IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 25-_____

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

Petitioner,

v.

THE HONORABLE LORA DYER,
Judge, Circuit Court of Jackson County, West Virginia,
and JESSE WOOD, Defendant Below
and Party in Interest,

Respondents.

PETITION FOR A WRIT OF PROHIBITION

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QUESTIONS PRESENTED

I. Should a circuit court "vault" seal a criminal defendant's ex parte applications for Rule 17(c) subpoenas, the subpoenas, and the orders granting those applications, rendering those documents inaccessible to the State in criminal prosecutions?

II. Should a circuit court remove an elected prosecutor when the court enters its own order in such a way that the State is given access to a non-detailed order directing that ex parte applications for subpoenas duces tecum (and the subpoenas themselves) be filed under seal?

STATEMENT OF THE CASE

Respondent Jesse Wood is subject to lifetime sex offender registration because of his conviction, in 2015, of one count of possession of child pornography. Pet'r's App. Vol. 1 77. In September 2024, the West Virginia State Police received several "cyber tips" from Sony Interactive Entertainment that included a report of an uploaded file associated with an account in Ripley, West Virginia. Pet'r's App. Vol. 1 69-70. The file image "portray[ed] a prepubescent juvenile female, lying unclothed on a mattress, to be vaginally penetrated by an adult male's penis." Pet'r's App. Vol. 1 71. "The juvenile appear[ed] to be under the age of five . . . years old." Pet'r's App. Vol. 1 71. A state police officer investigated the address associated with the account, and the officer's inquiries led to Respondent Wood. Pet'r's App. Vol. 1 71. Ultimately, the investigation revealed that Respondent Wood was residing at an address that he failed to register, that he used two Sony PlayStation Network screen names that he failed to register, and that two email addresses associated with the PlayStation accounts were unregistered. Pet'r's App. Vol. 1 73. The investigating officer also learned that Respondent Wood was convicted of second-offense failure to register as a sex offender in 2022. Pet'r's App. Vol. 1 73.

For the multiple failures to register uncovered in the investigation, a grand jury indicted Respondent Wood for five counts of second-offense failure to register as a sex offender in June 2025. Pet'r's App. Vol. 1 49-54. Respondent Wood moved for trial within the June 2025 term of

court, which continues until the fourth Tuesday in October. Pet'r's App. Vol. 1 19; W. Va. Tr. Ct. R. 2.05. Respondent Wood's trial is currently scheduled to begin on September 16, 2025. Pet'r's App. Vol. 1 37. He is represented by the Public Defender Corporation for the Fifth Judicial Circuit. Pet'r's App. Vol. 1 19.

Respondent Wood filed an omnibus discovery motion, requesting numerous items, including his own statements, his grand jury testimony, his criminal record, and the State's witness list. Pet'r's App. Vol. 1 5-18. The State filed a statement of disclosure, an exhibit list, a witness list, supplemental discovery, and its own request for reciprocal discovery. Pet'r's App. Vol. 1 21-32, 41, 44, 55-59. Respondent Wood did not offer reciprocal disclosures. Pet'r's App. Vol. 1 55-59.

Instead, consistent with the Public Defender's Office's recent practice, Respondent Wood filed ex parte applications for subpoenas duces tecum, with both the applications and the subpoenas filed under "vault seal," rendering those filings inaccessible by the State. Pet'r's App. Vol. 1 57-58. The circuit court granted the applications in multiple orders, including one styled as an "Order Issuing Requested Subpoenas Duces Tecum Under Seal and Sealing the Ex-Parte Application for a Subpoena Duces Tecum and This Order Issuing Said Subpoenas" (entered on August 22, 2025). Pet'r's App. Vol. 1 58, Vol. 2 1.

The circuit court's order issuing the subpoenas was similarly filed under "seal" but in a manner that left the order, though not generally viewable, accessible by the parties and, thus, the State. Pet'r's App. Vol. 1 58, 84-87. The order made available to the State showed that Respondent Wood sought documents returnable from an "adult parole authority" but provided no other information. Pet'r's App. Vol. 2 2. It appears other ex parte orders were subsequently

entered but not made available to the State. Pet'r's App. Vol. 1 57-58; Pet'r's *Partial Designation of the Record*.

Upon learning that, "[t]hrough no fault of [its] own, the Jackson County Prosecuting Attorney's Office [had] gained access to information that was under seal by order of the [c]ourt" (meaning the circuit court's August 22, 2025 ex parte order), Respondent filed a motion on August 25, 2025, for the appointment of a special prosecutor to displace the Jackson County Prosecuting Attorney's Office. Pet'r's App. Vol. 1 42-43. The circuit court conducted a pretrial hearing on September 8, 2025, at which Respondent Wood's public defender argued in conclusory fashion that a special prosecutor should be appointed simply because the State had received an ex parte order of the court. Pet'r's App. Vol. 1 80, 89. The public defender declined to openly explain how the State's receipt of the order prejudiced Respondent Wood but asked that the court inquire about prejudice ex parte if it needed further information; the court did not do so. Pet'r's App. Vol. 1 89. The public defender argued, also in conclusory fashion, that the ex parte process is justified by her client's indigence. Pet'r's App. Vol. 1 94.

The State objected to the motion for appointment of a special prosecutor, emphasizing that "the State did nothing wrong here." Pet'r's App. Vol. 1 90. It also objected to the court's use of ex parte procedure that is counter to Rule 17 of the West Virginia Rules of Criminal Procedure. Pet'r's App. Vol. 1 90. The assistant prosecuting attorney explained that though Rule 17(b) permits ex parte application for compulsory process when a defendant is financially unable to pay witness fees, the rule applicable here—Rule 17(c) for the production of documentary evidence and objects—contains no similar provision. Pet'r's App. Vol. 1 91-92. Because that rule provides for the "prompt" quashing or modification of a subpoena duces tecum "on motion," the State must have the opportunity to make a motion, and it has no opportunity when the procedure is done on

an ex parte basis. Pet'r's App. Vol. 1 92. Furthermore, he explained, the mere request for documents does not reveal trial strategy. Pet'r's App. Vol. 1 93. In any case, the assistant prosecuting attorney noted, the public defender's office failed to show that it is not permitted to use its budget to request subpoenas. Pet'r's App. Vol. 1 95.

The circuit court received evidence showing how the ex parte order was delivered to the State. A deputy clerk from the Jackson County Circuit Clerk's Office testified at the pretrial hearing that the circuit clerk's office filed the August 22, 2025 circuit court order "under seal" as directed by the circuit court. Pet'r's App. Vol. 1 83. A document filed "under seal" is automatically provided to the parties by the CourtPLUS system. Pet'r's App. Vol. 1 83. The deputy clerk pointedly testified that the circuit court did not direct that the order be filed under "vault seal," which would have prevented dissemination of the order to the parties. Pet'r's App. Vol. 1 83.

Over the State's objection and without discussion, the circuit court granted Respondent Wood's motion for appointment of a special prosecutor. Pet'r's App. Vol. 1 96. The State immediately moved for a stay of proceedings for one week—primarily to stave the State's obligation to request the appointment of a special prosecutor—so that the State could consider petitioning this Court for relief. Pet'r's App. Vol. 1 96-97. The circuit court denied the State's motion.[1] Pet'r's App. Vol. 1 97. The circuit court also told the parties it would no longer accept ex parte applications electronically, and that it would henceforth personally deliver ex parte communications to the circuit clerk, Pet'r's App. Vol. 1 98, thus suggesting that the court intends to continue following the practice at issue.

[1] The circuit court's order from the September 8 hearing has not been entered. Petitioner includes the proposed order in Petitioner's Appendix Vol. 1 at page 1.

SUMMARY OF ARGUMENT

I. The circuit court has permitted Respondent Wood to use ex parte applications for subpoenas duces tecum and obtain resulting subpoenas in a manner that disregards the State's right to reciprocal discovery. The applications, the subpoenas, and the resulting documents are hidden from the State. West Virginia jurisprudence provides no authority for this "secret discovery" approach.

II. The circuit court has removed the Jackson County elected prosecutor from Respondent Wood's case and appointed a special prosecutor in his stead. But no evidence exists showing any relationship or special interest that requires the court to disqualify the elected prosecuting attorney. The court disqualified the prosecutor after *the court* disseminated an ex parte order to the State. The court had no justification for withholding the order from the State in the first place; it certainly had no basis for removing the prosecutor after the prosecutor learned (through no fault of his own) certain minimal facts about the secret discovery. The circuit court's removal of the elected prosecuting attorney and appointment of a special prosecutor deprives the State and the people of Jackson County of the proper representation in this case.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Court need not hear oral argument in this matter because it is apparent that extraordinary relief is warranted and necessary. The Court should issue a rule to show cause and grant the requested relief without further proceedings. *See* W. Va. R. App. P. 16(j).

STANDARD OF REVIEW

Petitioner seeks the extraordinary relief of prohibition, as described in Rule 16 of the West Virginia Rules of Appellate Procedure.

> 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 (W. Va. 1996).

ARGUMENT

I. The Court should issue a writ of prohibition because West Virginia law does not permit the filing and issuance of subpoenas duces tecum under seal in criminal cases.

A. The third *Hoover* factor supports the issuance of a writ of prohibition because the circuit court has allowed Respondent Wood to engage in a dubious practice that usurps the discovery process that the West Virginia Rules of Criminal Procedure prescribe.

West Virginia Rule of Criminal Procedure 17(c) says that a subpoena can be used to obtain "books, papers, documents, or other objects designated therein." But responsive items must then be offered for "inspect[ion] by the parties and their attorneys." W. Va. R. Crim. P. 17(c). Some courts have construed similar language to require defendants to provide notice to the State when obtaining documents through a subpoena duces tecum. *See, e.g.*, *State v. Russell*, 897 N.W.2d 717, 729 (Iowa 2017) ("We conclude that there is no authority, either in a statutory provision or our rules of procedure that would allow Russell to issue an ex parte subpoena duces tecum to a third party without notice to the State."); *Commonwealth v. Cambron*, 546 S.W.3d 556, 562-67 (Ky. Ct. App. 2018) (rejecting the "minority view" that ex parte subpoenas duces tecum may issue

and excoriating a trial court for becoming a "secret ally" of the defense through the "deceptive practice" of ex parte motions).

On information and belief, the Jackson County Public Defender's Office has persuaded the Circuit Court of Jackson County to instead follow a controversial practice in *some federal district courts* that permits indigent criminal defendants to obtain ex parte subpoenas duces tecum returnable before trial under Rule 17 of the *Federal* Rules of Criminal Procedure under *very limited circumstances*.[2] This method is purportedly designed to prevent the government from prematurely discovering an indigent defendant's trial strategy. *See, e.g.*, *United States v. Beckford*, 964 F. Supp. 1010, 1018-20 (E.D. Va. 1997); *but see, e.g.*, *United States v. Urlacher*, 136 F.R.D. 550, 555-56 (W.D.N.Y. 1991) (explaining that Rule 17(c)'s "provision for pretrial production under supervision of the court and upon terms which permit 'inspect[ion] by the parties and their attorneys,' clearly suggests, if not compels, a conclusion that litigation concerning issuance of and compliance with subpoenas duces tecum be conducted upon notice, and not in secret" (citation omitted)); *United States v. Peterson*, 196 F.R.D. 361, 362 (D.S.D. 2000) (same); *United States v. Finn*, 919 F. Supp. 1305, 1330 (D. Minn. 1995) ("[W]hen the Rule is utilized for the disclosure of evidentiary materials in advance of Trial, the application should be reviewable by the other parties to that proceeding."). Rule 17 provides for the right to compulsory process for trial purposes—it's not for use as an "investigative tool." *People v. Baltazar*, 241 P.3d 941, 944 (Colo. 2010). And especially because West Virginia criminal discovery rules disfavor trial by surprise, the circuit court's approach is inconsistent with West Virginia law. *Accord United States v. Fox*, 275 F. Supp.

[2] If the Court determines that the State has misapprehended the circuit court's rationale for its ex parte process, the State respectfully asks the Court to permit supplemental briefing on any outstanding issue.

2d 1006, 1012 (D. Neb. 2003) (holding ex parte subpoena duces tecum should not issue because "there is no entitlement under a plain reading of the Rules to tactical surprise").

"[C]ourts should tread carefully in … ex parte proceedings." *State ex rel. Chris Richard S. v. McCarty*, 200 W. Va. 346, 351, 489 S.E.2d 503, 508 (W. Va. 1997). After all, "due process of law is only upon a hearing of the parties in a court of competent jurisdiction." *Campbell v. Wyant*, 26 W. Va. 702, 707 (W. Va. 1885). And the Jackson County Circuit Court's choice to broadly adopt a limited *federal* practice in a West Virginia *state* court prosecution does not reflect the appropriate care for a few reasons. *First*, the practice offends the reciprocal discovery process; here, Respondent Wood has failed to disclose any trial information, though his trial is scheduled to begin in less than a week. *Second*, the practice is not necessary because West Virginia law already provides indigent defendants with sufficient means to enable investigation. And *third*, the Jackson County Circuit Court has apparently not narrowly tailored this practice to address the natural concerns animating it.

1. Inasmuch as the ex parte applications in this case have been withheld from the State and the circuit court's application and rule analysis have not been divulged, Petitioner will focus this discussion on the known fact: The circuit court's apparent permissive adoption of ex parte procedure unnecessarily thwarts reciprocal discovery practice. As Respondent Wood noted in his omnibus discovery motion, "the ends of justice will best be served by a system of liberal discovery which gives *both parties* the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial." Pet'r's App. Vol. 1 16 (emphasis added) (quoting *Wardius v. Oregon*, 412 U.S. 470, 473 (1973)). But the process deliberately defeats this mutual disclosure.

Rule 16 of the West Virginia Rules of Criminal Procedure explicitly requires a defendant to produce documents and other tangible objects, as well as reports of examinations and tests. W. Va. R. Crim. P. 16(b)(1)(A) and (B). Rule 16 offers clear directives that eclipse Respondent Wood's speculative reading of Rule 17. Rule 16(b)(1)(A) and (B) provides that when a defendant requests disclosure of documents, other tangible objects, reports of examinations, and tests, once the state complies with that request, and upon the State making its own request for such disclosures, the defendant *is required* to permit inspection, copying, or photocopying of any documents in the defendant's possession and which the defendant intends to introduce as evidence during the presentation of his case-in-chief at trial. W. Va. R. Crim. P. 16(b)(1)(A) and (B). That is what happened in this case; Respondent Wood requested certain disclosures, and the State complied with those requests and made requests for reciprocal disclosures from Respondent Wood, thereby triggering Respondent Wood's duty to reciprocate.

The "State's right to request discovery from a defendant is triggered only if the Defendant initially seeks discovery, and is confined to the particular area in which the defendant sought discovery." Syl. pt. 6, *State v. Doonan*, 220 W. Va. 8, 640 S.E.2d 71 (W. Va. 2006) (citation omitted). "Additionally, the State must have complied with the Defendant's initial discovery request before it can request discovery." *Id.* Once the State does so, it is entitled to information in kind. As Chief Justice Wooten has explained, these principles reflect "an intent 'to encourage complete and open discovery consistent with the applicable statutes, case, law, and rules of the court at the earliest practicable time." *State v. Taber*, No. 19-0502, 2021 WL 3833708, at *6 (W. Va. Supreme Court, Aug. 27, 2021 (memorandum opinion) (Wooton, J., concurring) (citation omitted).

Here, the State met its threshold obligation: it has produced requested discovery to Respondent. In Respondent Wood's June 30, 2025 omnibus discovery request, he specifically requested documents and tangible objects pursuant to Rule 16(a)(1)(C), and reports of examination and tests pursuant to Rule 16(a)(1)(D). Pet'r's App. Vol. 1 5-6. At the arraignment, the State provided discovery to defendant. Pet'r's App. Vol. 1 33. In other words, the State complied with all procedural rules, so it was entitled to discover any documents, tangible objects, reports of examinations, and tests that may have been obtained (and which Respondent Wood intended to introduce during his case-in-chief at trial.

Thereafter, the State did indeed request reciprocal discovery—but Respondent has not provided it. Pet'r's App. Vol. 1 21-22, 33, 55-59. In its written discovery request, the State sought permission for "the State to inspect or furnish to the State with photocopies of all books, papers, documents, photographs, tangible objections, or portions thereof which are in the possession, custody or control of" Respondent Wood that he intended to introduce as evidence at trial. Pet'r's App. Vol. 1 21. The State also sought permission to "allow the State to inspect or to furnish to the State with photocopies of any results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the charges" that are in the possession of Respondent Wood and which he intended to introduce as evidence at trial. Pet'r's App. Vol. 1 21. These discovery requests were granted without objection, and Respondent Wood was required "to participate in discovery as required by the rules." Pet'r's App. Vol. 133. But he did not.

The items subject to the secret subpoenas would almost certainly fall within the scope of those reciprocal discovery requests, so the State is entitled to know what they say. After all, if Respondent Wood intended to use relevant information received via that subpoena, the State was entitled to disclosure of that information under Rule 16(b)(1) of the West Virginia Rules of

Criminal Procedure. The docket sheet shows that Respondent Wood has yet to provide any discovery to the State despite the State's reciprocal request for discovery and the circuit court's order requiring him to comply with the discovery rules. Pet'r's App. Vol. 1 21-22, 33, 55-59. Indeed, as of the date of filing, and less than a week from Respondent Wood's trial date, he has not provided a single piece of discovery to the State. Rule 17 protects Respondent Wood from informing the State of his theory of defense prior to trial while trying to obtain compulsory process despite an inability to pay for it himself. But it is not a mechanism of obfuscation or an avenue defendants may utilize to hide evidence that the State is entitled to discover prior to trial in accordance with Rule 16 or other applicable discovery rules. And it is not a mode to impede the State's right to move for modification or quashing of the subpoena, as provided in Rule 17(c). "By requesting an ex parte review of documents before trial, defendant is attempting to convert rule 17(c) into a grand jury-type procedure for private litigants. The courts, however, have uniformly held that rule 17(c) subpoenas may not be used as a discovery device." *United States v. Hart*, 826 F. Supp. 380, 382 (D. Colo. 1993).

2. The circuit court's approach is also mistaken because other ways exist to obtain the information, and none of them call for the secrecy imposed here. Even if secrecy is permitted in obtaining a subpoenas duces tecum—a dubious proposition, *see United States v. Bradley*, No. CRIM. 09-40068-GPM, 2011 WL 1102837, at *2 (S.D. Ill. Mar. 23, 2011)—it is unclear why a defendant represented by the Public Defender Corporation would need to use such a rule. *Cf. Hart*, 826 F. Supp. at 381 ("There is no suggestion in these cases that the *ex parte* procedure would be available for financially able defendants such as Hart."). West Virginia Code §§ 29-21-1 through -22 creates public defender corporations within each circuit tasked with providing legal representation to indigent criminal defendants. Each public defender corporation is provided

annual funding for the sole purpose of carrying out its mission of providing legal representation to indigent criminal defendants. Before May 1 of each year, each public defender corporation is required to submit a funding application and proposed budget for the ensuing fiscal year. W. Va. Code § 29-21-13(a). After obtaining approval, a plan is prepared focused on "providing legal services," a funding contract is executed, and funds are committed to the public defender corporations for those purposes. *Id.* This funding "shall be by annual grants disbursed in such periodic allotments as the executive director shall deem appropriate." W. Va. Code § 29-21-13(c). These funds "shall be used only to provide legal representation for eligible clients involved in proceedings defined by this article as eligible proceedings." W. Va. Code § 29-21-14(a). Panel attorneys—private attorneys not employed by a public defender corporation but who are appointed to represent indigent clients when the public defender corporation within a circuit is unable for some reason to represent the client—are entitled to *reimbursement or compensation for expenses* incurred during the course of providing legal representation to indigent criminal defendants. W. Va. Code § 29-21-13a.

Because of this, it does not appear that a defendant represented by a public defender corporation requires assistance to obtain compulsory process or discovery. The public defender corporation receives funding for the specific purpose of covering the expenses attendant to providing legal representation to indigent criminal defendants. And because obtaining subpoenas for witnesses and documents is such a critical, basic, and fundamental aspect of criminal litigation, the funding the public defender corporations receive must necessarily cover such costs and fees. Thus, the Legislature has already provided Respondent a way to secure these documents—by providing defendants like Respondent with appointed counsel.

3. Even if the Court determines that ex parte practice is acceptable in certain circumstances, it cannot be acceptable in all circumstances. One state court, considering the practice, found that while "ex parte applications for a pretrial subpoena duces tecum are generally impermissible under Rule 17(c)," it is possible "that ex parte process for issuance of such a subpoena may be warranted in certain extraordinary circumstances, such as a case where identification of the source of evidence might imperil the source or the integrity of the evidence or where a fundamental privacy right or constitutional interest of a defendant might be implicated." *State v. DiPrete*, 698 A.2d 223, 228 (R.I. 1997) (emphasis added). There is no evidence that those considerations are present here. This is not an extraordinary circumstance. It appears, instead, to be the very ordinary circumstance where a criminal defendant seeks information which the State is entitled to view. The courts must narrowly tailor any use of ex parte applications and orders to ensure that they are used only, if at all, in extraordinary circumstances and not in disregard of the reciprocal discovery process.

* * *

All this lends to an appearance that Respondent Wood is attempting to use Rule 17 to avoid his discovery obligations pursuant to the circuit court's arraignment order and Rule 16 of the West Virginia Rules of Criminal Procedure. And the circuit court's willingness to go along with this apparent tactic is a clear legal error that fundamentally cuts at the foundation of our State's discovery rules. The issue here is not just a procedural one; it is an issue of fairness. Respondent Wood is required to comply with the Rules of Criminal Procedure as the State of West Virginia has done. For these reasons, a writ of prohibition should issue.

B. The remaining *Hoover* factors support issuance of a writ of prohibition to prevent the circuit court from excluding the State from the discovery process.

The remaining *Hoover* factors support the issuance of a writ of prohibition. The State never had an opportunity to challenge Respondent Wood's use of Rule 17 to obtain the issuance of subpoenas because, by design, it was kept in the dark. And while one can only speculate as to why the defendant in this case—and the Public Defender Corporation for the Fifth Judicial Circuit, in particular—has looked to Rule 17 as the means to obtain subpoenas rather than obtaining them through the normal course, the State has been deprived of any ability to challenge this practice every step of the way. When the State did learn the outcome of the ex parte application—through no fault of its own—it was promptly removed from the case and a special prosecutor was appointed. This chain of events clearly demonstrates the first two *Hoover* factors are met, because the State had no other adequate means, such as a direct appeal, to obtain relief in the form of clarification regarding whether the use of Rule 17 in this circumstance is appropriate. Syl. pt. 4, *Hoover*, 199 W. Va. 12, 483 S.E.2d 12.

The Jackson County Public Corporation and the Jackson Count Circuit Court's conduct in this case represents an "oft repeated error" or manifests a "persistent disregard for either procedural or substantive law," in satisfaction of the fourth *Hoover* factor. *Id.* The record on appeal reveals that this same issue has occurred at least two previous times within the last year. Pet'r's App. Vol. 3 1-35. Thus, this is not an isolated incident that is the result of some peculiarity or particular issue appliable to only this case. It appears that this is a developing pattern within the jurisdiction that has been permitted despite the State's objections.

This issue also raises "new and important problems or issues of law of first impression" because there is no clear legal guidance from this Court on the parameters of Rule 17. And given how the rule has been used on at least three prior occasions to remove the rightful prosecuting

attorney's office from a case that it had indicted, this Court should take this opportunity to expound upon the issue and provide guidance so that this issue can be clearly resolved.

Finally, if this Court finds that the State has failed to meet anything less than all five *Hoover* factors, relief in prohibition is still appropriate. "Although all five [*Hoover*] 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, *Hoover*, 199 W. Va. 12, 483 S.E.2d 12. This case presents a clear error as a matter of law and, therefore, a writ of prohibition should issue.

II. The Court should issue of a writ of prohibition because the people have a right to be represented by their elected prosecutor, and the prosecutor did nothing to justify his removal from Respondent Wood's prosecution.

A. The third *Hoover* factor supports the issuance of a writ of prohibition because the circuit court clearly erred in removing the Jackson County Prosecuting Attorney's Office from the prosecution of Respondent Wood.

In an independent clear error of law, the circuit court disqualified the Jackson County Prosecuting Attorney's Office from the prosecution of Respondent Wood, thereby preventing the prosecuting attorney from fulfilling his duty as the county's chosen prosecutor. The Court should issue a writ of prohibition against that order, too.

Our laws set forth the immutable duty of an elected prosecuting attorney. "The prosecuting attorney *shall* attend to the criminal business of the state *in the county in which he or she is elected and qualified*." W. Va. Code § 7-4-1(a) (emphasis added). "[W]hen the prosecuting attorney has information of the violation of any penal law committed within the county, the prosecuting attorney *shall* institute and prosecute all necessary and proper proceedings against the offender." *Id*. (emphasis added). These are serious duties. "The [constitutionally-created prosecuting attorney's] office is a public trust created in the interest of and for the benefit of the people, and it imposes upon the officer who assumes it certain duties for the public good." *State ex rel. Preissler*

v. Dostert, 163 W. Va. 719, 730, 260 S.E.2d 279, 286 (W. Va. 1979). In his capacity as a "public officer," the prosecuting attorney "is in the position of a fiduciary" to the people who elected him "and he is under an obligation to serve the public with highest fidelity and undivided loyalty. . . . The public officer is bound to act primarily for the benefit of the public and must perform the duties of his office honestly, faithfully and to the best of his ability." *Id*. (internal citations omitted). The prosecuting attorney, consequently, is answerable to the electorate that "selected [him] to represent them and whose salary they pay with their taxes." *Id*. at 732, 260 S.E.2d at 287. "In other words, . . . the prosecuting attorney is the trustee and servant of the people and at all times amenable to them." *Id*.

Axiomatically, then, very good cause should be shown before the electorate is denied the representation of its chosen public servant.

No cause exists in this case for the people of Jackson County to be denied the representation of the prosecuting attorney that is directly answerable to them through the electoral process. "Prosecutorial disqualification can be divided into two major categories. The first is where the prosecutor has had some attorney-client relationship with the parties involved whereby he obtained privileged information that may be adverse to the defendant's interest in regard to the pending criminal charges." *State v. Keenan*, 213 W. Va. 557, 563, 584 S.E.2d 191, 197 (W. Va. 2003) (citation omitted). No evidence suggests that the Jackson County Prosecuting Attorney's Office had an attorney-client relationship with any party involved in this case, and no evidence suggests that the prosecuting attorney's office is in possession of any privileged information that may be adverse to Respondent Wood's interest. "A second category" supporting prosecutorial disqualification "is where the prosecutor has some direct personal interest arising from animosity, a financial interest, kinship, or close friendship such that his objectivity and impartiality are called

into question." *Id.* Neither of the specified categories apply to this case, and the circuit court was wholly without basis to direct the elected prosecutor and his office to stand down.

There is not only a dearth of information showing any sort of disqualifying relationship or interest on the prosecuting attorney's part, but there is also a dearth of evidence that the Jackson County prosecuting attorney or his office possesses information of a privileged nature concerning Respondent Wood's trial strategy.[3] The "Order Issuing Requested Subpoenas Duces Tecum Under Seal and Sealing the Ex-Parte Application for a Subpoena Duces Tecum and This Order Issuing Said Subpoenas" that the circuit court entered on August 22, 2025, is a nearly-single page order that names the entity from which information is sought, and merely states "that the issuance of this subpoena without being under seal could potentially reveal trial strategy" of Respondent Wood "and could result in the inadvertent revelation of information that could be used against" Respondent Wood "if revealed to the State." Pet'r's App. Vol. 2 2. It goes on to state that Respondent Wood, "if he were not indigent, would have the right to have a subpoena issue in blank and served by his own process server and it is only due to his indigency that he must make application for the cost of said subpoena to issue[,] and not placing the request and subpoena under seal would place him in a position in which he would be disadvantaged by his mere indigency alone." Pet'r's App. Vol. 2 2. This is the extent of the order's substance. There is no description of the application. There is no information hinting at the defense strategy. There is no inherent "revelation of information" in the court's order. In short, there is absolutely no disclosure in the court's order that jeopardizes the defense; no information in conveyed that was not already known to the State through just a cursory review of the circuit court's docket. "[T]he disclosure of

[3] In fact, as explained in Section I of this petition, the State has been left very much in the dark about Respondent Wood's trial plans.

documentary evidence obtained via a Rule 17(c)(1) subpoena"—let alone a court order obliquely *alluding* to such evidence "doesn't invariably result in the impermissible disclosure of the defense's trial strategy." *United States v. Sarinana*, No. CR-25-00865-001-PHX-DWL, 2025 WL 2062710, at *2 (D. Ariz. July 23, 2025).

Indeed, the lack of information in the court's order begs the question, "Why did Respondent Wood seek ex parte orders at all?" An ex parte order is not the equivalent of an ex parte subpoena duces tecum. *Cambron*, 546 S.W.3d at 566. The court's rationale in granting an ex parte subpoena duces tecum should not be withheld from the State, nor is it necessary for the court to do so. Even if the Court determines that the unusual procedure that the Jackson County Circuit Court has undertaken is copacetic, it does not follow that the circuit court must follow that procedure in such a cloak-and-dagger manner. The absolute exclusion of the prosecuting attorney from the process leaves the impression of a practice whereunder "defense counsel . . . developed a secret ally in the trial court" and that "the trial court endorsed and fully cooperated in the covert practice." *Id.* at 565-66. The circuit court's order directing the appointment of a special prosecutor punishes the Jackson County prosecuting attorney and his electorate for receiving an order that should not have been withheld from him in the first place.

Moreover, the Jackson County prosecuting attorney did nothing to bring about this situation. Respondent Wood acknowledged in his motion requesting the appointment of a special prosecutor that the State received the court's nondescriptive order "through no fault of [its] own." Pet'r's App. Vol. I 42. No circumstance on the face of the record shows that the Jackson County prosecuting attorney should have been relieved of his duty, and it was clear error of law for the circuit court to call in a special prosecutor. The State has thus shown that the third Hoover factor

favors the issuance of a writ of prohibition, and this factor "should be given substantial weight" in this Court's analysis. *See* syl. pt. 4, *Hoover*, 199 W. Va. 12, 483 S.E.2d 12.

B. The remaining *Hoover* factors support issuance of a writ of prohibition to prevent the circuit court from removing the elected prosecuting attorney.

The circuit court has ordered the removal of the elected prosecutor and his office from the prosecution of a case, and the State "has no other adequate means, such as direct appeal" to ensure that the people of Jackson County are represented by the prosecuting attorney of their choosing. The first *Hoover* factor is, thus, met. *See id.* For the same reason, the State "will be damaged or prejudiced in a way that is not correctable on appeal" if it is not permitted to proceed in the prosecution of Respondent Wood with its chosen prosecuting attorney, and the second *Hoover* factor is present. *See id.* The circuit court's order appointing a special prosecutor is the latest in a pattern in Jackson County and thus represents "an oft repeated error" and "manifests persistent disregard for either procedural or substantive law," as acknowledged by Respondent Wood in his motion for the appointment of a special prosecutor. Pet'r's App. Vol. 1 42; *see* syl. pt. 4, *Hoover*, 199 W. Va. 12, 483 S.E.2d 12. Respondent Wood's statement is supported by filings in other Jackson County criminal cases that Petitioner is providing for the Court's review. Pet'r's App. Vol. 3 1-35. The fourth *Hoover* factor is, consequently, present in this case. *See* syl. pt. 4, *Hoover*, 199 W. Va. 12, 483 S.E.2d 12. Finally, Petitioner has located no other case addressing the involuntary disqualification of a prosecuting attorney based on a circuit court's clear error in the application of law or its disclosure of a non-detailed ex parte order to the State. This case, then, "raises new and important problems or issues of law of first impression" and the fifth *Hoover* factor also weighs in favor of the issuance of a writ of prohibition. *See id.*

CONCLUSION

The circuit court committed clear and egregious errors of law that can be remedied only through the extraordinary relief of prohibition. The Court should issue the requested writ and prohibit the circuit court from removing the elected prosecutor in this case, and further prohibit the circuit court from maintaining the ex parte filings under seal.

Respectfully submitted,

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VERIFICATION

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

I, Michele Duncan Bishop, 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 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.

Michele Duncan Bishop

Taken, sworn to, and subscribed before me this 12th day of September, 2025.

Lori D. Nichols

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 25-_____

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

Petitioner,

v.

THE HONORABLE LORA DYER,
Judge, Circuit Court of Jackson County, West Virginia,
and JESSE, Defendant Below
and Party in Interest,

Respondents.

CERTIFICATE OF SERVICE

I, Michele Duncan Bishop, do hereby certify that on the 12th day of September, 2025, I served a true and accurate copy of the forgoing Petition for a Writ of Prohibition upon the individuals listed below, using the West Virginia Supreme Court of Appeals e-filing system pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure:

Meghan Scarberry, Esq.
Public Defender Corp.
5th Judicial Circuit
P.O. Box 797
Ripley, WV 25271

And via first-class mail, postage prepaid, addressed as follows, to the Respondent Judge:

Honorable Lora Dyer, Judge
Jackson County Courthouse
P.O. Box 800
Ripley, WV 25271

Michele Duncan Bishop
Senior Assistant Attorney General