IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL. STATE OF WEST VIRGINIA,	:	
	:	Case No.: 25-16
PETITIONER,	:	
-VS-	:	
THE HONORABLE JASON A. CUOMO JUDGE OF THE CIRCUIT COURT OF BROOKE COUNTY,	:	
AND	:	
THOMAS ANTHONY SMOGONOVICH,	:	
RESPONDENTS.		

TO: The Honorables, the Justices of the Supreme Court of Appeals of West Virginia:

Hon. William R. "Bill" Wooton, Chief Justice
Hon. Tim Armstead, Chief Justice
Hon. Elizabeth D. Walker, Justice
Hon. C. Haley Bunn, Justice
Hon. Charles S. Trump, IV, Justice

Hon. C. Casey Forbes, Clerk of Court

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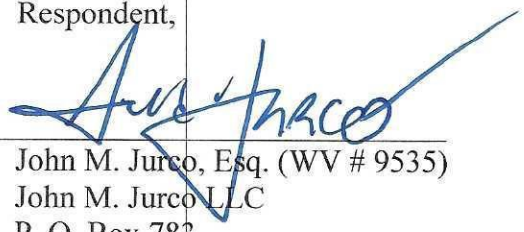
THE RESPONDENT, ANTHONY SMOGONOVICH'S SUMMARY RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION

Arising from the November 12, 2024 Brooke County Circuit Court Order dismissing the case in the underlying Brooke County Circuit Court Criminal Action No.: 23-F-78.

Respectfully submitted,

Anthony Smogonovich,

Respondent,

By: 

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(III) STATEMENT OF THE CASE

On May 12, 2021, a Complaint was filed in Jefferson County Court of Common Pleas – Juvenile Court Division, charging the respondent herein and underlying criminal defendant, Anthony Smogonovich, then 17 years of age, with two counts of having sexual conduct with another person, who was less than 13 years of age. Appendix, at 32.

Count 1 charged Ohio Revised Code 2907.02(A)(1)(b) "rape" and Count 2 charged Ohio Revised Code 2907.05(A)(4) "gross sexual imposition."

The words "forcible compulsion" and "lack of consent" were not used. Indeed, the State did not charge Mr. Smogonovich with forcible compulsion but rather, that he engaged in sexual conduct with someone under age. *Cf.* ORC 2907.02 (A)(1)(b) with (A)(1)(a). And *cf.* ORC 2907.05(A)(4) with (A)(1).

On August 16, 2021, the State dismissed Count 1 and Mr. Smogonovich admitted to Count 2, a third degree felony, whereupon the Trial Court ruled/adjudicated that he was a delinquent child. Appendix, at 36.

Consequently, Ohio law required that Mr. Smogonovich register as a Tier II sex offender for a period of 20 years with in-person verification every 180 days. Appendix, at 37.

Ohio's juvenile registration requirements for Mr. Smogonovich read:

> What happens if a juvenile registrant moves to another State?
>
> Every state has its own registration requirements. No state has the exact same requirements as Ohio, So, before a juvenile registrant moves to another state, he should consult with an attorney to find out what the requirements of that new state are, so that he complies with that state's requirements when he moves.

Appendix, at 48-49.

On November 8, 2023, the Brooke County Grand Jury indicted the defendant for three (3) felony counts of failure to register as a sex offender in alleged violation of West Virginia Code

15-12-8(b). Appendix, at 7-9 (Indictment). The State contends that the underlying predicate offense requiring Mr. Smogonovich to register for life in West Virginia was the August 16, 2021 Ohio juvenile delinquency adjudication for gross sexual imposition, which the State mischaracterized as a "conviction" in the Indictment in Counts 1-3. *Id.*

After the defense moved to dismiss, the prosecutor responded, and the defense replied, the Trial Court issued its November 12, 2024 Order Dismissing Indictment with Prejudice. Appendix, at 88-90.

The State's *Petition for Writ of Prohibition* follows.

(IV) ARGUMENT

(A) The standards of review

The standard of review for writs of prohibition

(1) The West Virginia Code 53-1-1 reads:

> The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.

(2) *State ex rel. Games-Neely v. Overington*, Syl. Pts. 2-4, 230 W.Va. 739, 742 S.E.2d 427 (2013) reads:

> 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." Syl. Pt. 4, *State ex rel. Hoover v.*

Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996).

> The State may seek a writ of prohibition in this Court 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. In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the defendant's right to a speedy trial. Furthermore, the application for a writ of prohibition must be promptly presented." Syl. Pt. 5, *State v. Lewis*, 188 W.Va. 85, 422 S.E.2d 807 (1992).
>
> A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W. Va.Code, 53–1–1' Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977)." Syl. Pt. 2, *State ex rel. Kees v. Sanders*, 192 W.Va. 602, 453 S.E.2d 436 (1994).

(3) A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. Prohibition will issue only in clear cases. *Brown v. Arnold*, 125 W. Va. 824, 26 S.E.2d 238, 1943 W. Va. LEXIS 55 (W. Va. 1943). And "issuance by the Court of an extraordinary writ is not a matter of right, but of discretion sparingly exercised." Rule 16(a), West Virginia Rules of Appellate Procedure.

(4) "To justify the execution of a writ of prohibition, a petitioner has the burden of showing that the lower court's jurisdictional usurpation was clear and indisputable and, because there is no adequate relief at law, the extraordinary writ provides the only available and adequate remedy." *State ex rel. Rose L. v. Pancake,* 209 W.Va. 188, 191, 544 S.E.2d 403 (2001)(citing *State ex rel. Allen v. Bedell,* 193 W.Va. 32, 37, 454 S.E.2d 77, 82 (1994)) –."

(5) "The court has acted, whatever its action may amount to. Prohibition does not lie after action has been had. It is "a preventive rather than a corrective remedy" and cannot be used after the act is done." *Town of Hawk's Nest v. County Court*, 55 W. Va. 689, 48 S.E. 205 (1904)(citing *Haldeman v. Davis*, 28 W. Va. 324 (1886)).

(6) *State ex rel. Williams v. Narick*, 164 W. Va. 632, 638-39, 264 S.E.2d 851 (1980)(citing *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979)) reads:

> In most of the cases where a rule has been issued the question has been exclusively legal and not a mixed question of fact and law. This court is not engineered to be as efficient a finder of fact as a trial court because of the cumbersome procedures for taking depositions. When, however, there is a clear legal question it is often efficient to come in prohibition. . . . However, where the proper resolution of the legal question first depends upon a proper finding of disputed facts, then the efficiency of prohibition disappears because of mechanical problems in fact finding inherent in multimember courts. In that event, surely, the relative adequacy of a remedy by appeal becomes correspondingly enhanced.
>
> In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

Hinkle v. Black, Syl. Pt. 1, 164 W. Va. 112, 262 S.E.2d 744 (1979); *Conley v. Spillers*, 171 W. Va. 584, 301 S.E.2d 216 (1983); *State ex rel. Strickland v. Daniels*, 173 W. Va. 576, 318 S.E.2d 627 (1984); *Ash v. Twyman*, 174 W. Va. 177, 324 S.E.2d 138 (1984); *Board of Educ. v. Starcher*, 176 W. Va. 388, 343 S.E.2d 673 (1986); *State ex rel. King v. MacQueen*, 182 W. Va. 162, 386 S.E.2d 819 (1986); *State ex rel. Elish v. Wilson*, 189 W. Va. 739, 434 S.E.2d 411 (1993); *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 470 S.E.2d 205 (1996); *State ex rel. Cavender v. McCarty*, 198 W. Va. 226, 479 S.E.2d 887 (1996).

The standard of review for dismissal of an Indictment

The Court generally applies a *de novo* standard of review to a circuit court's dismissal of an indictment. See State's *Petition for Writ of Prohibition,* at p. 10. This Court has determined:

> The term "de novo" means "Anew; afresh; a second time." "We have often used the term 'de novo' in connection with the term 'plenary.'. . . Perhaps more

> instructive for our present purposes is the definition of the term 'plenary,' which means '[f]ull, entire, complete, absolute, perfect, unqualified.'" "We therefore give a new, complete and unqualified review to the parties' arguments and the record before the circuit court."

Gastar Expl. Inc. v. Rine, 239 W. Va. 792, 806 S.E.2d 448 (2017); *see also State ex rel. Morrisey v. Diocese of Wheeling-Charleston*, 244 W. Va. 92, 851 S.E.2d 755 (2020). Further, "De Novo review on appeal means that the result and not the language used in or reasoning of the lower tribunal's decision is at issue. A reviewing court may affirm a lower tribunal's decision on any grounds." *Fairmont Gen. Hosp. v. W. Va. Health Care Auth.*, 218 W. Va. 360, 624 S.E.2d 797 (2005); *see also Alcan Rolled Prods. Ravenswood, LLC v. McCarthy*, 234 W. Va. 312, 765 S.E.2d 201 (2014); *Noland v. Va. Ins. Reciprocal*, 224 W. Va. 372, 686 S.E.2d 23 (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. State's *Petition for Writ of Prohibition*, at 11.

(B) Prohibition does not lie where an act has already been done and, as such, the Court should dismiss the case.

Prohibition does not lie after action has been had; it is "a preventive rather than a corrective remedy" and cannot be used after the act is done. *Town of Hawk's Nest v. County Court*, 55 W. Va. 689, 48 S.E. 205 (1904)(citing *Haldeman v. Davis*, 28 W. Va. 324 (1886)).

The Trial Court acted in November, 2024 when it dismissed Mr. Smogonovich's Indictment.

Thus, the Trial Court already acted and the State is impermissibility attempting to use the writ as a corrective measure.

Therefore, the State's petition for writ of prohibition must be denied.

(C) The State has not shown that appeal was an inappropriate remedy and that the State had no other adequate means such as direct appeal to obtain the desired relief. Similarly, the State has not shown that it will be damaged or prejudiced in a way that was not correctable on appeal.

The State acknowledges that W.Va. Code 58-5-30 allows the State to appeal in a criminal case if an indictment is held bad or insufficient by the judgment of a circuit court, but argues that the Trial Court dismissed the indictment based on an erroneous finding that the evidence did not support the indictment, concluding that Mr. Smogonovich's Ohio juvenile delinquency adjudication for an Ohio sex offense was not a conviction under West Virginia Code 15-12-4(a)(2) by which to subject him to the felony offense with which he was indicted. Thus, the State argues that the indictment was not dismissed as bad or insufficient, but rather, based on the evidence. State's Petition for Writ of Prohibition, at p. 7.

W.Va. Code 58-5-30 reads:

> Whenever in any criminal case an indictment is held bad or insufficient by the judgment of a circuit court, the State, on the application of the Attorney General or the prosecuting attorney, may appeal such judgment to the Supreme Court of Appeals. No such appeal shall be allowed unless the State presents its petition therefor to the Supreme Court of Appeals within thirty days after the entry of such judgment. No such judgment shall finally discharge, or have the effect of finally discharging, the accused from further proceedings on the indictment unless the State fails, within such period of thirty days, to file a petition for appeal with the clerk of the court in which judgment was entered; but after the entry of such judgment or order the accused shall not be kept in custody or required to give bail pending the hearing and determination of the case by the Supreme Court of Appeals.

State v. Zain, 207 W. Va. 54, 528 S.E.2d 748 (1999) reads:

> 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.

Where an appeal conforms to the basic requirements of this section and the circuit court's

dismissal was clearly predicated on a finding that the indictment was bad or insufficient, it would be inappropriate for the State to invoke the court's original jurisdiction by petitioning for a writ of prohibition. *State v. Wallace*, 205 W. Va. 155, n.1, 517 S.E.2d 20 (1999), reading:

> The present appeal conforms to the basic requirement of § 58-5-30, since the circuit court's dismissal of the burglary count was clearly predicated on a finding that the indictment was "bad or insufficient." See State ex rel Forbes v. Canady, 197 W. Va. 37, 41, 475 S.E.2d 37, 41 (1996). Consequently, it would have been inappropriate in this case for the State to resort to such an extraordinary remedy. See Syl. pt. 4, State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996) (one criterion used to determine whether a writ of prohibition should issue is "whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief"); Syl. pt. 1, Crawford v. Taylor, 138 W. Va. 207, 75 S.E.2d 370 (1953) ("Prohibition . . . may not be used as a substitute for a writ of error, appeal or certiorari.").

In Mr. Smogonovich's case, the Trial Court ruled that "...the defendant's Ohio juvenile delinquency adjudication for sex offense cannot be considered a "conviction" under W.Va. Code 15-12-4(a)(2) by which to subject him to the felony offenses with which he has been indicted" and therefore dismissed the case. Appendix, at 90. In essence, the Trial Court ruled that: (1) the Indictment failed to contain the necessary predicate "conviction" element of each of the felony offenses therein, therefore not sufficiently apprising Mr. Smogonovich with what he must be prepared to meet; and (2) the Indictment also failed to contain sufficient accurate information – the existence of an actual predicate conviction - to permit a plea of former acquittal or conviction.

Thus, the State has not shown that Trial Court dismissed the Indictment for any other reason than that it was bad or insufficient.

Therefore, the law mandated the State to appeal the Trial Court's ruling rather than petition this Court for a writ of prohibition.

(D) The State has not shown that the Trial Court's Order is clearly erroneous as a matter of law.

(1) The Trial Court correctly ruled on the sex-offender issue.

West Virginia's Sex Offender Registration Act covers W.Va. Code 15-12-1 to 15-12-10.

> In its creation of the Act the Legislature expressly noted that it "is intended to be regulatory in nature and not penal." In spite of the "regulatory" nature of the Petitioner's crime, the Legislature imposed a significant punishment for violators of the reporting requirements. That is, the Legislature did not impose a mere fine for this "simple regulatory scheme." Instead, it imposed significant time in prison for those who failed to comply with reporting requirements.

State vs Patrick C., 243 W.Va. 258, 264, 843 S.E.2d 510 (2020)(citing W. Va. Code § 15-12-1a (2000))

"An important principle applicable in the case before us is that criminal statutes require a strict construction. Penal statutes must be strictly construed against the State and in favor of the defendant." *State v. Cain*, 178 W. Va. 353, 359 S.E.2d 581 (1987).

W.Va. Code 15-12-19(b)(3)(2006) provides that "any person…who is required by the state, federal or military jurisdiction in which he or she resides to register in that state, federal or military jurisdiction as a sex offender, or has been convicted of a violation in that state, federal or military jurisdiction that is similar to a violation in this article requiring registration as a sex offender in this State, shall register in this State and otherwise comply with the provisions of this article." This section does not specify whether out-of-state registrants must register for life or for 10 years.

Assuming *arguendo* that section 15-12-19 required Mr. Smogonovich to register in West Virginia, the issue is the duration of Mr. Smogonovich's registration - whether it be for 10 years or for life – because violation of the 10-year duration results in a misdemeanor charge and the violation of the lifetime registration results in a felony charge.

W.Va. Code 15-12-4(a) specifies when a person must register for 10 years and when they must register for life, and reads:

> A person required to register under the terms of this article shall continue to comply with this section, except during ensuing periods of incarceration or confinement, until:
>
> (1) Ten years have elapsed since the person was released from prison, jail, or a mental health facility or 10 years have elapsed since the person was placed on probation, parole, or supervised or conditional release. The 10-year registration period may not be reduced by the sex offender's release from probation, parole, or supervised or conditional release; or
>
> (2) For the life of that person, if that person: (A) Has one or more prior **convictions** or has previously been found not guilty by reason of mental illness, mental retardation, or addiction for any qualifying offense referred to in this article; (B) has been **convicted** or has been found not guilty by reason of mental illness, mental retardation, or addiction of a qualifying offense as referred to in this article, and upon motion of the prosecuting attorney, the court finds by clear and convincing evidence that the qualifying offense involved multiple victims or multiple violations of the qualifying offense; (C) has been **convicted** or has been found not guilty by reason of mental illness, mental retardation, or addiction of a sexually violent offense; (D) has been determined pursuant to §15-12-2a of this code to be a sexually violent predator; or (E) has been **convicted** or has been found not guilty by reason of mental illness, mental retardation, or addiction of a qualifying offense as referred to in this article, involving a minor or a person believed or perceived by the registrant to be a minor.

(bold emphasis added).

W.Va. Code 15-12-8(b), (c) sets forth a felony penalty for violating the lifetime registration requirement and sets forth a misdemeanor penalty for violating the 10-year registration requirements.

The State indicted Mr. Smogonovich for felony offenses for failing to register for life based on his Ohio juvenile delinquency adjudication, which the State told the grand jury was a conviction. Appendix, at 7-8 (Indictment.)

Problematically, this Court ruled that a juvenile delinquency adjudication does not qualify as a conviction for purposes of the West Virginia Sex Offender Registration Act.

In *State v. J.E.*, 238 W. Va. 543, 796 S.E.2d 880 (2017), this Court addressed the following certified question:

> Does the phrase "any person" within [***9] the meaning of W.Va. Code § 15-12-2(b) of the "Sex Offender Registration Act," W.Va. Code § 15-12-1, et seq., include a juvenile who has been adjudicated for having committed acts of delinquency which would require said person, once having reached the age of eighteen, to register as a sexual offender as required by law?

(The question itself does not include "West Virginia" or "out-of-state" juvenile-delinquency qualifiers; rather, it refers to juveniles adjudicated of delinquency acts requiring their registration as sexual offenders once they reach adulthood.)

The Court engaged in a statutory analysis, first reviewing rules of statutory construction:

> ...the resolution of this issue begins with a review of our rules of statutory construction. This Court has held that HN4 in deciding the meaning of a statutory provision, "[w]e look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." Appalachian Power Co. v. State Tax Dep't of West Virginia, 195 W.Va. 573, 587, 466 S.E.2d 424, 438 (1995); see also Syllabus Point 2, Crockett v. Andrews, 153 W.Va. 714, 172 S.E.2d 384 (1970) ("Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation."); and Syllabus Point 2, State v. Epperly, 135 W.Va. 877, 65 S.E.2d 488 (1951) ("A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.").
>
> Additionally, this Court has held that "[a] statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning." Sizemore v. State Farm Gen. Ins. Co., 202 W.Va. 591, 596, 505 S.E.2d 654, 659 (1998) (internal quotations and citation omitted).

The dispute centered around the parties' conflicting interpretations of the phrase "any person who has been convicted of an offense" contained in W.Va. Code § 15-12-2(b).

The Court determined as follows:

After review, we find that the Legislature and this Court have determined that a

juvenile adjudication is not a conviction. In Syllabus Point 3 of *State ex rel. Slatton v. Boles*, 147 W.Va. 674, 130 S.E.2d 192 (1963), this Court held: "An adjudication of juvenile delinquency by a juvenile court shall not be deemed a conviction." Further, in Syllabus Point 4 of Brooks v. Boles, 151 W.Va. 576, 153 S.E.2d 526 (1967), the Court noted that a proceeding in a juvenile court cannot result in a criminal conviction. The Court held: "Inasmuch as proceedings in a juvenile court cannot result in a criminal conviction, such proceedings do not, in a legal sense, place the juvenile in jeopardy and cannot, therefore, constitute a basis for the defense of double jeopardy.

HN7 The Legislature has also made it clear that a juvenile adjudication is not a criminal conviction. West Virginia Code § 49-4-103 [2015] provides:

> Any evidence given in any cause or proceeding under this chapter, or any order, judgment or finding therein, or any adjudication upon the status of juvenile delinquent heretofore made or rendered, may not in any civil, criminal or other cause or proceeding whatever in any court, be lawful or proper evidence against the child for any purpose whatsoever except in subsequent cases under this chapter involving the same child; nor may the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court; nor may any adjudication upon the status of any child by a juvenile court operate to impose any of the civil disabilities ordinarily imposed by conviction, nor may any child be deemed a criminal by reason of the adjudication, nor may the adjudication be deemed a conviction, nor may any adjudication operate to disqualify a child in any future civil service examination, appointment, [***15] or application.

(Emphasis added).

The two juveniles in the present matters were adjudicated delinquent in juvenile court. As W.Va. Code § 49-4-103 makes [**886] [*549] clear, these juvenile adjudications may not be used under another chapter of the code, such as our sex offender registration statute, W.Va. Code 15-12-2(b), for any purpose whatsoever:

> [A]ny adjudication upon the status of juvenile delinquent heretofore made or rendered, may not in any civil, criminal or other cause or proceeding whatever in any court, be lawful or proper evidence against the child for any purpose whatsoever except in subsequent cases under this chapter involving the same child[.]

Further, the Court determined that "when the Legislature intends to include convicted

persons and adjudicated juveniles in the same statute, it does so explicitly. For instance, W.Va. Code § 62-11B-2 [1994], contained in the "Home Incarceration Act," provides, "[t]his article applies to adult offenders [***16] and to juveniles who have committed a delinquent act that would be a crime if committed by an adult." *State vs J.E.,* cited *supra.*

Similarly, in analyzing the meaning of the phrase "[a]ny person who has been convicted of an offense" contained in W.Va. Code § 15-12-2(b), the Court was guided by the precept that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Id.* (citing *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 586, 466 S.E.2d 424, 437 (1995)). Had the Legislature intended to include adult offenders convicted of a criminal offense and adjudicated juvenile delinquents in W.Va. Code § 15-12-2(b), this Court presumed it would have done so explicitly. *Id.* (citing *Stinson v. Com.*, 396 S.W.3d 900, 903 (Ky. 2013) (internal citations omitted) ("The plain meaning of the statutory language is presumed to be what the legislature intended."); *Fox v. Fox,* 61 Va.App. 185, 196, 734 S.E.2d 662, 667 (2012) ("We look to the plain meaning of the statutory language, and presume that the legislature chose, with care, the words it used when it enacted the relevant statute."); *State v. Rama*, 298 N.J. Super. 339, 689 A.2d 776, 777 (N.J.Super.Ct.App.Div.1997) ("[W]e are not to presume that the Legislature intended something other than what it expressed by its plain language.").

The Court then reviewed cases from outside West Virginia's jurisdiction and determined that courts upholding laws requiring an adjudicated juvenile to register as a sex offender have done so pursuant to clear, explicit statutory direction. By contrast, W.Va. Code § 15-12-2(b) does not include any mention of juvenile offenders, nor does it make any reference to individuals adjudicated delinquent for committing certain sex offenses. *Id.* at *19.

The Court then distinguished the Adam Walsh Act, 42 U.S.C. §§ 16901-16991/ Sex Offender Registration and Notification Act of 2006 (SORNA), determining that the West Virginia Legislature had not adopted the three-tier sex offender system contained therein. *Id.* at *21. (*Cf.* Ohio sex-offender tiered registration with which Mr. Smognovich was subjected.)

In conclusion, this Court did:

> … hold that because this Court, in Syllabus Point 3 of State ex rel. Slatton v. Boles, 147 W.Va. 674, 130 S.E.2d 192 (1963), and the Legislature, in W.Va. Code § 49-4-103, have determined that a juvenile adjudication of delinquency shall not be deemed a conviction, we find the phrase "any person who has been convicted of an offense" contained in W.Va. Code § 15-12-2(b) [2012], does not include a juvenile who has been adjudicated delinquent. We therefore answer the first certified question in the negative.

Id.

The holding does not include "West Virginia" or "out-of-state" juvenile-delinquency qualifiers.

Accordingly, just as this Court ruled that under W.Va. Code 15-12-2, a juvenile adjudication for delinquency shall not be deemed a conviction, this Court should deny the State's petition for writ of prohibition and affirm the Trial Court's consistent ruling that under W.Va. Code 15-12-4(2), a juvenile adjudication for delinquency is not deemed a conviction, thus requiring dismissal of the felony Indictment.

Indeed, to rule otherwise violates Equal Protection and public policy by treating Mr. Smogonovich more harshly under West Virginia law than persons adjudicated delinquent under West Virginia, who do not have to register as sex offenders. There is no lawful basis to do so.

Additionally, Ohio's sexual offender registry to which Mr. Smogonovich was subjected in Ohio appears to be based on the Adams Walsh Act, which West Virginia has not adopted and applied to juvenile delinquents; thus, public policy likewise supports Mr. Smogonovich's

position and there are no circumstances justifying disparate treatment relative to Equal Protection.

West Virginia Constitution Article III, Section 10 reads that "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers."

"The concept of equal protection of the laws is inherent in article three, section ten of the West Virginia Constitution, and the scope and application of this protection is coextensive or broader than that of the fourteenth amendment to the United States Constitution." *Bd. of Educ. of the Cnty. of Cabell v. Cabell Cnty. Pub. Libr.*, 249 W. Va. 618, n.8, 900 S.E.2d 44 (2024).

Kyriazis v. University of W. Va., 192 W. Va. 60, 450 S.E.2d 649 (1994) reads:

> To begin, HN3 equal protection means the State cannot treat similarly situated people differently unless circumstances justify the [***20] disparate treatment. See, Courtney v. State Department of Health, 182 W.Va. 465, 388 S.E.2d 491 (1989); Israel v. Secondary Schools Activities Commission, 182 W. Va. 454, 388 S.E.2d 480 (1989); Janasiewicz v. Board of Education, 171 W.Va. 423, 299 S.E.2d 34 (1982). As two commentators have noted, "the equal protection guarantee has nothing to do with the determination of whether a specific individual is properly placed within a classification. Equal protection tests whether the classification is properly drawn." John C. Nowak and Ronald D. Rotunda, Constitutional Law § 14.2, at 570 (4th ed. 1991).
>
> In Cimino v. Board of Education, 158 W.Va. 267, 274-275, 210 S.E.2d 485, 490 (1974), this Court stated the tests used to determine whether a classification will pass constitutional muster under equal protection:
>
> HN4 Whether a statute or governmental action violates the Equal Protection Clause is a determination made by the application of one of two constitutional tests. The more demanding test relates to [***21] statutes which impinge upon sensitive and fundamental rights and constitutional freedoms, such as religion and speech. In order to uphold such a statute, a reviewing court must find that a compelling state interest is served by the classification. . . .
>
> In all other instances, the constitutionality of a statute, challenged under the Equal Protection Clause, is subject to the traditional standard requiring that the state law be shown to bear some rational relationship to legitimate state purposes. . . . Under this test, the court must consider whether the classification is a rational one based on social, economic, historic or geographic factors; whether the

classification bears a reasonable relationship to a proper governmental purpose; and whether all persons within the classes established are treated equally.

Indeed, the Trial Court dismissed an Indictment that violated Mr. Smogonovich's right to Equal Protection of the law.

Based on the foregoing reasons and rationale, the Trial Court's ruling was not clearly erroneous as a matter of law.

Problematically for the State, this factor and this factor alone must be given substantial weight.

Indeed, this Court's substantial-weight requirement is consonant with this Court's rule that when a Trial Court acts without exceeding its jurisdiction, then prohibition will be used to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

(2) The *Gwaltney* cases are in violation of Rule 12 of the West Virginia Rules of Criminal Procedure and/or otherwise distinguishable

The State heavily relies on the *Gwaltney* cases, *Gwaltney I,* 249 W.Va. 706, 901 S.E.2d 70 (2024) and *Gwaltney II,* ___ W.Va ___, 908 S.E.2d 192 (2024).

The *Gwaltney* Courts ruled in a Syllabus Point that "A circuit court may not grant a defendant's pretrial motion to dismiss an indictment on the basis of the sufficiency of the evidence or whether a factual basis for the indictment exists."

With all due respect, this Syllabus Point contravenes and violates Rule 12 of the West Virginia Rules of Criminal Procedure. See *Gwaltney I,* cited *supra,* at Justice Wooton dissent/concurrence, reading:

The issue presented in this case was very straightforward: Did the circuit court have authority to dismiss an indictment returned by a grand jury charging the respondent parents, J.L. and D.F., with crimes relating to abuse and neglect of their children based solely on legal arguments made during a prior preliminary hearing and [***18] evidence presented during the abuse and neglect proceeding that preceded the criminal case. Based on these facts and circumstances, the majority correctly finds that the circuit court lacked [**81] [*717] the authority to dismiss the indictment and grants the State relief in prohibition, and I concur in its judgment. However, the majority takes a step too far by elevating a sentence from a footnote in State v. Finley, ___ W. Va. ___, ___ S.E.2d ___, 2023 W. Va. LEXIS 383, 2023 WL 6804936 (W. Va. Oct. 15, 2023), into syllabus point three: "A circuit court may not grant a defendant's pretrial motion to dismiss an indictment on the basis of the sufficiency of the evidence or whether a factual basis for the indictment exists." For these reasons, I respectfully dissent from the statement of law articulated in the syllabus point.

The launching point for the majority's new syllabus point is found in footnote eight of Finley, wherein the majority stated:

> "We use the plain error doctrine "sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result." Syl. pt. 4, in part, State v. England, 180 W. Va. 342, 376 S.E.2d 548 (1988). However, this case arises from a conditional plea based upon the circuit court's denial of Mr. Finley's motion to dismiss [***19] a count of the indictment. A circuit court may not grant a defendant's pretrial motion to dismiss an indictment on the basis of the sufficiency of the evidence or whether a factual basis for the indictment exists. See W. Va. R. Crim. P. 12(b)(1) (regarding pretrial motions). Therefore, we review Mr. Finley's conviction for plain error based on the factual basis for his plea rather than reviewing the circuit court's order denying Mr. Finley's motion to dismiss, which could not raise such factual issues. However, this case arises from a conditional plea based upon the circuit court's denial of Mr. Finley's motion to dismiss a count of the indictment. A circuit court may not grant a defendant's pretrial motion to dismiss an indictment on the basis of the sufficiency of the evidence or whether a factual basis for the indictment exists. See W. Va. R. Crim. P. 12(b)(1) (regarding pretrial motions)."

Finley, 2023 W. Va. LEXIS 383, 2023 WL 6804936, at *3 n.8 (emphasis added). Notably, with the exception of a citation to West Virginia Rule of Criminal Procedure 12(b)(1), neither Finley nor the instant case contains any statutory or case law to support that broad statement. Moreover, not even West Virginia Rule of Criminal Procedure 12(b)(1) supports the majority's sweeping premise, as the

rule simply provides, in pertinent part, that "[a]ny defense, objection or request which is capable of determination [***20] without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial . . . (1) Defenses and objections based on defects in the institution of the prosecution . . ." Id.

Fundamentally, as indicated supra, the majority's new point of law fails to address what actually transpired here: the circuit court relied on evidence wholly outside the face of the indictment to support its dismissal of the indictment. Instead, the majority has crafted a very broad point of law that not only allows but requires a repeat of what occurred in Finley: allowing a pure legal challenge to an indictment to be characterized as a factual one that will ultimately force the State and defendants to go through a meaningless jury trial — meaningless because the facts alleged in the indictment do not constitute a violation of the crime alleged therein, whether or not the State proves those facts beyond a reasonable doubt.

In Finley, the indictment charged the defendant with the crime of possession of altered pseudoephedrine, a substance used in making methamphetamine, despite the fact that he was alleged [***21] to be in possession of completed methamphetamine only. See 2023 W. Va. LEXIS 383, 2023 WL 6804936, at *2. The defendant filed a motion to dismiss the indictment on the basis that "there is no evidence that Mr. Finley knowingly possessed pseudoephedrine or another designated precursor with the intent to use it in the manufacture of methamphetamine[;]" the circuit court denied the motion. Id. Thereafter, the defendant entered into a conditional plea agreement wherein he pleaded no contest to attempt to commit possession of pseudoephedrine in an altered state but reserved the right to appeal the denial of the [**82] [*718] motion to dismiss.1Link to the text of the note 2023 W. Va. LEXIS 383, [WL] at *2

Applying the majority's new syllabus point — which, it will be recalled, was only in a footnote at that point — this Court determined in Finley that the circuit court was precluded from granting the defendant's motion to dismiss the indictment because, in the Court's view, whether the facts alleged in an indictment constitute the crime alleged in the indictment is a factual dispute, not a legal one. Now that the Finley footnote has been elevated into a syllabus point, it can, and I fear will be used to force a trial in cases simply because the indictment is legally sufficient on its face, regardless [***22] of whether the actual facts support the crime for which a defendant was indicted.

Not only is this result unfair to both the State and the defendant, it is a complete waste of judicial resources.

For all the foregoing reasons, I respectfully concur, in part, and dissent, in part.

* * * * * *

"West Virginia Rules of Criminal Procedure are the paramount authority controlling criminal proceedings before the circuit courts of this jurisdiction; any statutory or common-law procedural rule that conflicts with these Rules is presumptively without force or effect." *State v. Simmons*, 239 W. Va. 515, 801 S.E.2d 530 (2017) (citing *State v. Davis*, 178 W.Va. 87, 90, 357 S.E.2d 769, 772 (1987) (holding that W.Va. R. Crim. Pro. 7(c)(1) supersedes the provisions of W. Va. Code § 62-9-1 (1931), to the extent that the statute requires the indorsement of the grand jury foreman and attestation of the prosecutor on the reverse side of the indictment), overruled on other grounds, *State ex rel. R.L. v. Bedell*, 192 W.Va. 435, 452 S.E.2d 893 (1994)).

West Virginia Criminal Rule 12(b) reads:

> Any defense, objection or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:
>
> (1) Defenses and objections based on defects in the institution of the prosecution; or
>
> (2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings);

Rule 12(b) excludes jurisdictional issues and failure to charge an offense as being required to be raised before trial. Thus, it includes everything else. *Cf. See In re N.C.*, No. 22-681, 2023 W. Va. LEXIS 378, (Sept. 26, 2023), *quoting* Syl. Pt. 3, *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984) ("In the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies.").

Subdivision (b)(2) requires that a defendant raise any objection to an indictment prior to trial, and although a challenge to a defective indictment is never waived, the courts will construe

an indictment in favor of validity where a defendant fails to timely challenge its sufficiency. *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535, (1996).

Subdivision (b)(2) of this rule requires that a defendant must raise any objection to an indictment prior to trial. *State ex rel. Thompson v. Watkins*, 200 W. Va. 214, 488 S.E.2d 894 (1997).

"For the purposes of Rule 12(b)(2) and Rule 12(f) of the West Virginia Rules of Criminal Procedure, if a defect in a charging instrument does not involve jurisdiction or result in a failure to charge an offense, a defendant must raise the issue prior to trial or the defect will be deemed waived absent a showing of good cause for failing to timely raise the issue." *State v. Tommy Y.*, Syl., 219 W. Va. 530, 637 S.E.2d 628 (2006).

Although a challenge to a defective indictment is never waived, the Supreme Court of Appeals will construe an indictment in favor of validity where a defendant fails timely to challenge its sufficiency; without objection, the indictment should be upheld unless it is so defective that it does not, by any reasonable construction, charge an offense under West Virginia law or for which the defendant was convicted. *State ex rel. Thompson v. Watkins*, 200 W. Va. 214, 488 S.E.2d 894, (1997); *State v. Palmer*, 210 W. Va. 372, 557 S.E.2d 779 (2001).

And in *State vs Bongalis,* 180 W.Va. 584, 378 S.E.2d 449 (1989), "challenges to the 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."

Additionally, *State v. Tommy Y.,* Syl., 219 W. Va. 530, 535, 637 S.E.2d 628 (2006) discusses how Criminal Rule 34 provides that the court on motion of a defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. *See also State v. Johnson*, 219 W. Va. 697, 639 S.E.2d 789,

2006 W. Va. LEXIS 128 (2006), reading that "Though the motion in arrest of judgment based on an insufficient indictment was not timely under W. Va. R. Crim. P. 34, the defects in the indictment were such that they could not be ignored on the basis of a technicality such as timeliness."

If Rules 12 and 34 are followed, then the Trial Court acted well within his jurisdiction and discretion in dismissing the Indictment. In addition to the Indictment's statutory/constitutional violations discussed above, the Trial Court's dismissal was within the scope and purview of Rule 34 because the defect in the indictment – unlawful mischaracterization of Smogonovich's Ohio delinquency adjudication as a conviction – was a defect that could not be ignored and created a subject-matter jurisdictional issue: indeed, the Indictment could not have even charged a felony.

Notwithstanding the foregoing, the *Gwaltney* cases are also distinguishable: in contrast to *Gwaltney,* the Trial Court herein dismissed an Indictment that otherwise would have violated Smogonovich's constitutional right to equal protection and the right to a fair trial. Moreover, the Trial Court dismissed an Indictment which was founded on improper evidence, i.e., Mr. Smogonovich's Ohio juvenile delinquency adjudication mischaracterized as a "conviction" for purposes of West Virginia's registration statute. *See State ex rel. Pinson v. Maynard*, 181 W. Va. 662, 383 S.E.2d 844 (1989), reading:

> We therefore hold, prospectively, as did the Seventh Circuit in Udziela, that [**851] HN6 where perjured or misleading testimony presented to the grand jury is discovered before trial and there is no evidence of prosecutorial misconduct, the State may withdraw the indictment without prejudice, or request the court to hold an in camera hearing to inspect the grand jury transcripts and determine if other sufficient evidence exists to support the indictment. The standard mandated by the United States Supreme Court in Bank of Nova Scotia v. United States, 487 U.S. 250, 101 L. Ed. 2d 228, 108 S. Ct. 2369 (1988) should be applied in this review. "Dismissal 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 the substantial influence of such violations." 101 L. Ed. 2d at 238 (citing Mechanik, 475 U.S. 66, 78, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986) (O'Connor, J., concurring)). Dismissal of an indictment [***21] based on improper testimony of a trivial or inconsequential nature would neither be in the interests of the efficient administration of justice, nor would it be dictated by the court's duty to protect the defendant's constitutional rights. In this review, the court must also ascertain that there was significant and material evidence presented to the grand jury to support all elements of the alleged criminal offense. If the record reveals that the improper evidence substantially influenced the decision to indict or that the remaining evidence is insufficient to support an indictment, the trial court should dismiss the indictment without prejudice.

(E) The State has not shown that the Trial Court's Order is an oft repeated error or manifests persistent disregard for either procedural or substantive law.

The State has not cited one other case where a Trial Court dismissed a failure-to-register felony Indictment against an out-of-state resident based on his juvenile-delinquency adjudication in his state of residence requiring him to register there. Thus, there is no oft repeated error or persistent disregard for procedural or substantive law.

(F) The State has not shown that the Trial Court's Order raises new and important problems or issues of law of first impression.

Only if this Court had not decided the *State vs J.E.* case, cited *supra,* then the Trial Court's Order would have raised a new and important problem/issue of first impression. Such is not the case.

(G) The State has not shown that the Trial Court's Order deprived the State of the right to prosecute the case or to have deprived it of a valid conviction.

Pursuant to the Constitutional right of Equal Protection and the *State vs J.E.* case, cited *supra*, the State had no right to prosecute Mr. Smogonovich for felony failure-to-register.

And the State has not shown that under these circumstances how it would have survived a motion for judgment of acquittal after the close of its case-in-chief at trial. See Rule 29 of the West Virginia Rules of Criminal Procedure.

(V) CONCLUSION

Therefore, the Court should deny the State's petition for writ of prohibition and affirm the Trial Court's dismissal of the Indictment.

WHEREFORE, the respondent, Anthony Smogonovich prays that the Court affirm the Trial Court's decision dismissing the underlying criminal case.

Respectfully submitted,

Anthony Smogonovich,

Respondent,

By:_____

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(VI) CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify that on this 6 day of February, 2025, I served **THE RESPONDENT, ANTHONY SMOGONOVICH'S SUMMARY RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION** on the following through the e-filing system:

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