

**STATE OF WEST VIRGINIA**  
**SUPREME COURT OF APPEALS**

**State of West Virginia ex rel.**  
**Dalton Ours,**  
**Petitioner**

**v.) No. 25-788** (Grant County No. CC-12-2025-B-13)

**The State of West Virginia and the**  
**Honorable F. Cody Pancake III,**  
**Judge of the Circuit Court of Grant County,**  
**Respondents**

**MEMORANDUM DECISION**

Petitioner Dalton Ours seeks a writ of prohibition to preclude Respondent F. Cody Pancake III, Judge of the Circuit Court of Grant County, from enforcing his September 5, 2025, order denying the State’s motion to dismiss two counts of third-degree sexual assault against the petitioner.<sup>1</sup> As explained below, the circuit court exceeded its legitimate powers by denying the State’s good faith motion to dismiss, to which the petitioner consented. Therefore, we grant the requested writ and prohibit the circuit court from enforcing its order denying the motion to dismiss. We determine that oral argument is unnecessary and that this case satisfies the “limited circumstances” requirement of Rule 21(d) of the Rules of Appellate Procedure for issuance of a memorandum decision rather than an opinion.

The petitioner submitted to a preemployment polygraph examination in anticipation of being hired as a deputy sheriff. West Virginia Code § 21-5-5b permits a West Virginia law enforcement agency to use a polygraph examination to evaluate a person’s employability but provides that “the results of any examination shall be used solely for the purpose of determining whether to employ or to continue to employ any person exempted hereunder and for no other purpose.”

A certified polygraph examiner, who was a retired West Virginia State Police trooper, conducted the petitioner’s examination. At some point during the polygraph examination, the petitioner admitted to inappropriate sexual contact with a minor female under the age of sixteen. In his capacity as a mandatory reporter, the polygraph examiner reported the petitioner’s incriminating statements during the examination to the West Virginia State Police. During the ensuing investigation, the State Police spoke to both the petitioner and the victim. In March 2025,

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<sup>1</sup> The petitioner appears by counsel Daniel R. James, and the State of West Virginia appears by counsel Attorney General John B. McCuskey and Deputy Attorney General Andrea Nease.

the State Police obtained a Mirandized confession from the petitioner and thereafter charged him with two counts of third-degree sexual assault. The case was bound over for the grand jury.

In August 2025, the State filed a motion to dismiss the charges against the petitioner, and the circuit court held a hearing at which the petitioner joined in the State's motion. In seeking the dismissal, the prosecuting attorney interpreted West Virginia Code § 21-5-5b as preventing the petitioner's polygraph examination from being used to prosecute him. The prosecuting attorney further stated that he consulted the executive director of the West Virginia Prosecuting Attorneys Institute,<sup>2</sup> who agreed that West Virginia Code § 21-5-5b precluded the petitioner's prosecution based upon his polygraph examination.

By order entered on September 5, 2025, the circuit court denied the State's motion to dismiss. The circuit court disagreed with the prosecuting attorney's interpretation of West Virginia Code § 21-5-5b, finding that the polygraph examination results were protected from being disclosed as part of a Freedom of Information Act request but concluding that this code section did not guarantee immunity. Importantly, the court did not find that the prosecuting attorney was acting in bad faith in moving to dismiss the charges against the petitioner.

The petitioner files this original jurisdiction petition for a writ of prohibition, arguing that the circuit court exceeded its legitimate powers by denying the State's good faith motion to dismiss the criminal charges against him. To decide this petition, we consider the following factors:

“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 had 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.” Syllabus point 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

Syl. Pt. 2, *State ex rel. Cross v. Wilmoth*, 250 W. Va. 683, 907 S.E.2d 805 (2024).

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<sup>2</sup> West Virginia Code § 7-4-6(a) establishes the West Virginia Prosecuting Attorneys Institute as “a public body whose membership shall consist of the 55 elected county prosecuting attorneys in the state,” and West Virginia Code § 7-4-6(d) lists the duties of the Institute and its executive director.

The circumstances under which a circuit court may deny a motion to dismiss by the prosecution, when the defendant consents to the motion, are narrow and rare. *See id.* at 685, 907 S.E.2d at 807, Syl. Pt. 4. In Syllabus Point 4 of *Cross*, we held that (1) pursuant to Rule 48(a) of the West Virginia Rules of Criminal Procedure, when a defendant consents to a dismissal sought by the State, the circuit court must determine “whether dismissal is consistent with the public interest in the fair administration of justice”; (2) a sought-after dismissal satisfies the public interest “if the State acts in good faith at the time the State seeks dismissal”; and (3) “[a] motion that is not motivated by bad faith *must be granted*.” *Id.* at 685, 907 S.E.2d at 807 (emphasis added).

Here, the State responds that it does not oppose the issuance of a writ of prohibition, arguing that the circuit court’s failure to dismiss the criminal charges against the petitioner is contrary to this Court’s recent decision in *Cross*, in which the Court concluded that a circuit court exceeded its legitimate powers by denying the State’s good faith motion to dismiss a criminal case. *Id.* at 693, 907 S.E.2d at 815. The circuit court did not discuss this Court’s opinion in *Cross* when it denied the motion to dismiss in this case.

Upon our review, we agree with the parties and conclude that the circuit court erroneously denied the State’s motion to dismiss. The petitioner consented to the dismissal sought by the State, and the prosecution based its motion on its interpretation of whether evidence was admissible. Indeed, before filing the motion to dismiss, the prosecuting attorney consulted the executive director of the West Virginia Prosecuting Attorneys Institute, who also concluded that West Virginia Code § 21-5-5b prevented the petitioner’s polygraph examination from being used to prosecute him. Here, “the court did not limit its inquiry to whether the prosecutor acted in good faith at the time the State sought dismissal[.]” instead focusing on competing interpretations of a statute and the admissibility of evidence. *Id.* (internal quotations omitted). Furthermore, the circuit court made no finding, and considered no evidence, that the prosecuting attorney acted in bad faith by moving to dismiss the charges against the petitioner. While this Court makes no determination as to which interpretation of West Virginia Code § 21-5-5b is correct, under such circumstances, where no bad faith is demonstrated, the State’s motion to dismiss the charges against the petitioner “must be granted.” *Cross*, 250 W. Va. at 685, 907 S.E.2d at 807, Syl. Pt. 4.

Having found that the circuit court erred by refusing to dismiss the charges at the State’s request, we now apply the *Hoover* factors and conclude that the petitioner is entitled to a writ of prohibition. *See Hoover*, 199 W. Va. at 14-15, 483 S.E.2d at 114-15, Syl. Pt. 4. Most importantly, the circuit court’s denial of the motion to dismiss constitutes a clear error of law, satisfying the third *Hoover* factor. *Id.* Moreover, we concur with the petitioner’s argument that he has no other adequate means of relief, such as avoiding a criminal prosecution, if the State’s good faith motion to dismiss is not granted, satisfying the first *Hoover* factor, and that he “will be damaged or prejudiced in a way that is not correctable on appeal” if the petitioner is indicted and forced to stand trial, which satisfies the second *Hoover* factor. *Id.*; *Cross*, 250 W. Va. at 693, 907 S.E.2d at 815 (concluding that the circuit court exceeded its legitimate powers by denying the State’s good faith motion).

For the foregoing reasons, we grant the writ of prohibition, precluding the circuit court from enforcing its September 5, 2025, order denying the State’s motion to dismiss the criminal charges against the petitioner.

Writ granted.

**ISSUED:** August 25, 2026

**CONCURRED IN BY:**

Chief Justice C. Haley Bunn  
Justice William R. Wooton  
Justice Charles S. Trump IV  
Justice H. L. Kirkpatrick  
Justice James W. Flanigan