable doubt" to sustain a conviction of either Respondent Defendant. A.R. 96. This finding is both factually erroneous and legally unsound.

To begin, in the companion abuse and neglect case, both Respondent Defendants admitted that they each "engaged in excessive corporal punishment of [their] children which resulted in physical abuse." *In re A.F.-1,* 2022 WL 3949315, at *2; *In re A.F.-1*, 2022 WL 3949414 at *2. Both Respondent Defendants were adjudicated as abusing parents, and both eventually had their rights terminated. *In re A.F.-1*, No. 21-0711, 2022 WL 3949315, at *4; *In re A.F.-1*, No. 21-0712, 2022 WL 3949414, at *3. Accordingly, assuming *arguendo* that considering the facts in an abuse and neglect cases could be proper, the Respondent Judge erred in finding there was "no evidence" to support a conviction based on the abuse and neglect proceedings when both Respondent Defendants specifically admitted to physical abuse.

More importantly, however, is the fact that the State has sole discretion to determine what evidence is meaningful in each arm of its case, and further, is under no duty to present every piece of evidence obtained in every case. "The prosecuting attorney is vested with discretion in the management of criminal causes, which discretion is committed to him or her for the public good and for vindication of the public interest." Syl. Pt. 1, in part, *State v. Satterfield*, 182 W. Va. 365,

387 S.E.2d 832 (1989). The State had no duty to present all of its evidence against Respondents David F. and Jennifer L. in the abuse and neglect proceeding, and, in fact, the investigation has remained ongoing since the closure of that case. Further, the presumption from the Respondent Judge that the evidence must be the same in both cases ignores this Court's clear dictates regarding the purpose of abuse and neglect cases: "civil abuse and neglect proceedings focus directly upon the safety and well-being of the child and are not simply 'companion cases' to criminal prosecutions." *Matter of Taylor B.*, 201 W. Va. 60, 66, 491 S.E.2d 607, 613 (1997). The Respondent Judge's reliance on the abuse and neglect evidence, even if the Respondent Judge had properly qualified said evidence, is simply wrong. The evidence presented in one case has no bearing on the evidence presented in the other; and to opine that an interpretation of the abuse and neglect evidence would not support criminal prosecution, especially in light of the fact that indictments were properly procured, is simply wrong and this error must be corrected. As discussed, the State has no other adequate means for relief and has been prejudiced in a way that cannot be corrected on appeal; accordingly, the State is entitled to the relief requested.

CONCLUSION

In light of the foregoing, the State seeks the immediate issuance of a writ of prohibition, preventing the lower court from enforcing its January 6, 2023, Order and reinstating the Indictments in Monongalia County case numbers 21-F-312 and 21-F-313.

STATE OF WEST VIRGINIA,
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VERIFICATION

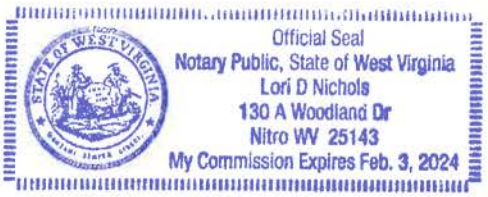
State of West Virginia, Kanawha County, to-wit:

I, Andrea Nease Proper, Senior Assistant Attorney General and counsel for the Petitioner named in the foregoing ***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.

Andrea Nease Proper

Taken, sworn to, and subscribed before me this 17th day of March, 2023

[SEAL]



Notary Public

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. _____

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

Petitioner,

v.

THE HONORABLE SUSAN TUCKER,
Judge, Circuit Court of Monongalia County, West Virginia,
JENNIFER L.and DAVID F.,
Criminal Defendants Below and Parties in Interest,

Respondents.

CERTIFICATE OF SERVICE

I, Andrea Nease Proper, do hereby certify that on the 17th day of March, 2023, I served a true and accurate copy of the foregoing **Petition for a Writ of Prohibition** and **Appendix** under seal upon the below-listed individuals via the West Virginia Supreme Court of Appeals E-filing System pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure, and further, a courtesy copy was mailed to said individuals at the addresses below:

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