

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

SCA EFiled: Sep 29 2025
01:52PM EDT
Transaction ID 77191520

Petitioner,

v.

Supreme Court No.: 25-556
Circuit Court No.: 24-F-69
Circuit Court of Fayette County, WV

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

Respondent.

BRIEF FOR RESPONDENT

Tyler Keller
Rule 10 Certification
tyler.d.keller@wv.gov
Supervised by
Matthew D. Brummond
Appellate Counsel
W.Va. Bar No. 10878
Public Defender Services
Appellate Division
112 California Ave., 5th Floor
Charleston, WV 25305
matt.d.brummond@wv.gov

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
Question Presented.....	1
Statement of the Case	1
Summary of the Argument.....	6
Statement Regarding Oral Argument and Decision	7
Argument	7
I. The circuit court correctly found counts 1-16 violated due process because Defendant suffered actual, substantial prejudice and the State offered no justification for the delay.	8
A. The circuit court correctly found Defendant suffered actual substantial prejudice.	8
B. The circuit court correctly found prejudice against Defendant and moved to the second prong of <i>Facemire</i>	12
II. The circuit court properly weighed the <i>Facemire</i> factors, even when the State gave no justification for the delay.	12
III. Even if correct, the State seeks the wrong remedy.....	14
Conclusion	15

TABLE OF AUTHORITIES

Cases

<i>Bailey v. Norfolk & W. Ry. Co.</i> , 206 W. Va. 654, 527 S.E.2d 516 (1999)	15
<i>Brown v. Gobble</i> , 196 W. Va. 559, 474 S.E.2d 489 (1996)	15
<i>Chrystal R.M. v. Charlie A.L.</i> , 194 W. Va. 138, 459 S.E.2d 415 (1995)	8
<i>Frank A. v. Ames</i> , 246 W.Va. 145, 866 S.E.2d 210 (2021)	15
<i>Jones v. Angelone</i> , 94 F.3d 900 (4th Cir. 1996).....	8
<i>Moore v. Murphy</i> , 47 F.3d 8 (1st Cir. 1995)	15
<i>State ex. rel. Knotts v. Facemire</i> , 223 W. Va. 594, 678 S.E.2d 847 (2009)	passim
<i>State v. Grimes</i> , 226 W. Va. 411, 701 S.E.2d 449 (2009)	8
<i>State v. Holden</i> , 243 W. Va. 275, 843 S.E.2d 527 (2020)	8
<i>State v. Jessie</i> , 225 W.Va. 21, 689 S.E.2d 21 (2009)	8
<i>State v. Miller</i> , 194 W.Va. 3, 459 S.E.2d 114 (1995)	15
<i>U.S. v. Cornielle</i> , 171 F.3d 748 (2nd Cir. 1999).....	8
<i>U.S. v. Lovasco</i> , 431 U.S. 783 (1977).....	13
<i>U.S. v. Sabath</i> , 990 F.Supp 1007 (N.D. Ill. 1998).....	9
<i>Walker v. West Virginia Ethics Commission</i> , 201 W.Va. 108, 492 S.E.2d 167 (1997)	8

Question Presented

Did the circuit court correctly find that pre-indictment delay actually prejudiced Defendant where the State could not explain its thirteen-year lapse, the delay deprived Petitioner of the only two adult witnesses in a position to testify on his behalf, and their testimony would have both shown his actual innocence and directly impeached his accuser?

Statement of the Case

There is no basis to disturb the circuit court's factual findings and legal conclusions. Both parties agree on the controlling law.¹ The circuit court followed every step of the legal test. The State simply disagrees with its conclusion.

The petition argues that the circuit court clearly erred in finding that (1) Defendant suffered actual prejudice and (2) that actual prejudice outweighed the State's justification for its delay. It is mistaken. The thirteen-year delay deprived Defendant of the only two witnesses in a position to affirmatively testify to his innocence and impeach his complainant. And although the petition now speculates as to the possible reasons for the thirteen-year delay, the prosecutor below could not explain the actual reason when given the opportunity.

The circuit court did everything right. It followed the test, made appropriate findings, and reached a sound result. Defendant therefore asks the Court to deny the writ so his trial can proceed on the remaining counts.

In 2023, Defendant was accused of abusing his daughter.² The following year, the State returned a 31-count indictment against Defendant that included this alleged conduct.³ The indictment also contained charges relating to alleged conduct from 2011⁴; counts 1-16 of the indictment accused Defendant of abusing his niece 13

¹ A.R. 6.

² A.R. 3; A.R. 10.

³ *Id.*

⁴ A.R. 21-26.

years earlier.⁵ Counts 17-31 related to the alleged 2023 conduct against Defendant's daughter.^{6 7}

At a pre-trial hearing, Defendant moved to dismiss the charges based on the 2011 allegations.⁸ Defendant alleged prejudice from pre-indictment delay, so the circuit court heard evidence under *Facemire*.⁹ The circuit court correctly identified the *Facemire* elements. Defendant was required to show actual, substantial prejudice.¹⁰ The State was then required to offer the actual reason for the delay, if any.¹¹ The circuit court would then weigh the prejudice established against the State's justification for its delay.¹²

To show actual, substantial prejudice, Defendant was first required to identify the witnesses to be called.¹³ Defendant would have to demonstrate the expected testimony of those witnesses and show that testimony was unavailable from other sources.¹⁴ Defendant then needed to show how the prejudice impacted his defense.¹⁵

First, Defendant identified that the only then-adult witnesses in the house, to whom the complainants would have reported alleged conduct, had passed away.¹⁶ Defendant's adoptive mother had several serious battles with cancer.¹⁷ She finally

⁵ A.R. 21-26.

⁶ A.R.26-31.

⁷ Only counts 1-16 were challenged for pre-indictment delay. Counts 17-31 were not challenged and remain undisturbed.

⁸ A.R. 10.

⁹ *State ex. rel. Knotts v. Facemire*, 223 W. Va. 594, 678 S.E.2d 847 (2009).

¹⁰ *Id.* at 603, 856.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 604, 857.

¹⁶ A.R. 109; A.R. 115; A.R. 131-32.

¹⁷ A.R. 4.

succumbed to her cancer shortly after the indictment.¹⁸ Defendant's adoptive father passed away nine months before the indictment.¹⁹

Second, Defendant proffered what the lost testimony of his parents would have been. They would have testified to what happened, or more, accurately what did not happen, in the household.²⁰ Defendant's parents were the only adults in the house, the only adult witnesses who could testify as to the happenings inside the household.²¹ They were willing and able to provide substantive evidence of Defendant's innocence.²² But that testimony was lost with the death of Defendant's parents.²³

Third, Defendant explained his diligent but failed efforts to preserve his mother's testimony. The parties had taken a video deposition of Defendant's mother in September of 2024—four months after the indictment.²⁴ During her deposition, however, Defendant's mother struggled to accurately and definitively answer the attorneys' questions because the cancer had taken her memory, impacted her sight, and destroyed her hearing in one ear.²⁵ She had difficulty recalling events. She could not remember who lived in her house for certain ranges of years.²⁶ She was confused by simple questions about the layout of her house, not knowing whose bedroom was whose and where those bedrooms were.²⁷ She would get confused and scoff, almost angrily at herself, "come on...think of it, think of it," and "see my mind's not working."²⁸ Even if she could have remembered, she struggled to see the

¹⁸ *Id.*

¹⁹ A.R. 5; A.R. 111-12.

²⁰ A.R. 138-39.

²¹ A.R. 3-4.

²² A.R. 108; A.R. 5.

²³ A.R. 7.

²⁴ A.R. 15.

²⁵ A.R. 72-74; A.R. 59.

²⁶ A.R. 55-58.

²⁷ A.R. 59-61.

²⁸ A.R. 57; A.R. 66.

floor plan of her home, stating, “I can’t see too good either right now because of my eye.”²⁹ The deafness affected her too, often asking the attorneys to repeat their questions, requesting they speak to her good ear, or looking to her daughter for prompting.³⁰ Defendant’s mother acknowledged as much in the deposition that the cancer had caused these deficiencies.³¹ She passed away from her final battle with brain cancer three months later.³²

Finally, Defendant explained how the prejudice impacted his potential defense against the indictment. Defendant proffered below that his parents’ testimony not only provided substantive value but impeachment value as well.³³ Putting either parent on the stand, Defendant argued, could have impeached the complainant and factchecked her claims in real time.³⁴ If the allegations changed or if the story differed, Defendant claimed, he would not have a chance to impeach the complainant without his parents’ testimony.

Defendant’s mother’s video deposition was inadequate to preserve her testimony. The credibility of her testimony had deteriorated over the course of thirteen years. The circuit court found it confusing.³⁵ So did the State. Even when Defendant’s mother could remember and did not need prompting from others, the prosecutor objected that she was “not answering the question” and rambling.³⁶ Her video testimony was confusing and likely would confound a jury too.³⁷ The value of her testimony in Defendant’s trial was irrecoverable.³⁸

²⁹ A.R. 4; A.R. 59.

³⁰ A.R. 4; A.R. 60; A.R. 73.

³¹ A.R. 4; A.R. 73-74.

³² A.R. 4.

³³ A.R. 132-33.

³⁴ A.R. 132-33.

³⁵ A.R. 8.

³⁶ A.R. 5; A.R. 57.

³⁷ A.R. 8.

³⁸ *Id.*

As the Circuit court found, Defendant's parents were important to his defense because they "acted in a parental role for the children of the household, and were custodians or guardians for [the complainant]." ³⁹ Defendant's mother "firmly den[ied] that [the complainant] had ever reported being sexually abused." ⁴⁰ The complainant only "reported alleged sexual abuse...to her school counselor." ⁴¹ The circuit court found the first-hand experience, knowledge, impressions, and parental role of the defendant's deceased parents were important. ⁴² The testimony could not be resurrected through secondary sources; the first-hand testimony of Defendant's parents was lost. ⁴³

Accordingly, the circuit court found Defendant satisfied the first prong of *Facemire*. ⁴⁴ Defendant suffered actual, substantial, non-speculative prejudice from the pre-indictment delay. ⁴⁵ Defendant identified the witnesses to be called, demonstrated the expected content of the testimony, and showed that the information the witnesses would have provided was not available from other sources. ⁴⁶

The State then had the opportunity to explain its delay. It offered no justification for its thirteen-year delay. ⁴⁷ The State conceded that four separate prosecutors had held the office since, and there was no reasonable explanation why none of them brought the indictment until now. ⁴⁸ The only party in a position to

³⁹ A.R. 4.

⁴⁰ A.R. 5.

⁴¹ A.R. 3.

⁴² A.R. 7-8.

⁴³ A.R. 6-8.

⁴⁴ A.R. 8.

⁴⁵ *Id.*

⁴⁶ A.R. 6-8.

⁴⁷ A.R. 8.

⁴⁸ A.R. 16; A.R. 133-34.

know the actual reason for the delay, the prosecutor below, could not articulate that actual reason.⁴⁹

The circuit court then weighed the actual, substantial prejudice to Defendant against the non-reason offered by the State for its delay⁵⁰ and dismissed the counts.⁵¹ Balancing the prejudice to Defendant against no reasonable, non-speculative delay, the circuit court found the State's lack of justification for its delay did not outweigh that prejudice.⁵²

Summary of the Argument

The circuit court applied the law correctly. The State does not like the outcome. To dismiss an indictment that violates due process, a circuit court must show that (1) the delay in bringing the indictment caused actual, substantial prejudice to the defendant; and (2) after such a showing, the prejudice to the defendant outweighed any justification for the delay offered by the State.⁵³ The circuit court did it by the book. It reached a legally sound conclusion.

"The issue before the Court is whether [Defendant] was actually and substantially prejudiced by a 13-year [pre-indictment] delay from the time the State became aware of the allegations."⁵⁴ The court immediately knew the high burden Defendant must meet to show prejudice. The court walked through pages of facts, setting out how Defendant was prejudiced.

"Having found that the State's delay caused actual, substantial prejudice to the Defendant, the Court turns its attention to weighing the prejudice to the Defendant against the justification for the delay as required by *Facemire*."⁵⁵ The

⁴⁹ *Id.*

⁵⁰ A.R. 8.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Facemire*, 223 W. Va. at 603, 678 S.E.2d at 856.

⁵⁴ A.R. 2.

⁵⁵ A.R. 8.

circuit court did it exactly right. The circuit court correctly applied the law in *Facemire* and methodically went through its requirements on the record. This Court should deny the writ because the circuit court's findings are entitled to deference, those findings were not clearly erroneous, and the circuit court did not abuse its discretion when it followed *Facemire* step by step.

Statement Regarding Oral Argument and Decision

The parties here agree on the controlling law. There is no challenge from either side to the validity of *Facemire*. The State simply does not agree with the finding of the circuit court. So, the State seeks an extraordinary remedy for an ordinary problem: dissatisfaction with a fact-finder's conclusions. Therefore, Defendant requests a Rule 19 argument and a signed opinion denying the writ.

Argument

The State and Defendant agree that *State ex. Rel. Knotts v. Facemire* controls here. Defendant must show prejudice.⁵⁶ The State must then justify its delay.⁵⁷ And finally, the circuit court must weigh the competing interests.⁵⁸ The State, however, misreads the requirements to establish prejudice under this Court's precedent. While fading memories and deceased witnesses alone are not enough, the State ends its inquiry there. The substantial delay, the loss of witnesses, and the violation of notions of fair play, in total, required the dismissal of counts 1-16 of the indictment.⁵⁹ After the State offered *nothing* for the court to balance the prejudice against, the circuit court still engaged in the required balancing test.⁶⁰ The circuit court explicitly applied the *Facemire* prongs and dismissed counts 1-16.⁶¹

⁵⁶ *Facemire*, 223 W.Va. at 603, 678 S.E.2d at 856.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ A.R. 8.

⁶¹ *Id.*

I. The circuit court correctly found counts 1-16 violated due process because Defendant suffered actual, substantial prejudice and the State offered no justification for the delay.

Questions of law are subject to de novo review by this Court.⁶² “This Court’s standard of review concerning a motion to dismiss an indictment is, generally, de novo;” however, when an evidentiary hearing is held on a motion to dismiss an indictment, the clearly erroneous standard of review applies concerning the circuit court’s finding of fact.⁶³ The final order and ultimate disposition of the case are reviewed under an abuse of discretion standard.⁶⁴

A. The circuit court correctly found Defendant suffered actual substantial prejudice.

The circuit court found that Defendant suffered actual substantial prejudice. *Facemire* guides the analysis, but its three factors implicated here are not the end of the inquiry. The *Facemire* Court set out what is *typically* required to establish a due process violation⁶⁵: identifying the would-be witnesses, demonstrating with specificity the expected content of the witnesses’ testimony, and showing the information the witnesses would have provided is not available from other sources.⁶⁶ Following that non-exhaustive list, the *Facemire* Court cites with approval instances where actual, substantial prejudice existed. Actual prejudice “is commonly demonstrated by the loss of documentary evidence *or* the unavailability of a key witness.”⁶⁷ Additionally, the combination of “lost evidence, impaired memories of fact witnesses, flawed governmental reports, and deceased key

⁶² *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 140, 459 S.E.2d 415, 417 (1995).

⁶³ *State v. Grimes*, 226 W. Va. 411, 417, 701 S.E.2d 449, 455 (2009); see also *State v. Holden*, 243 W. Va. 275, 279, 843 S.E.2d 527, 531 (2020).

⁶⁴ *State v. Jessie*, 225 W.Va. 21, 26, 689 S.E.2d 21, 26 (2009) (quoting *Walker v. West Virginia Ethics Commission*, 201 W.Va. 108, 492 S.E.2d 167 (1997)).

⁶⁵ *Facemire*, 223 W.Va. at 603, 678 S.E.2d at 856.

⁶⁶ *Id.*; *Jones v. Angelone*, 94 F.3d 900, 906 (4th Cir. 1996).

⁶⁷ *U.S. v. Cornielle*, 171 F.3d 748, 752 (2nd Cir. 1999) (emphasis added).

witnesses . . . combine to plague [defendants] with just the kind of concrete and substantial prejudice that the Due Process Clause was designed to remedy.”⁶⁸

This Court’s precedent supports the existence of actual substantial prejudice when key witnesses are dead or unavailable, fact witness’ memories are impaired, documentary evidence is lost, or any combination thereof prevents the defendant from mounting a meaningful defense to the charges. And this is exactly what the circuit court found.⁶⁹

Defense counsel identified what he expected Defendant’s parents to testify to; they did not see any abuse, any signs of abuse, or anything “off” about the interactions in the house.⁷⁰ Only the deceased parents, the circuit court found, were “in a position of trust [and] would have had firsthand knowledge of both the home and the children.”⁷¹ Defendant’s parents would be in a “position to see, hear, and know about the allegations in this case, one way or another.”⁷² The children in the house would have reported abuse, if any had occurred, to their parents.⁷³ And even though the parents received no such reports,⁷⁴ they now cannot testify to that.

And while Defendant’s mother attempted to testify in a video deposition, her memory was impaired, her sight was limited, and she could not hear out of one ear.⁷⁵ The cancer had affected her testimony. So much so that the circuit court found the testimony the parties did manage to get from her was “questionable” and “confus[ing].”⁷⁶ But, the circuit court found, even with her impaired memory, Defendant’s mother “firmly denied [complainant] had ever reported being sexually

⁶⁸ *U.S. v. Sabbath*, 990 F.Supp 1007, 1014 (N.D. Ill. 1998).

⁶⁹ A.R. 7-8.

⁷⁰ A.R. 138-39.

⁷¹ A.R. 7.

⁷² *Id.*

⁷³ A.R. 6-7.

⁷⁴ A.R. 5.

⁷⁵ *Id.*

⁷⁶ A.R. 5; A.R. 7.

abused.”⁷⁷ This was not speculation. This is how Defendant’s mother would have testified had she lived to trial and been competent to testify.

As the only two adult witnesses positioned to testify to what happened in the house, the circuit court found this testimony irreplaceable.⁷⁸ The testimony could not be cobbled together through tertiary sources.⁷⁹ There was no other source for the first-hand impressions of Defendant’s parents. Although other witnesses “could corroborate—or even dispute—[their] testimony...it would have been [their] own, based on...unique observations, knowledge, memories, and perceptions.”⁸⁰ The State waited thirteen years until Defendant’s parents were deceased to indict Defendant. The circuit court found Defendant’s parents’ testimony was lost, and it was irreplaceable.⁸¹

The testimony of Defendant’s parents, the circuit court found, was also essential to Defendant’s trial defense. The parents’ testimony “would have been both relevant to the criminal trial and unique to [their] own observations and knowledge.”⁸² The parents, “in a position of trust would have had firsthand knowledge of both the home and the children in [their] care.”⁸³ But because of the thirteen-year delay, Defendant’s mother was “significantly less capable of recalling specific times, dates, and places” and his father was deceased.⁸⁴ Had the charges been brought sooner, both parents’ testimony could have been used to impeach the complainant. The complainant “reportedly told [Defendant’s parents] about the incident.”⁸⁵ However, Defendant’s mother repeatedly and firmly denied in her video

⁷⁷ A.R. 5.

⁷⁸ *Id.*

⁷⁹ A.R. 7.

⁸⁰ *Id.*

⁸¹ A.R. 7-8.

⁸² A.R. 7.

⁸³ *Id.*

⁸⁴ A.R. 7-8.

⁸⁵ A.R. 35.

deposition that the complainant ever reported abuse to her.⁸⁶ Defendant's parents stated in the abuse and neglect proceeding that the complainant is vindictive.⁸⁷ The complainant lies.⁸⁸ And according to both parents, the complainant never reported any abuse to them.⁸⁹ Yet she claims she did. A jury could find their testimony more credible than the testimony of the complainant, directly impeaching her testimony. Thus, the circuit court found the death of Defendant's parents "meaningfully impaired [Defendant's] ability to defend against those charges."⁹⁰

The circuit court correctly found all of this—unavailability, fragmented, absent memory, and the State's thirteen-year delay—actually and substantially prejudiced Defendant.⁹¹

The circuit court made factual findings consistent with the case law. Defendant's parents were unavailable.⁹² They were key fact and character witnesses.⁹³ His mother, in her attempt to give her testimony post-indictment, suffered from a cancer-induced impaired memory.⁹⁴ There were unexplainable delays by the State; they waited for thirteen years and two deaths to indict.⁹⁵ Defense counsel then offered the court what the parents' expected testimony would be⁹⁶, and the court agreed.⁹⁷ And obviously a witness's impressions and observations, their own personal interpretation of events, cannot be replicated

⁸⁶ A.R. 5; A.R. 35-36.

⁸⁷ A.R. 36.

⁸⁸ *Id.*

⁸⁹ A.R. 35-36.

⁹⁰ A.R. 7.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ A.R. 5.

⁹⁵ A.R. 8.

⁹⁶ A.R. 138.

⁹⁷ A.R. 7-8.

piecemeal through third parties. And finally, the court found, Defendant's parents' lost testimony impacted his ability to defend against the charges.

The circuit court did exactly what the law requires to find actual, substantial prejudice against the Defendant. "Having found the State's delay caused actual substantial prejudice to the Defendant" ⁹⁸ It is explicit in the circuit court's order. That court found Defendant satisfied the first prong of *Facemire*.

B. The circuit court correctly found prejudice against Defendant and moved to the second prong of *Facemire*.

After finding actual, substantial prejudice, the circuit court moved on to the second prong of *Facemire*. ⁹⁹ "Once that showing has been made, the trial court must then balance the resulting prejudice against the reasonableness of the delay." ¹⁰⁰ "[T]he Court turns its attention to weighing the prejudice to the Defendant against the justification for the delay *as required by Facemire*." ¹⁰¹ The circuit court explicitly turned to the second step of the *Facemire* analysis. On the record, the circuit court followed the law step by step.

II. The circuit court properly weighed the *Facemire* factors, even when the State gave no justification for the delay.

The State gave no justification for its delay, but the circuit court still properly weighed the *Facemire* factors. The circuit court, on one side, weighed the "actual, non-speculative, substantial prejudice" to Defendant against the State's asserted reason for the delay: nothing. ¹⁰²

When a defendant has shown actual and substantial prejudice from pre-indictment delay, the circuit court must "proceed to consider the reasons offered by the state for the delay and determine...if due process was denied." ¹⁰³ And if this

⁹⁸ A.R. 8.

⁹⁹ *Id.*

¹⁰⁰ *Facemire*, 223 W.Va. at 603, 678 S.E.2d at 856.

¹⁰¹ A.R. 8 (emphasis added).

¹⁰² A.R. 7.

¹⁰³ *Facemire*, 223 W.Va. at 604, 678 S.E.2d at 857.

balancing weighs against the fundamental concepts of justice and the community's sense of fair play, the circuit court must dismiss the portion of the indictment contested.¹⁰⁴

So, the court's order "turn[ed] its attention to weighing the prejudice to the Defendant against the justification for the delay as required by *Facemire*."¹⁰⁵ The State conceded, and the circuit court found, "no justification [was offered] for the 13-year delay in indicting the Defendant."¹⁰⁶

The circuit court conducted the balancing test. The State offered nothing of weight for the other side of the scale; therefore, the circuit court found the balance weighed in favor of Defendant. Defendant's constitutional right to due process was violated with no justification. The circuit court correctly found that violating due process tipped the scales when weighed against nothing.

The State mistakenly contends the circuit court erred by not "conducting a meaningful balancing of the...prejudice against the reasonableness of the delay."¹⁰⁷ The State asserts "Respondent Judge's order...only considered one side of the scale."¹⁰⁸ There was nothing on the other side of the scale. The State concedes as much.¹⁰⁹

Just as Defendant must show actual prejudice, the State must show the *actual* reason for the delay. It could not. Yet the State's petition implies the circuit court, not the State itself, should have done the heavy lifting.¹¹⁰ Apparently, the circuit court was supposed to conjure an articulable reason for the delay, when in fact none

¹⁰⁴ *Id.* Citing *U.S. v. Lovasco*, 431 U.S. 783 (1977).

¹⁰⁵ A.R. 8.

¹⁰⁶ *Id.*

¹⁰⁷ Petition for Writ of Prohibition at 24.

¹⁰⁸ *Id.*

¹⁰⁹ A.R. 16.

¹¹⁰ See Petition for Writ of Prohibition at 25-26.

existed.¹¹¹ Even so, the court still conducted the balancing test as required by *Facemire* and dismissed the counts.¹¹²

The State only speculates as to the reasons for the delay, when presumably they are the only party positioned to know why the delay happened.¹¹³ The State offers, after the fact, everything from lack of evidence to absence of nefarious intent as possible justifications.¹¹⁴ The State further alleges because the current prosecutor was not the prosecutor then or perhaps that the complainants may not have been able or willing to testify, the State was somehow absolved from having to present evidence related to delay.¹¹⁵ It was the responsibility of the State, not the circuit court, to proffer such justification at the hearing.

Regardless, none of those reasons were put forth at the evidentiary hearing on the motion to dismiss.¹¹⁶ The petition's argument is the definition of speculation. As opposed to the concrete, dutiful factfinding of the circuit court, the petition can only offer possible reasons for a delay it acknowledges has no actual basis.¹¹⁷

III. Even if correct, the State seeks the wrong remedy.

The State's argument is without merit. The circuit court was not clearly erroneous in its finding of facts, and it did not abuse its discretion in concluding the prejudice required dismissal. But if this Court takes the State's argument at its face, the State is seeking the wrong remedy.

Circuit courts are the fact tribunals in West Virginia criminal cases. If the record is devoid of evidence supporting the circuit court's order, as the State contends, then the proper remedy is for this Court to remand for further factual findings and

¹¹¹ A.R. 8.

¹¹² *Facemire*, 223 W.Va. at 604, 678 S.E.2d at 857.

¹¹³ See Petition for Writ of Prohibition at 25-26.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 26.

¹¹⁶ A.R. 133-34.

¹¹⁷ *Id.*

conclusions of law. This Court has long held “it is not the task of the appellate court reviewing facts to determine how it would have ruled on the evidence presented.”¹¹⁸

Here, that is exactly what the State is asking this Court to do. The State asks this Court to second-guess the persuasiveness of the evidence, to make factual findings at the appellate level, and to rule on the motion to dismiss de novo. The circuit court was not clearly erroneous in its factual findings, and it did not abuse its discretion in granting the motion to dismiss. But for the purposes of the State’s petition for the writ, the proper remedy would be remand vacating the order.

Conclusion

The only party “depriving the State of its ability pursue [sic] a criminal prosecution and conviction”¹¹⁹ was the State. When the State offered no justification for its thirteen-year delay, the circuit court did not abuse its discretion in granting the motion to dismiss. This Court should deny the writ.

Respectfully Submitted,
Michael Dougan
By Counsel

/s/ Tyler Keller
Tyler Keller
Rule 10 Certification
tyler.d.keller@wv.gov
Supervised by
Matthew D. Brummond
Appellate Counsel
W.Va. Bar No. 10878
Public Defender Services

¹¹⁸ *Frank A. v. Ames*, 246 W.Va. 145, 163, 866 S.E.2d 210, 228 (2021) (quoting *Bailey v. Norfolk & W. Ry. Co.*, 206 W. Va. 654, 664, 527 S.E.2d 516, 526 (1999)); *see also Brown v. Gobble*, 196 W. Va. 559, 565, 474 S.E.2d 489, 495 (1996) (“our decisions have made plain that an appellate court is not the appropriate forum for a resolution of the persuasive quality of evidence.”); “The mission of the appellate judiciary is neither to mull theoretical abstractions nor to practice clairvoyance.” *State v. Miller*, 194 W.Va. 3, 14, 459 S.E.2d 114, 125 (1995), *quoting Moore v. Murphy*, 47 F.3d 8, 10 (1st Cir. 1995).

¹¹⁹ See Petition for Writ of Prohibition at 2.

Appellate Division
112 California Ave., 5th Floor
Charleston, WV 25305
matt.d.brummond@wv.gov

Counsel for Respondent