IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 25-_____

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

Petitioner,

v.

THE HONORABLE THOMAS FAST,
Judge, Circuit Court of Fayette County, West Virginia,
and MICHAEL DOUGAN,
Defendant Below,

Respondents.

PETITION FOR A WRIT OF PROHIBITION

JOHN B. MCCUSKEY
ATTORNEY GENERAL

William E. Longwell (WV Bar # 12290)
Assistant Attorney General
State Capitol Complex
Building 6, Suite 406
Charleston, WV 25305
Telephone: (304) 558-5830
Facsimile: (304) 558-5833
Email: William.E.Longwell@wvago.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statute

Rules

INTRODUCTION

Respondent Judge Thomas Fast committed clear error as a matter of law when he granted Respondent (Defendant) Michael Dougan's motion to dismiss sixteen counts of his indictment for preindictment delay.

In alleging a due process violation from preindictment delay, Defendant faced a heavy burden. *See State ex rel. Knotts v. Facemire*, 223 W. Va. 594, 678 S.E.2d 847 (W. Va. 2009). First, he was required prove the delay caused him actual prejudice that has materially and substantially impacted his ability to defend against the State's allegations. Second, he was required to prove the prejudice outweighed any reason for the delay. But note the threshold requirement: if Defendant could not establish actual prejudice, then the circuit court was required to reject Defendant's claim no matter the reason for the delay.

Respondent Judge granted Defendant's motion even though he did not show actual prejudice. Actual prejudice cannot be based on speculation or conjecture; a defendant must present substantial evidence that demonstrates, with specificity, the prejudice that resulted from the delay. But here, the circuit court found that Defendant suffered actual prejudice based solely on Defendant's speculation and conjecture. Defendant had *no* specific proof of prejudice. This failure alone warrants the issuance of a writ of prohibition.

Still, the circuit court compounded its error by failing to conduct the required balancing test adopted in *Facemire*. The circuit court noted only that the State did not offer a reason for the delay. But several plausible (and reasonable) explanations for the delay can be discerned from the record. So the State's inability in this case to offer a specific reason for the delay did not, by itself, justify the circuit court disregarding and dispensing of its obligation to conduct the required balancing test.

Because of the circuit court's errors, the State has been deprived of its ability to prosecute and—if the evidence proves the offenses beyond a reasonable doubt—to convict Defendant of several serious sexual offenses perpetrated upon his minor family member. The only way for the State to be restored to its rightful position is for this Court to intervene and issue a writ of prohibition preventing the enforcement of the circuit court's illegal order dismissing more than half of the counts charged in the indictment returned against Defendant.

For these reasons, the State requests that this Court issue a writ of prohibition.

QUESTION PRESENTED

Did the Fayette County Circuit Court exceed its authority and commit clear legal error by granting Defendant's motion to dismiss portions of an indictment based on preindictment delay—depriving the State of its ability pursue a criminal prosecution and conviction—upon nothing more than speculation as to the prejudice suffered from the delay?

STATEMENT OF THE CASE

A Fayette County grand jury returned a thirty-one count felony indictment in May 2024 charging Defendant with multiple counts of sexual assault and incest. App. 21-32.[1] Counts 1 through 16 charged seven counts of second-degree sexual assault; seven counts of incest; one count of attempted second-degree sexual assault; and one count of attempted incest. App. 21-26. Each

[1] The State has contemporaneously filed an Appendix Record in accordance with Rules 7 and 16(e) of the West Virginia Rules of Appellate Procedure. Pursuant to Rule 40(c) of the West Virginia Rules of Appellate Procedure, the State further notes that the Appendix Record contains confidential materials, which is conspicuously noted on the Appendix Record's cover sheet.

of the first sixteen counts named Defendant's biological sister, R.E.C.,[2][3] as the victim, and further alleged that each offense occurred sometime between 2007 and 2011. App. 21-26. The remaining counts allege various counts of second-degree sexual assault, incest, and sexual abuse by a parent, guardian, or custodian against Defendant's biological daughter, N.D.S. App. 26-31.

Four months after the return of Defendant's indictment, the parties took deposition testimony of Defendant's mother, Nancy Dougan. App. 51. The parties apparently deposed Ms. Dougan to preserve her testimony about the allegations contained in the indictment in light of Ms. Dougan's then-deteriorating health. App. 11, 14-15. Ms. Dougan explained that she had been suffering from cancer for approximately two and a half years. App. 72-73. She also testified that the cancer and the treatments she had been receiving had adversely impacted her eyesight and memory. App. 73.

Ms. Dougan testified that she and her late husband, Patrick Dougan, adopted Defendant. App. 55, 63. Throughout 2007 and 2011—the timeframes alleged in Counts 1 through 16 of the indictment—Ms. Dougan testified that she, her husband, Defendant, and numerous other children lived in their family home in Oak Hill, Fayette County, West Virginia. App. 55-58. She acknowledged that the victim, R.E.C., also lived in the home during the relevant timeframe, but she insisted she never saw or heard Defendant "do anything sexual to [R.E.C.]." App. 62. She further denied R.E.C. ever disclosing to her that Defendant had sexually assaulted, abused, or

---

[2] Pursuant to Rule 40(e) of the West Virginia Rules of Appellate Procedure, the State will refer to the minor victim by their initials to protect the identity of said victim and to prevent the dissemination of personal identifying information.

[3] R.E.C. is also referred to in some records as R.E.B. For purposes of this petition, the State will refer to the victim as R.E.C., as that is how she is identified in the instant indictment.

touched her. App. 62.[4] Ms. Dougan further testified that Defendant had regular contact with—or access to—R.E.C. from 2007 through 2011. App. 74. Although she reiterated that R.E.C. had never told her that Defendant sexually abused or assaulted her, she acknowledged that abuse and neglect proceedings were instituted in 2011 based upon allegations that Defendant had sexually assaulted R.E.C. App. 74-75.

Approximately five months after Ms. Dougan's deposition, Defendant filed a motion to dismiss Counts 1 through 16 of the indictment based on the preindictment delay. App. 10-13. In support of his motion, Defendant correctly noted that the allegations set forth in Counts 1 through 16 stemmed from the same allegations that resulted in the 2011 abuse and neglect proceedings. App. 10. Defendant complained that the State failed to file contemporaneous criminal charges against Defendant at that time. App. 10. Instead, charges were not filed until 2023, when Defendant's biological daughter, N.D.S., made new allegations that Defendant had sexually abused her between August 2018 and June 2023. App. 10. The motion further alleged that Defendant's father, Patrick Dougan, and his mother, Nancy Dougan, passed away in August 2023 and December 2024, respectively. App. 11.

Defendant's motion noted that since the institution of the 2011 abuse and neglect proceedings, three separate individuals have held the position as the elected prosecuting attorney in Fayette County. App. 11. Carl Harris, who was the elected prosecutor in 2011, retired in 2014. App. 11. Mr. Harris was succeeded by Larry Harrah, who served as the prosecuting attorney from January 2015 through December 2019. App. 11. Jeffery Mauzey took office in December 2019 and served until December 2020. App. 11. The current prosecuting attorney, Anthony Ciliberti,

[4] Although this will be addressed below, Nancy Dougan's claim that she had no knowledge of the abuse are directly and explicitly belied by information contained in the underlying abuse and neglect proceedings.

took office in January 2020, and has continued to serve as Fayette County Prosecuting Attorney since then. App. 11.

Defendant argued that the thirteen-year delay between the State learning of the offenses and the formal institution of criminal proceedings in 2024 resulted in "actual and substantial" prejudice because "Patrick and Nancy Dougan are witnesses who cannot appear at trial." App. 11. "The [Dougans] had physical and legal custody of the alleged victim and her siblings and were knowledgeable of people and events within their household." App. 11. Defendant also claimed that the delay in prosecution left him "unable to rely on vital witnesses at trial," but he supported this claim with no evidence or proffer as to what either Patrick or Nancy Dougan would have offered at trial had either been available to testify. App. 11. Defendant then asserted that if he "is able to meet his burden of [proving] actual [ ] prejudice, the [ ] court should proceed to consider the reasons offered by the State for the delay and determine, after weighing the tendered justifications against the demonstrate[d] prejudice, if due process was denied based on preindictment delay." App. 11 (citing *Facemire*, 223 W. Va. 594, 678 S.E.2d 847).

Approximately one week after Defendant filed his motion, the State filed a written objection. App. 14-19. The State agreed with Defendant's recitation of facts in his motion but asserted that the testimony taken from Nancy Dougan during her deposition may be presented to the jury despite her passing. App. 14-15. Regardless of the unavailability of either witness, "Defendant ha[d] not explained in his Motion . . . why the video deposition of Nancy Dougan would not be sufficient to present the information from Nancy Dougan to the jury." App. 15. What's more, the offenses charged in Counts 1 through 16 involved allegations that Defendant sexually assaulted R.E.C. "in private," so the assaults "were not witnessed by anyone other than Defendant and the victim." App. 15. And although Defendant had obtained other substantial evidence from the "complete case file from the West Virginia Department of Health and Human Services[,] which consists of 1170 pages of documentation and audio/video recorded statements of the victim, R.E.C.," Defendant still had not alleged "with any specificity the testimony that would have been offered by Patrick or Nancy Dougan." App. 15. Finally, the State pointed out that Defendant had not "set forth in his Motion what steps have been taken by the Defendant to obtain the information that would have been provided by Nancy Dougan and Patrick Dougan from other sources." App. 15. Among other things, numerous other individuals lived in the Dougan home at the time of the assaults, yet Defendant failed to show how those individuals were unable to offer the same or similar testimony that Defendant alleged his parents could have offered. App. 15.

The State acknowledged that it could "offer no explanation as to why a prosecution of the Defendant was not pursued contemporaneously with the abuse and neglect proceeding that was instituted in 2011." App. 16. The State had reached out to the prosecuting attorney in office at the time the abuse and neglect proceedings were instituted in 2011, but the former prosecutor could not provide an explanation as to why criminal charges were not filed at the time. App. 16.

Based upon all of this, the State asserted that Defendant's motion should be denied for failure to set forth facts sufficient to meet this Court's standard under *Facemire*. App. 17. As to Patrick Dougan, the State noted that "the Defendant completely fails to allege what the testimony of Patrick Dougan would have been had [he] been called as a witness to testify at trial." App. 18. The State also asserted that Defendant had failed to identify what steps—if any—he had taken to obtain the information from other available sources. App. 18.

As to Nancy Dougan, the State similarly noted that Defendant had not alleged what her testimony would have been, nor did he specify why presenting the jury with Nancy Dougan's deposition testimony would not be sufficient in light of her passing. App. 18. The State also noted Defendant's failure to demonstrate that he attempted, but was unsuccessful, to obtain the information Nancy Dougan would have offered at trial from some other available source. App. 18.

An evidentiary hearing was held before the Fayette County Circuit Court in February 2025 upon Defendant's motion. App. 94. Defendant called three witnesses during the hearing: private investigator Andrew Wheeler; Defendant's biological sister, Lita Underwood; and Defendant's biological mother, Rita Hunt. App. 95.

Andrew Wheeler testified that he was asked to interview Nancy Dougan in June 2024 about the allegations in the indictment. App. 99-100. Without offering many specifics, Mr. Wheeler testified that Ms. Dougan struggled to recall several events on her own. App. 101. Still, the interview yielded some information through "collaborative effort[s]" with two other individuals who were present at the time of the interview. App. 100-101. Petitioner did not question Mr. Wheeler regarding Ms. Dougan's substantive responses to questions regarding the allegations contained in Counts 1 through 16. App. 99-102. On cross-examination, Mr. Wheeler stated that two other individuals were present during the interview that assisted Ms. Dougan in responding to the questions asked of her. App. 102. In total, Mr. Wheeler's testimony was vague, and offered only broad statements regarding Nancy Dougan's ability to recall certain timeframes. App. 99-104.

Lita Underwood testified that Defendant is her adoptive brother and that R.E.C. is her niece. App. 130-31. Although she did not live at the Dougan home between 2007 and 2011, she lived just a short walk away and visited the home "[a]ll the time." App. 107. She testified that Patrick Dougan never spoke to her about R.E.C.'s allegations that she had been physically or sexually abused. App. 108. She also offered vague testimony regarding the location of Patrick Dougan's bedroom at various times during the 2007 to 2011 timeframe and its proximity to R.E.C.'s bedroom. App. 108-09. She testified that Patrick Dougan dealt with declining health in his final years before his death in August 2023. App. 109. On cross-examination, Ms. Underwood confirmed that in addition to Patrick, Nancy, and Defendant, R.B., R.M.B., and H.S. were all residing in the Dougan residence from 2007 through 2011. App. 114. The only evidence Ms. Underwood offered regarding the potential testimony of Patrick or Nancy Dougan was her general denial that either mentioned that R.E.C. made allegations that she had been sexually molested. App. 118. She acknowledged, however, that she was present in 2011 when CPS removed the children from the Dougan home, and that she knew that the reason for the removal was because Defendant "supposedly molested [R.E.C.]" App. 118-19.

Rita Hunt testified that Defendant is her biological son, but her parents, Patrick and Nancy Dougan, adopted him. App. 120. R.E.C. is her daughter, making her Defendant's biological sister. App. 120. R.E.C. initially lived with Hunt after her birth, but she began living with Nancy and Patrick Dougan sometime around 2001. App. 121. Hunt did not live with the Dougans when R.E.C. was living with them between 2007 and 2011, as she lived in numerous areas throughout Fayette County during that period of time. App. 121. She stated that neither Patrick nor Nancy Dougan mentioned that R.E.C. made allegations of sexual or physical abuse against Defendant. App. 123. She confirmed that Nancy Dougan's memory deteriorated during her final years as she was battling cancer. App. 123-126.

At the close of evidence, both parties were given the opportunity to argue their respective positions. App. 130. Defendant noted this Court's holding *Facemire*, but misstated the actual test: "It is basically a two-part inquiry. Did the [S]tate know about the allegations of criminal activity;

was there an unreasonable delay, and . . . [p]art two: . . . due to that delay, was the Defendant prejudice[d] in a material [manner]?" App. 130. Defendant focused on the fact that the State knew of the sexual assault allegations contained in Counts 1 through 16 as far back as 2011 as evidenced by the abuse and neglect proceedings. App. 130. He noted that no criminal complaint was filed contemporaneously with the abuse and neglect proceedings, and that the failure to bring the charges then deprived him of the opportunity to call Patrick or Nancy Dougan to testify due to their passing in 2023 and 2024. App. 130-31. Specifically, Defendant alleged that "if this case was brought in a timely manner, [Patrick Dougan] certainly might be able to tell us whether children have stepped forward with a complaint or allegation, whether he heard anything, whether he saw anything." App. 131. Despite this claim, Defendant never identified anything specific that Patrick Dougan would have offered if called to testify at trial, instead speculating that "throughout this period, if something was amiss in the household, he might have been in a position where he should have known about it. All of those things can be material in a criminal trial." App. 131. Based only upon things Patrick "might" have said, Defendant claimed that his unavailability "is a source of material prejudice for [Defendant] to present a defense." App. 131.

Defendant's argument regarding the alleged prejudice from Nancy Dougan's unavailability was similarly speculative. He offered more "mights": "If something . . . was going on in her household, she might be in a position to know about it or should have known about it." App. 132. Defendant offered a conclusory assertion that Ms. Dougan's unavailability "is a substantial source of prejudice, which materially affects [Defendant's] ability to [present a] defense." App. 132. Defendant also claimed that Nancy and Patrick Dougan's passing has left him without a means to "fact check" testimony offered by R.E.C. at trial. App. 132-33.

Finally, Petitioner argued a conflation of the two *Facemire* prongs and asserted that "there has been a substantial delay. We haven't heard any good reason for that delay, and as a result of that delay, [Defendant] has been prejudice[d]."[5] App. 133.

The State immediately pointed out that "counsel for the Defendant has [not] set forth the appropriate standard the [c]ourt needs to consider." App. 133. The State acknowledged that it could not provide a reason for the decision to forego formally charging Defendant with sexually assaulting R.E.C. in 2011. App. 133-34. But it but noted that this Court's decision in *Facemire* required Defendant to prove prejudice. App. 134-35. *Facemire*, the State explained, explicitly provides that "vague assertions of lost witnesses, faded memories, or misplaced documents are insufficient to establish a due process violation from preindictment delay." App. 135. And when claims of preindictment delay center upon unavailable witnesses, courts require the person claiming the violation to "identify [the] witnesses he would have called, demonstrate with specificity the expected content of that witness's testimony and establish, to the [c]ourt's satisfaction, that . . . the information that the witness would have provided is not available from other sources." App. 135.

With that in mind, the State observed that "during the course of this hearing, and during the course of Defendant's argument, we have not heard a single word about what Patrick Dougan's testimony would have been." App. 135. It also noted that at least three other individuals resided in the home during the relevant periods of time, but Defendant has not mentioned, called to testify,

[5] As will be discussed in greater detail below, the question of prejudice and the reasons for the delay are separate inquiries. It is Petitioner's burden to first demonstrate, through the presentation of substantial evidence, that actual prejudice exists. It is only upon that showing that the reason for the delay becomes at all relevant. Thus, to the extent that Petitioner claimed that the lack of a reason for the delay has any bearing on the question of whether actual prejudice exists, that suggestion is incorrect under *Facemire*.

or tried to ascertain whether those witnesses could offer relevant information regarding the allegations. App. 135-36. "We have heard absolutely nothing from the defense as to why the information that could have been obtained from Nancy Dougan and Patrick Dougan could not be obtained from other witnesses." App. 136. The State observed that the types of offenses charged in Counts 1 through 16 are not the type that typically involve eyewitnesses. App. 136. "[T]he reality is . . . most defendants understand [sexual offenses] are illegal; most defendants understand that behavior carries with it a significant penalty" and will take steps to ensure that their acts are done in private away from the eyes and ears of those who may witness the offense. App. 136.

Respondent Judge took Defendant's motion under advisement so he could review the deposition testimony of Nancy Dougan. App. 139.

The Respondent Judge entered its order on June 15, 2025. App. 2. While reciting the facts elicited throughout the prior hearing, Respondent Judge concluded, without identifying any factual basis, that "Patrick and Nancy Dougan are significant, because they were the adoptive parents of [Defendant], acted in a parental role for the children of the household, and were custodians or guardians for [R.E.C.] at various times during her childhood, including the times Defendant allegedly abused her." App. 3-4. Respondent Judge recognized that, during her deposition, "Ms. Dougan at times had difficulty recalling certain events, sought confirmation, and required prompting or clarification from her daughter . . . or the attorneys." App. 4. But "Ms. Dougan did, in her deposition, firmly deny that R.E.C. had ever reported being sexually abused by [Defendant]." App. 5.[6]

Although Respondent Judge briefly mentioned *Facemire*, he did not appear to apply that authority. In particular, the Respondent Judge *started* by noting how the State was unable to explain the delay—*before* making any mention of whether the evidence Defendant presented proved that he suffered actual prejudice from the preindictment delay. App. 6.

Only *after* faulting the State for its lack of a reason did Respondent Judge then hold that "the State's delay in prosecuting [Defendant] for the allegations listed in Counts 1-16 of the indictment . . . resulted in actual, non-speculative, substantial prejudice that meaningfully impaired [Defendant's] ability to defend against those charges." App. 7. Respondent Judge did not acknowledge the lack of evidence even tending to state what Patrick or Nancy Dougan would have offered as testimony. Instead, Respondent Judge simply declared that "Patrick Dougan's testimony would have been both relevant to the criminal trial and unique to his own observations and knowledge as an adult parent and custodian to both Defendant and alleged victim." App. 7. Respondent Judge also rejected the "State's assertion that the substance of Patrick Dougan's testimony can be effectively elicited through composite witness testimony."[7] App. 7. Respondent Judge made similar findings regarding Nancy Dougan's unavailability. App. 7-8.

---

[6] While Nancy Dougan did deny during her deposition that R.E.C. had reported being sexually abused by Defendant, App. 62, information contained in the underlying abuse and neglect case file clearly demonstrate otherwise. And Respondent Judge was aware of them as evidence by the fact that it took judicial notice of those proceedings. App. 3 n.1. With that in mind, the 2011 abuse and neglect petition, it is alleged that R.E.C. *did* tell Nancy Dougan about the assaults, and that Nancy did nothing other than have R.E.C. "bend over" so that Nancy could "check[ ] her butt." App. 34-36.

[7] The State did not argue that the testimony could be offered through other witnesses; it argued that the Defendant failed to demonstrate that the testimony could not be offered through other witnesses. Under *Facemire*, the State has *no burden* to disprove actual prejudice. So the Defendant was obligated to show that the unavailable witness testimony was not available from other sources.

Respondent Judge then "turn[ed] its attention to weighing the prejudice to the Defendant against the justification for the delay as required by *Facemire*." App. 8. But rather than conduct any balancing of the two competing interests, Respondent Judge merely stated "the State offers no justification for the 13-year delay in indicting the Defendant." App. 8.

SUMMARY OF THE ARGUMENT

The Fayette County Circuit Court's order dismissing Counts 1 through 16 of the indictment returned against Defendant has illegally and unjustifiably stripped the State of its ability to prosecute and convict Defendant of serious crimes involving the sexual assault of Defendant's minor sister.

Despite clear legal precedent from this Court to guide the Respondent Judge in addressing Defendant's motion to dismiss, it found prejudice to Defendant based on speculation and conjecture. *Facemire* said such conjecture is insufficient to warrant a dismissal for preindictment delay. Indeed, nothing in the record explains what Defendant expected Patrick or Nancy Dougan to offer as testimony if called as witnesses during his trial. Rather, he speculated as to what they "might" have said—but even then, the details are scant. In addition, Defendant failed to show that the expected testimony was not available from other sources, as required by this Court. More importantly, Defendant did not identify how or why the unavailability of Patrick or Nancy Dougan had any impact on his ability to defend against the State's charges—much less result in a *material* impact—as required by this Court. Because the record lacks any evidence of prejudice, the circuit court's order finding to the contrary is, on its own, sufficient to justify the issuance of a writ of prohibition.

Even if Defendant had met his burden of proving actual prejudice, Respondent Judge erred again by failing to conduct a balancing test, as *Facemire* requires. Respondent Judge did not discuss *Facemire*'s second prong, and it made no findings explaining why the balancing of interests in this case inures to Defendant's benefit. Instead, Respondent Judge treated the State's inability to offer a reason for the delay as reason enough to dispense with the balancing test entirely. Especially given that the record discloses plausible, reasonable justifications for the delay, this refusal to comply with *Facemire*'s clear guidance was in error.

This Court should enjoin the enforcement of Respondent Judge's order and issue a writ of prohibition as requested.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State does not request oral argument. This case can be disposed of by memorandum decision under Rule 18 of the West Virginia Rules of Appellate Procedure. Oral argument is unnecessary to aid this Court in its consideration of the question presented, and a writ should issue preventing enforcement of the lower court's order.

ARGUMENT

I. Standard of Review

The State may seek a writ of prohibition in a criminal case "where the trial court has exceeded or acted outside of its jurisdiction." Syl. pt. 3, *State ex rel. State v. Gwaltney* (*Gwaltney II*), 250 W. Va. 695, 908 S.E.2d 192 (W. Va. 2024) (citation omitted); syl. pt. 1, *State ex rel. State v. Gwaltney* (*Gwaltney I*), 249 W. Va. 706, 901 S.E.2d 70 (W. Va. 2024) (citation omitted). "Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction." Syl. pt. 3, *Gwaltney II*, 250 W. Va. 695, 908 S.E.2d 192 (citation omitted); syl. pt. 1, *Gwaltney I*, 249 W. Va. 706, 901 S.E.2d 70 (citation omitted). This Court considers five "general guidelines" when determining whether a writ should issue:

> (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.

Syl. pt. 2, *Gwaltney II*, 250 W. Va. 695, 908 S.E.2d 192 (quoting syl. pt. 4, *State ex rel. Hoover v. Berger,* 199 W. Va. 12, 483 S.E.2d 12 (W. Va. 1996)); syl. pt. 2, *Gwaltney I*, 249 W. Va. 706, 901 S.E.2d 70 (quoting syl. pt. 4, *Hoover*, 199 W. Va. 12, 483 S.E.2d 12). "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. 2, *Gwaltney II*, 250 W. Va. 695, 908 S.E.2d 192 (quoting syl. pt. 4, *Hoover,* 199 W. Va. 12, 483 S.E.2d 12); syl. pt. 2, *Gwaltney I*, 249 W. Va. 706, 901 S.E.2d 70 (quoting syl. pt. 4, *Hoover*, 199 W. Va. 12, 483 S.E.2d 12). This factor weighs heavily in Petitioner's favor, as explained below.

II. The circuit court clearly erred as a matter of law and exceeded its authority when it granted Defendant's motion to dismiss without holding him to his burden of proving actual prejudice and without conducting a balancing test, as *Facemire* requires.

The law in West Virginia is clear: "To maintain a claim that preindictment delay violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution and Article III, Section 10 of the West Virginia Constitution, the Defendant must show actual prejudice." Syl. pt. 2, *Facemire*, 223 W. Va. 594, 678 S.E.2d 847. "[T]he initial burden is on the defendant to show that actual prejudice has resulted from the [preindictment] delay." *Id.* at syl. pt. 3. The failure of a defendant to meet this initial burden is dispositive, because "proof of actual prejudice makes a due process claim concrete and ripe for adjudication." *United States v. Lovasco*, 431 U.S. 783, 789 (1977). Defendant must therefore present "substantial evidence . . . which proves he was meaningfully impaired in his ability to defend against the state's charges to such an extent that the disposition of the criminal proceeding was or will be likely affected." Syl. pt. 4, *Facemire*, 223 W. Va. 594, 678 S.E.2d 847. Only when a defendant has made this initial threshold showing, the circuit court "must then balance the resulting prejudice against the reasonableness of the delay." *Id.* at syl. pt. 3. "In balancing these competing interests, the core inquiry is whether the government's decision to prosecute after substantial delay violates fundamental notions of justice or the community's sense of fair play." *Id.* Respondent Judge failed to follow these clear provisions of law and, thus, a writ should issue here.

A. The circuit court clearly erred in finding that the Defendant had proved actual prejudice, as the only "evidence" was entirely speculative and lacked specific factual details, contrary to *Facemire*.

Under *Facemire*, the burden of demonstrating actual prejudice rests solely on the shoulders of the person claiming the due process violation; it does not impose any burden on the State to refute the claim of actual prejudice. Syl. pt. 3, *Facemire*, 223 W. Va. 594, 678 S.E.2d 847; *Lovasco*, 431 U.S. at 789. This burden placed on a defendant claiming a due process violation for preindictment delay is a heavy one "because it requires not only that a defendant show actual prejudice, as opposed to mere speculative prejudice, . . . but also that he show that any actual prejudice was *substantial*." *Facemire*, 223 W. Va. at 603, 678 S.E.2d at 856 (quoting *Jones v. Angelone*, 94 F.3d 900, 907 (4th Cir. 1996)). Defendant must prove "that he was meaningfully impaired in his ability to defend against the State's charges to such an extent that the disposition of the criminal proceeding was likely affected." *Id.* (citation omitted). A defendant's reliance on "dimming memories and the passage of time alone are insufficient to establish the level of prejudice necessary to show the denial of due process." *Id.* (quoting *United States v. Marion*, 404 U.S. 307, 326 (1971)); *see also United States v. McDougal*, 133 F.3d 1110, 1113 (8th Cir. 1998)

("[T]he mere loss of or impairment of memories does not constitute actual prejudice for the purpose of the [D]ue [P]rocess [C]lause." (internal quotation marks and citation omitted)); *United States v. Beszborn*, 21 F.3d 62, 67 (5th Cir. 1994) ("Vague assertions of lost witnesses, faded memories, or misplaced documents are insufficient to establish a due process violation from pre-indictment delay.").

Defendant did not meet his burden. As the basis for his claim that he suffered actual prejudice, Defendant only asserted that before Patrick or Nancy Dougan passed away, their memories had faded to the point where he could not meaningfully rely on either to defend against the State's allegations. But unsubstantiated claims like these are insufficient to prove that actual prejudice flowed from a preindictment delay. *See, e.g., State v. Drexel M.*, No. 20-0322, 2021 WL 2577147, at *4 (W. Va. Supreme Court, June 23, 2021) (memorandum decision) ("Although two of these individuals were deceased prior to the trial, petitioner makes no other mention of how this prejudiced him.").

When a defendant claims that a preindictment delay actually prejudiced him because a witness has become unavailable, like in this case, the defendant must establish: (1) the purportedly unavailable witness's identity; (2) the *specific content* of the witness's expected testimony; (3) that serious attempts have been made to locate the witness; and (4) that the evidence the unavailable witness would have offered is not available from other sources. *Facemire*, 223 W. Va. at 603, 678 S.E.2d at 856 (quoting *Jones*, 94 F.3d at 908); *see also United States v. Scoggins*, 992 F.2d 164, 167 (8th Cir. 1993) (recognizing that the death of a potential alibi witness did not result in actual prejudice when the defendant failed to "relate the substance of the testimony of the missing witness in sufficient detail to permit the court to accurately assess whether the information rendered unavailable by the delay is material to the accused['s] defense" or that the missing testimony was not available from alternate sources).

Defendant did not meet these standards. Defendant did identify Patrick and Nancy Dougan as the missing witnesses at the heart of his claim. App. 14-15. And *Facemire*'s third factor does not apply, as both witnesses are now deceased. App. 126 (admission of Patrick and Nancy Dougan's death certificates). But Defendant failed to offer any evidence to satisfy *Facemire*'s second and fourth factors.

1. Defendant did not establish the expected content of the expected witnesses' testimony.

First, there is *no evidence* in the record that identifies with any degree of specificity what Patrick or Nancy Dougan would have offered if called to testify at Defendant's trial. Nancy Dougan's deposition transcript reveals no substantive information relevant to the criminal offenses charged in Counts 1 through 16 of the indictment, save perhaps her insistence that she was not aware of any abuse.[8] App. 54-87. At most, the transcript shows that Nancy Dougan suffered from a "dimming memory" at the time of her deposition. App. 54-87.

Rather than offer evidence, Defendant focused on speculation and distractions. In his motion, for instance, Defendant only claimed that Nancy and Patrick Dougan were in "physical and legal custody of the alleged victim and her siblings and were knowledgeable of people and events within their household." App. 11. But to what end—what would that knowledge have shown here? Likewise, at the motions hearing, Defendant merely alleged that Patrick Dougan "*might* be able to tell us whether children have stepped forward with a complaint or allegation,

[8] The circuit court's apparent reliance on Nancy Dougan's denial that she had any knowledge of the sexual abuse is directly belied by information contained within the underlying abuse and neglect proceedings of which the circuit court judicially noticed. App. 3 n.1. The 2011 abuse and neglect petition plainly alleges that R.E.C. told Nancy Dougan of the sexual assaults and that Nancy Dougan did nothing to ensure the safety of the child in her care. App. 34-36.

whether he heard anything, whether he saw anything." App. 131 (emphasis added). Or, "if something was amiss in the household, [Patrick Dougan] *might* have been in a position where he should have known about it." App. 131 (emphasis added). Defendant presented similarly tangential claims regarding whether Nancy Dougan possessed any relevant information to his defense. App. 131-133.

Even these speculative suggestions about what they "might" have said does not establish or rebut any material fact. It would prove nothing substantive if Nancy or Patrick Dougan took the stand and said that no one ever disclosed Defendant's sexual assault of R.E.C. to them. In fact, such testimony could have opened the door to their possible impeachment given the allegations in the underlying abuse and neglect proceedings plainly alleging that R.E.C. did disclose the abuse to Nancy. The State was not arguing that Nancy or Patrick Dougan observed the assaults or that either possessed any information that was remotely inculpatory. And testimony about how R.E.C. purportedly did not disclose to them—which would be of dubious veracity, at best—is of little relevance, as a minor sexual assault victim's failure to disclose says next to nothing about whether the assaults did in fact happen. It only proves that the victim did not disclose the assault to a specific person.

At bottom, Defendant never asserted that either Patrick or Nancy actually possessed relevant information to his defense. His argument can be boiled down to his assertion that because Patrick and Nancy Dougan were present in the multi-level home when the assaults occurred and that they had relationships with the parties involved, they might have had relevant information regarding the allegations. But this claim is the definition of speculation, and this Court has explicitly held that speculation is insufficient to prove actual prejudice. *Facemire*, 223 W. Va. at 603, 678 S.E.2d at 856 (quoting *Jones*, 94 F.3d at 907); *see also, e.g.*, *State v. Jessie*, 225 W. Va.

21, 30, 689 S.E.2d 21, 30 (W. Va. 2009) (finding that the defendant did not show prejudice from purported pretrial delay where he offered only a "self-serving" affidavit and no "corroborative evidence" of what two deceased witnesses "would have said or that it would be relevant").

2. The circuit court did not appropriately evaluate whether the information the witnesses would have provided was available from other sources.

Second, Respondent Judge ignored how Defendant made no apparent attempt to ascertain whether the information which would have been in Patrick or Nancy Dougan's testimony—whatever it may have been—was available through alternate sources.

As to Patrick Dougan, Respondent Judge conclusorily rejected the notion that alternative witnesses might have filled the gap, stating: "The State's assertion that the substance of Patrick Dougan's testimony can be effectively elicited through composite witness testimony is incorrect." App. 7; *contra Jessie,* 225 W. Va. at 30, 689 S.E.2d at 30 (finding no prejudice where "additional witnesses [were] available to testify on his behalf"). Respondent Judge then concluded that "[w]itnesses could corroborate—or even dispute—his testimony, but it would have been his own, based on his own unique observations, knowledge, memories and perceptions of both the children in his care, and the home they all shared." App. 7. This is not the standard. If it were, witness unavailability would almost always result in a due process violation. Merely stating platitudes and generalities that apply to any witness who could testify does not establish that the purported testimony of a witness is not available from alternate sources. And there's nothing in the record upon which this conclusion is reasonably based.

Respondent Judge's treatment of Defendant's failure to present any specific evidence regarding Nancy Dougan's testimony is similarly brushed aside without any legal basis. Respondent Judge only focused on Ms. Dougan's unfortunate battle with various debilitating medical conditions in her final years; noted that she was in a position where she *may have had* firsthand knowledge of the home and individuals living there; and that she may have heard, seen, or had knowledge of the allegations at issue in Counts 1 through 16. App. 7. But, again, Respondent Judge pointed to no facts that set forth what Nancy Dougan's testimony would have been with any degree of specificity.

3. *State v. Cook* confirms the problems in the circuit court's approach.

The impropriety of Respondent Judge's order here is further illustrated by this Court's opinion in *State v. Cook*, issued approximately one year after issuing its opinion in *Facemire*.

In *Cook*, the petitioner claimed that his due process rights were violated due to a fifteen-to-seventeen-year delay in the bringing of an indictment based, in part, upon his claim that four potential defense witnesses had passed away during the delay. *State v. Cook*, 228 W. Va. 563, 568, 723 S.E.2d 388, 393 (W. Va. 2010). This Court rejected the petitioner's claim that he proved actual prejudice in the circuit court, noting that he was required to prove not only that "the contemplated testimony of a missing or deceased witness be demonstrated with *ample specificity*, but the impact of that missing testimony on the defense must be shown." *Id.* (emphasis added). This Court also rejected the petitioner's attempt to demonstrate actual prejudice by merely arguing that his deceased mother "would have been able to contradict the evidence offered by the State against him" when petitioner "offer[ed] little in the way of specifics." *Id.* This Court held that this argument was "clearly insufficient under our holding in *Facemire*." *Id.* This Court concluded by recognizing that "[t]he degree of specificity required to establish actual prejudice is that which will solidly demonstrate how a defendant has been 'meaningful[ly] impair[ed]' in conducting his defense." *Id.* (quoting *Facemire*, 223 W. Va. at 604, 678 S.E.2d at 857).

Cook shows that the Respondent Judge committed clear legal error. Defendant similarly supported his claims of actual prejudice by "offering little in the way of specifics." *Id.* The petitioner in *Cook* similarly relied on scant evidence to support his claim that his deceased mother "would have been able to contradict the evidence offered by the State against him." *Id.* while Defendant here offered no such unequivocal statement; instead, he only claimed that Patrick and Nancy Dougan "might" have known something relevant that he could have used to rebut the State's allegations. App. 105-07. There is no reasonable avenue by which a court could conclude, upon this paltry evidentiary showing, that he provided a "degree of specificity [sufficient] to establish actual prejudice" by "solidly demonstrat[ing] how [he] has been 'meaningful[ly] impair[ed]' in conducting his defense." *Cook*, 228 W. Va. at 568, 723 S.E.2d at 393 (quoting *Facemire,* 223 W. Va. at 604, 678 S.E.2d at 857); *see also State v. Marenkovic*, No. 11-1764, 2013 WL 1501426, at *5 (W. Va. Supreme Court, Apr. 12, 2013) (memorandum decision) ("[H]ypothetical evidence is not substantial proof of actual prejudice as required by *Knotts*.").

The entirety of Defendant's arguments that he suffered actual prejudice can be best summarized by what this Court has described as "'garden variety' averments based on the passage of time—the inability to fully recall events or to produce witnesses or documentation to refute the State's evidence," which are insufficient to sustain a claim that a due process violation has occurred from a preindictment delay. *Cook*, 228 W. Va. at 569, 723 S.E.2d at 394. And this Court in *Cook* explicitly rejected a nearly identical claim of actual prejudice to the one raised by Defendant below when it found that "the mere fact [that the petitioner's] mother" resided in the area where the alleged sexual assaults occurred "does very little, standing on its own, to disprove the allegations." *Id.* Finally, *Cook* confirms that whether Respondent Judge subjectively believed that a thirteen-year delay was unreasonable is not the standard. This Court found no due process violation in the face of a longer delay.

The violation of this Court's jurisprudence shows that the State is entitled to writ relief.

4. **Defendant's purported inability to "fact check" R.E.C. does not establish actual prejudice.**

Finally, Defendant did present one additional argument in support of his actual prejudice claim: that the unavailability of Patrick and Nancy Dougan prevents him from having the ability to "fact check" R.E.C.'s testimony—although he does not indicate what "facts" need "checked." App. 132-33. This does nothing to aid his case for two reasons.

First, the record below contains nothing indicating that Defendant attempted to ascertain whether any of the speculative evidence he claims he cannot now offer is unavailable from other sources. *See Facemire*, 223 W. Va. at 603, 678 S.E.2d at 856 (noting that one of the evidentiary requirements for sustaining a claim of actual prejudice from preindictment delay requires a showing that "the information the [unavailable] witness would have provided was not available from other sources" (citation omitted)). Even if one assumes that someone in the house with Defendant will decisively "fact check" the victim, the record below clearly demonstrates that there were at least three other individuals residing in the Dougan home at the time of the alleged sexual assaults. App. 88. And given that Defendant's claims identifying only Nancy and Patrick Dougan's mere *presence* in the home as the sole basis for his claim of prejudice, it is difficult to fathom why he made no apparent effort to ascertain whether the other individuals who were also present at the home could offer the same or similar information at trial. Based on Defendant's argument, mere presence is all that is required.

The second reason why Defendant's alleged inability to "fact check" the victim's testimony is irrelevant is because this Court has unequivocally recognized that "[a] conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury." Syl. pt. 6, *Frank A. v. Ames*, 246

W. Va. 145, 866 S.E.2d 210 (W. Va. 2021) (internal quotation marks and citations omitted); syl. pt. 2, *State v. McPherson*, 179 W. Va. 612, 371 S.E.2d 333 (W. Va. 1988) (citation omitted); *see also* syl. pt. 4, *Ballard v. Dilworth*, 230 W. Va. 449, 739 S.E.2d 643 (W. Va. 2013) (internal quotation marks and citation omitted); syl. pt. 6, *State v. Wallace*, 205 W. Va. 155, 517 S.E.2d 20 (W. Va. 1999). Given this, the jury could still convict Petitioner of the offenses regardless of whether her claims are sufficiently corroborated or, alternatively, not corroborated at all.

* * *

The Defendant clearly failed to meet his burden of proving actual prejudice, and Respondent Judge concomitantly failed to hold Defendant to that burden. The only remedy for the circuit court's clear legal error is for this Court to intervene and issue a writ of prohibition to enjoin the enforcement of an obviously illegal order.

B. The circuit court did not conduct a balancing test as required by *Facemire.*

Even if Defendant had proved actual prejudice, Respondent Judge nevertheless committed an independent clear legal error by failing to conduct a meaningful balancing of the alleged prejudice against the reasonableness of the delay in this case. Respondent Judge's order contains no findings or any indication that it actually balanced the competing interests of the alleged prejudice Defendant suffered against the reasonableness of the delay. Respondent Judge's order simply concludes that "the State offer[ed] no justification for the 13-year delay in indicting the Defendant." App. 8. This analysis, however, fails to meet this Court's clear requirement that once actual prejudice is proven, the trial court must conduct a balancing test. Respondent Judge's order makes clear that it only considered one side of the scale while completely disregarding the other.

There is no dispute that the State was unable to offer a reason for the thirteen-year delay between learning of the offenses back in 2011 and the formal bringing of criminal charges in 2024.

App. 16, 133-34. But the inability to offer a reason for the delay does not, by itself, support the circuit court's decision to completely forego conducting the required balancing test. This is particularly true where, as here, the prosecuting attorney in Fayette County was not in office at the time the offenses were initially discovered. App. 11, 16, 133-34. Respondent Judge had access to the underlying abuse and neglect proceedings. *See* App. 3 n.1. (taking judicial notice of the underlying proceedings in Fayette County Case Numbers 11-JA-73-76). The State advised Respondent Judge that it could offer no explanation for why Defendant was not prosecuted in 2011. App. 107-08. But that does not mean no information existed that could offer potential explanations for the lack of a prosecution. Whether the State chose, as it did here, to take a more measured approach and not speculate as to facts that it could not verify did not absolve Respondent Judge of its duty to conduct the required balancing test.

Additionally, nearly the entirety of Defendant's claim that the delay was unreasonable is based upon the institution of the abuse and neglect proceedings in 2011 and involved the same conduct alleged in Counts 1 through 16 of the indictment in the instant case. App. 59. But simply pointing to the institution of abuse and neglect proceedings does not necessarily mean that the State possessed sufficient evidence to justifiably institute a criminal prosecution for that same conduct at the time. The burden of proof applicable in abuse and neglect proceedings in West Virginia is far less stringent than the burden of proof applicable to criminal prosecutions. *See In re Winship*, 397 U.S. 358, 362 (1970) (recognizing the government's burden of proving each element of a crime beyond a reasonable doubt), *and* W. Va. Code § 49-4-601(i) (providing that the applicable burden of proof in abuse and neglect proceedings is clear and convincing evidence). Mere knowledge of a criminal offense does not impose a duty upon the State to immediately institute criminal proceedings. "[T]here is no constitutional right to be arrested," and "[l]aw enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have minimum evidence to establish probable cause, a quantum of evidence which may fall short of the amount necessary to support a conviction." *State v. Parsons*, 214 W. Va. 342, 353, 589 S.E.2d 226, 237 (W. Va. 2003) (quoting *State v. Davis*, 205 W. Va. 569, 578, 519 S.E.2d 852, 861 (W. Va. 1999)).[9]

Although the State acknowledges that it was unable to provide a specific reason for the delay, the record contains possible reasonable explanations for the delay. For instance, the prosecutor in office at the time may have held off on pursuing criminal charges due to a perceived lack of evidence sufficient to satisfy the substantially higher burden of proof applicable in criminal proceedings or a perceived problem with witnesses. And if this is true, there is likewise nothing to indicate that the two prosecutors who proceeded him in office had any basis to revisit the case after that initial decision was made absent development of additional evidence. Things changed when Defendant's biological daughter made new allegations that her father had sexually assaulted her between 2018 and 2023. App. 10, 21-32. When additional evidence against the Defendant was developed years later, the State soon filed criminal charges in 2024. *See Rash v. Plumley*, No. 12-0564, 2013 WL 2300956, at *6 (W. Va. Supreme Court, May 24, 2013) (memorandum decision) (finding that State's delay was reasonable when it acted soon after "additional victims came forward"). That choice was reasonable.

---

[9] Although the fact that abuse and neglect proceedings being instituted years earlier may have been relevant under the prior "presumptive prejudice" standards this Court applied prior to its holding in *Facemire*, it has no real application under this Court's current analysis. In *Parsons*, this Court noted that under the *Leonard* standard, all that was required to warrant a presumption of prejudice resulting from a preindictment delay was proof that "the State had known of the crime, and the defendant's identity and whereabouts." 214 W. Va. at 253, 589 S.E.2d at 237 (citing *State ex rel. Leonard v. Hey*, __ W. Va. __, 269 S.E.2d 394 (W. Va. 1980), *overruled by Facemire*, 223 W. Va. 594, 678 S.E.2d 847). As noted above this standard was explicitly overruled by this Court in *Facemire*.

In addition no evidence suggested that the delay in the present case was motivated by some nefarious purpose or by some desire to gain a tactical advantage over the Defendant. Even under *Facemire*,[10] that lack of ill intent may be relevant. *See United States v. Farrah*, 475 F. App'x 1, 6 (4th Cir. 2007) (applying the same balancing test adopted by this Court in *Facemire*, and concluding, as part of its reasoning, that there were no indications of "nefarious motives on the Government's part" regarding the preindictment delay); *United States v. Automated Med. Lab., Inc.*, 770 F.2d 399, 404 (4th Cir. 1985) (assessing the government's reasons for a preindictment delay, the court noted that the "Government could possibly have acted with more dispatch," but that "we do not believe any portion of the delay was occasioned by deliberate or bad faith acts or omissions," and that there was no indication that "the Government intentionally delayed to gain some tactical advantage . . . or even that the delay was incurred in 'reckless disregard of the circumstances'" (citing *Marion*, 404 U.S. at 325, and *Lovasco*, 431 U.S. at 795 n.17)).

Furthermore, even once *some* prejudice is proven, "prejudice" is not some static concept that is reviewed without regard to the specific prejudice at issue. In *Automated Medical Laboratories, Inc.*, the Fourth Circuit noted the relevance of the specific level of prejudice involved when conducting the balancing test when it opined: "Assuming some *slight* prejudice to AML, it seems clear that there is no violation of due process when the Government's reasons for the delay

---

[10] Prior to *Facemire*, the analysis applicable to claims that a due process violation resulted from a preindictment delay were reviewed under a two-part burden-shifting analysis that first applied a presumption of prejudice once a defendant showed that there was a substantial delay between the indictment and the time at which the government became aware of the offenses, the defendant's identity, and the location of the defendant. Syl. pt. 1, *Leonard*, __ W. Va. __, 269 S.E.2d 394; *Hundley v. Ashworth*, 181 W. Va. 379, 382 S.E.2d 573 (W. Va. 1989), *overruled by Facemire*, 223 W. Va. 594, 678 S.E.2d 847. This presumption, however, was rebuttable, and all the State had to demonstrate in order to do so was prove that "the delay was not deliberately designed to gain a tactical advantage over the defendant." *Hundley*, 181 W. Va. at 382-83, 382 S.E.2d at 576-77. *Facemire* rejected its prior reliance on the burden-shifting analysis, *Facemire*, 223 W. Va. at 603, 678 S.E.2d at 856, but it did not go as far as saying that the State's intent was entirely irrelevant.

are considered." 770 F.2d at 404 (emphasis added). Indeed, if Defendant demonstrated *any* prejudice in the instant case, it can most generously be described as slight, at best. As noted above, Defendant did not identify any specific information that either Nancy or Patrick Dougan would have offered at trial if either were available. Nor did Defendant allege that they uniquely possessed specific information that was relevant to his ability to defend against the State's allegations. The only information that Defendant demonstrated with any specificity is that his alleged sexual abuse of his minor family member was first brought to the court's attention in a 2011 abuse and neglect proceeding, that he was not indicted on those offenses until 2024, and that his adoptive mother and father—who lived in the home at the time of the alleged assaults—had since passed away.

In sum, the Respondent Judge failed to conduct the required balancing test articulated in *Facemire*. The balancing test in *Facemire* does not hinge solely on the State's ability to offer up an explanation for the delay, and there is no legal support for the circuit court's reliance on that to simply forego conducting a meaningful balancing test. This Court has provided that the "core inquiry" in balancing the alleged prejudice with the reasonableness of the delay "is whether the government's decision to prosecute after substantial delay violates the fundamental notions of justice or the community's sense of fair play." Syl. pt. 3, *Facemire*, 223 W. Va. 594, 678 S.E.2d 847. Respondent Judge's order does not explain how the delay in the instant case violated "fundamental notions of justice or the community's sense of fair play." Indeed it could not, because it made no effort to consider the information before it (i.e. the lack of any evidence demonstrating that the delay was motivated by some nefarious purpose; that the current prosecuting attorney was not in office when the offenses were discovered; the possibility that there could have been evidentiary issues with pursuing a criminal prosecution in 2011; or that there may have been some issue with the minor victim's ability/willingness to testify at trial). All the circuit court did was cite to the Defendant's unsupported speculations, noted that the State could not explain the delay, and dismissed more than half of the counts charged in Defendant's indictment.

A writ of prohibition should issue, and the State's ability to properly prosecute Defendant on Counts 1 through 16 should be restored.

III. The remaining *Hoover* factors support this Court's issuance of a writ of prohibition.

The other *Hoover* factors also weigh in Petitioner's favor.

First, Respondent Judge's error cannot be corrected on appeal because direct appeal is unavailable. *See, e.g.*, *State v. Cohee*, 251 W. Va. 474, ___, 914 S.E.2d 709, 715 (W. Va. 2025) (observing the State "easily meets the first criterion in *Hoover* as the State lacks the authority to appeal from" a sentencing order) (citing *State v. Adkins*, 182 W. Va. 443, 446, 388 S.E.2d 316, 319-20 (W. Va. 1989) (observing that the State may appeal only when an indictment is held bad or insufficient or in criminal proceedings relating to the public revenue)). A writ of prohibition, therefore, is the appropriate method for the State to challenge Respondent Judge's order dismissing Counts 1-16 of the indictment.

The State also meets the second *Hoover* factor, as Respondent Judge's clear legal error in dismissing counts 1-16 of the indictment—absent intervention by this Court through a writ of prohibition—deprives the State of its right to prosecute those offenses. *See State ex rel. State v. Hill*, 201 W. Va. 95, 100, 491 S.E.2d 765, 770 (W. Va. 1997) (noting that if a "circuit court erred when it dismissed the indictment, the dismissal would result in unjustly denying the State of its right to prosecute the Defendant and of its right to seek a valid conviction" (citation omitted)).

The fourth and fifth *Hoover* factors also weigh in the State's favor. Although the State does not assert that the specific issue at hand is an oft-repeated error, Respondent Judge's order stands as an affront to this Court's clear jurisprudence. Despite this Court providing clear guidance in

Facemire as to how circuit courts should review and decide claims raising due process violations for preindictment delay, Respondent Judge effectively disregarded them, and entered an order that illegally deprives the State of its right to prosecute and obtain a valid conviction for offenses based, not upon "substantial evidence" of "actual prejudice, as opposed to mere speculative prejudice," *Facemire*, 223 W. Va. at 603, 678 S.E.2d at 856 (quoting *Jones*, 94 F.3d at 907), but based upon *pure speculation*; that which this Court has explicitly held is insufficient.

Finally, if this Court finds that the State has failed to meet the fourth or fifth *Hoover* factor, relief in prohibition is still appropriate because "[a]lthough 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. Because the circuit court committed clear error as a matter of law by dismissing Counts 1-16 of the indictment, a writ of prohibition should issue.

CONCLUSION

The State respectfully requests the Court issue a writ of prohibition preventing the lower court from enforcing its June 15, 2025, order and restore the State's ability to prosecute and seek a conviction upon Counts 1-16 of the indictment.

Respectfully submitted,

STATE OF WEST VIRGINIA
Petitioner,

By counsel,

JOHN B. MCCUSKEY
ATTORNEY GENERAL

WILLIAM E. LONGWELL
ASSISTANT ATTORNEY GENERAL
W. Va. State Bar No.: 12990
Office of the Attorney General
State Capitol Complex
1900 Kanawha Blvd. E.,
Bldg. 6, Ste. 406
Charleston, WV 25305
Tel: (304) 558-5830
Email: William.E.Longwell@wvago.gov
Counsel for Petitioner

VERIFICATION

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

I, William E. Longwell, Assistant Attorney General and Counsel for Petitioner named in the foregoing Petition for Writ of Prohibition, being duly sworn, state that the facts and allegations contained in the Petition for Writ of Prohibition 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.

William E. Longwell (W. Va. Bar # 12290)
Assistant Attorney General

Taken, sworn to, and subscribed before the this 29th day of August, 2025.

[SEAL]
OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
Lynn R. Deardorff
State of WV Office of the Attorney General
1900 Kanawha Blvd E Bldg 6, Suite 401
Charleston, WV 25305
My Commission Expires November 12, 2025

Lynn R. Deardorff
Notary Public

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 25-_____

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

Petitioner,

v.

THE HONORABLE THOMAS FAST,
Judge, Circuit Court of Fayette County, West Virginia,
and MICHAEL DOUGAN,
Defendant Below,

Respondents.

CERTIFICATE OF SERVICE

I, William E. Longwell, do hereby certify that on the 29th day of August, 2025, I served a true and accurate copy of the foregoing **Petition for a Writ of Prohibition** upon the below-listed individual via the West Virginia Supreme Court of Appeals E-filing System pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure:

James A. Adkins, Esq.
Public Defender Corp.
102 Fayette Avenue
Fayetteville, WV 25840

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

The Honorable Thomas Fast, Judge
Fayette County Courthouse
100 North Court Street, Suite 4
Fayetteville, WV 25840

William E. Longwell (WVSB # 12290)
Assistant Attorney General