IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2026 Term

FILED

November 13, 2026

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 25-556

STATE OF WEST VIRGINIA,
EX REL. STATE OF WEST VIRGINIA,
Petitioner,

v.

THE HONORABLE THOMAS FAST,
JUDGE OF THE CIRCUIT COURT OF FAYETTE COUNTY,
and
MICHAEL DOUGAN,
Respondents.

Petition for a Writ of Prohibition

WRIT GRANTED

Submitted: September 23, 2026
Filed: November 13, 2026

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JUSTICE TRUMP delivered the Opinion of the Court.

JUSTICE WOOTON dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "The State may seek a writ of prohibition in this Court in a criminal case where the trial court has exceeded or acted outside of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction. In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the defendant's right to a speedy trial. Furthermore, the application for a writ of prohibition must be promptly presented." Syllabus Point 5, *State v. Lewis*, 188 W. Va. 85, 422 S.E.2d 807 (1992), *superseded on other grounds by statute as recognized in State v. Butler*, 239 W. Va. 168, 799 S.E.2d 718 (2017).

2. "In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors

are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

3. "In determining whether 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 initial burden is on the defendant to show that actual prejudice has resulted from the delay. Once that showing has been made, the trial court must then balance the resulting prejudice against the reasonableness of the delay. 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." Syllabus Point 3, in part, *State ex rel. Knotts v. Facemire*, 223 W. Va. 594, 678 S.E.2d 847 (2009).

4. "To demonstrate 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, a defendant must introduce substantial evidence of actual prejudice 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." Syllabus Point 4 *State ex rel. Knotts v. Facemire*, 223 W. Va. 594, 678 S.E.2d 847 (2009).

TRUMP, Justice:

Petitioner, the State of West Virginia, invokes this Court's original jurisdiction seeking a writ of prohibition to prohibit the Circuit Court of Fayette County from enforcing its June 15, 2025, order dismissing Counts One through Sixteen of a thirty-one-count indictment returned against the Respondent, Michael Dougan, based on a claim of preindictment delay. After having considered the briefs and oral arguments of the parties, as well as the appendix record and pertinent legal authorities, we find that the circuit court exceeded its legitimate powers in dismissing the first sixteen counts of the indictment for preindictment delay. Consequently, we grant the State its requested writ of prohibition.

I. FACTS AND PROCEDURAL BACKGROUND

In October 2011, R.C.,[1] then fourteen years old, reported to her school counselor that the Respondent, her adoptive uncle and biological brother, had sexually abused her. The counselor reported the allegations to the State, and on October 11, 2011, the West Virginia Department of Health and Human Resources filed a civil abuse and

[1]Because of the nature of this case, we follow our longstanding practice of using initials to protect the privacy of alleged victims. *See, e.g.*, W. Va. R. App. P. 40(e); *State v. Edward Charles L.*, 183 W. Va. 641, 645 n.1, 398 S.E.2d 123, 127 n.1 (1990).

neglect petition. The petition alleged the abuse occurred at the residence of R.C.'s grandparents, Patrick and Nancy Dougan. No criminal charges were filed at that time.

In 2023, the Respondent's biological daughter, N.S., made similar allegations, reporting that the Respondent sexually assaulted her between 2018 and 2023. On May 17, 2024, a Fayette County grand jury returned a thirty-one-count indictment, charging the Respondent with ten counts of second-degree sexual assault, twelve counts of incest, five counts of sexual abuse by a parent, guardian, or custodian, two counts of first-degree sexual assault, one count of attempted second-degree sexual assault, and one count of attempted incest. Counts One through Sixteen related to R.C., and Counts Seventeen through Thirty-One related to N.S. Only the charges concerning R.C. are at issue in this case before us. Thirteen years elapsed between the 2011 report concerning R.C. and the 2024 indictment.

R.C.'s grandparents died prior to the Respondent being brought to trial—Patrick Dougan died on August 19, 2023, about nine months before the indictment and Nancy Dougan died in December 2024, after an approximately four-year battle with brain cancer. Both were the Respondent's adoptive parents and served as custodians or guardians of R.C. at times during her childhood, including the period of alleged abuse by the Respondent. On September 4, 2024—four months after the indictment and three months before her death—the parties took a video deposition of Nancy Dougan. She had difficulty

recalling events, could not remember who lived in the home during certain time periods,[2] gave contradictory answers about bedroom locations, and attributed her memory, sight, and hearing problems to her cancer. Nevertheless, she testified that she and her late husband adopted the Respondent, their biological grandson and that between 2007 and 2011, she and her husband, and the Respondent resided in a home in Oak Hill, Fayette County. Several of Nancy Dougan's children and grandchildren also resided off and on at that residence, including R.C. Nancy Dougan specifically denied ever seeing or hearing the Respondent doing anything sexual to R.C. She also specifically denied that R.C. had ever reported being sexually abused by the Respondent.[3]

The Respondent moved to dismiss Counts One through Sixteen of the indictment for pre-indictment delay on January 27, 2025, arguing that he was prejudiced by the unavailability of certain witnesses and evidence due to the lapse of thirteen years between the report of the alleged abuse and the indictment. He specifically identified his deceased parents, Patrick and Nancy Dougan, as witnesses who were no longer available. In response, the State conceded it could offer no explanation for the delay. The current Fayette County Prosecuting Attorney related that he had contacted his immediate predecessor, who had no recollection of the 2011 matter and therefore could offer no

[2]Other household residents during the relevant period included R.C.'s siblings and the Respondent's then-live-in girlfriend H.S. (N.S.'s mother).

[3]In the 2011 civil abuse and neglect petition, the DHHR alleged that R.C. told Nancy Dougan about the abuse.

explanation for the failure to bring charges at that time. However, the State argued that the unavailability of the witnesses was not prejudicial, added very little to the Respondent's defense, and that testimony could be obtained through other witnesses. The State also argued that the proposed testimony was impeachable based upon the 2011 civil abuse and neglect matter.

After a February 18, 2025, evidentiary hearing during which the Respondent called several witnesses, the circuit court took the matter under advisement to review Nancy Dougan's deposition. On June 15, 2025, the circuit court granted the Respondent's motion and dismissed Counts One though Sixteen of the indictment.

The circuit court found that the State's delay in indicting the Respondent resulted in "actual, non-speculative, substantial prejudice that meaningfully impaired [the Respondent's] ability to defend against those charges." Specifically, the circuit court found that since the initial 2011 report, the county had four different prosecuting attorneys and that the original investigators had either retired or relocated. The court found the unavailable testimony of Patrick and Nancy Dougan to be significant because they acted in the parental role for the household and were custodians or guardians of R.C. at various times during the indictment period. The court found the reliability of Nancy Dougan's deposition testimony questionable and likely to cause great confusion to a jury.

The State petitioned this Court seeking extraordinary relief to prohibit enforcement of the circuit court's order dismissing Counts One through Sixteen of the indictment.

II. STANDARD FOR ISSUANCE OF WRIT

We have previously held that the State may seek extraordinary relief in prohibition from this Court in limited circumstances. "A very narrow avenue by which the State may seek review by this Court of a circuit court's ruling with respect to criminal matters is the writ of prohibition." *State ex rel. Clifford v. Stucky*, 212 W. Va. 599, 601-02, 575 S.E.2d 209, 211-12 (2002); *see also State ex rel. State v. Gwaltney*, 250 W. Va. 695, 699, 908 S.E.2d 192, 196 (2024) ("We have held that the State may seek a writ of prohibition under limited circumstances in criminal cases[.]").

> The State may seek a writ of prohibition in this Court in a criminal case where the trial court has exceeded or acted outside of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction. In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the defendant's right to a speedy trial. Furthermore, the application for a writ of prohibition must be promptly presented.

Syl. Pt. 5, *State v. Lewis*, 188 W. Va. 85, 422 S.E.2d 807 (1992), *superseded on other grounds by statute as recognized in State v. Butler*, 239 W. Va. 168, 799 S.E.2d 718 (2017).

Because the State is not alleging that the circuit court lacked jurisdiction in this matter, but that the circuit court exceeded its legitimate powers, we turn to Syllabus Point 4 of *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996), which explains that

> [i]n determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Having established the parameters governing the exercise of our discretion, we now turn to applying the *Hoover* factors to the case at hand.

III. DISCUSSION

In this case, the State lacks a right of appeal from the circuit court's order dismissing the indictment on grounds of pre-indictment delay.[4] Without the right of appeal, the State is clearly damaged in a manner that would not be correctable on appeal. However, we cannot say that the circuit court's order is an oft-repeated error or manifests persistent disregard for either procedural or substantive law or that it raises new and important problems or issues of law of first impression. Thus, we turn to analyzing the most important *Hoover* factor—whether the circuit court's order is clearly erroneous as a matter of law. *See, e.g.*, *State ex rel. State v. Cohee*, 251 W. Va. 474, 480, 914 S.E.2d 709, 715 (2025). We find that it is and conclude that the State has demonstrated it is entitled to a writ of prohibition.

"The course of a criminal prosecution is composed of discrete segments." *Betterman v. Montana*, 578 U.S. 437, 448 (2016). "In the first stage—before arrest or indictment, when the suspect remains at liberty—statutes of limitations provide the primary protection against delay, with the Due Process Clause as a safeguard against fundamentally

[4]The State's statutory right to appeal is limited to a bad or insufficient indictment. W. Va. Code § 58-5-30. A bad or insufficient indictment is one that, on its face, does not charge a crime or lacks the specifics for a defendant to plead double jeopardy in the future. *State ex rel. State v. Cuomo*, 253 W. Va. 1, 927 S.E.2d 189, 197 (2026). A claim of preindictment delay in violation of due process requires going beyond the face of the indictment, so West Virginia Code § 58-5-30 would not apply. Thus, the State lacks the right to appeal an order granting a motion to dismiss for preindictment delay.

unfair prosecutorial conduct." *Id*. at 441. West Virginia has no statute of limitations governing felony sexual offenses. *See, e.g.*, *State ex rel. State v. Young*, 253 W. Va. 76, ___, 928 S.E.2d 758, 766 (2026) (Trump, J., dissenting) ("[O]ur law does not contain any generally applicable statute of limitation for the prosecution of a felony."). Consequently, due process generally provides the only legal basis in West Virginia for a criminal defendant to assert that his or her felony criminal prosecution is time barred. Dismissal of an indictment for preindictment delay is an "extreme sanction," *United States v. Solomon*, 688 F.2d 1171, 1179 (7th Cir. 1982); *United States v. Sebetich*, 776 F.2d 412, 430 (3d Cir. 1985) (similar), and one clearly not warranted in this case.

This Court articulated the test for whether a preindictment delay violates a defendant's due process rights in Syllabus Point 3, in part, of *State ex rel. Knotts v. Facemire*, 223 W. Va. 594, 678 S.E.2d 847 (2009):

> In determining whether 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 initial burden is on the defendant to show that actual prejudice has resulted from the delay. Once that showing has been made, the trial court must then balance the resulting prejudice against the reasonableness of the delay. 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.[5]

[5]*Knotts* relied on the Fifth Amendment's Due Process Clause in reaching its holdings. But the Fifth Amendment's Due Process Clause is a limitation only on the federal government; the Due Process Clause of the Fourteenth Amendment applies to the States and their political subdivisions. *See, e.g.*, *Dusenbery v. United States*, 534 U.S. 161, 167 (2002); *State ex rel. Urban v. Hardy*, 252 W. Va. 409, 418 n.10, 923 S.E.2d 339, 348 n.10 (2025); *State ex rel. Riley v. Rudloff*, 212 W. Va. 767, 778 n.12, 575 S.E.2d 377, 388 n.12 (2002). "Thus, technically, the Fourteenth Amendment's Due Process Clause applies to

A defendant's burden to show "actual prejudice" when alleging preindictment delay is a heavy one:

> To demonstrate 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, a defendant must introduce substantial evidence of actual prejudice 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, *Knotts*, 223 W. Va. 594, 678 S.E.2d 847. "This is a heavy burden 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*—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." *Jones v. Angelone*, 94 F.3d 900, 907 (4th Cir. 1996) (citations omitted) (emphasis in original); *see also id.* at 914 (Murnaghan, J., concurring) ("Actual prejudice must be demonstrated with more than mere speculation.").

[the Respondent's] claim for excessive preindictment delay." *Parker v. Burt*, 595 F. App'x 595, 600 n.3 (6th Cir. 2015). "However, the Fifth Amendment's Due Process Clause is 'analogous' to the Fourteenth Amendment's Due Process Clause. Therefore, cases interpreting the Fifth Amendment's Due Process Clause in the context of claims for excessive preindictment delay are equally applicable here." *Id*; *see also Pena v. Paramo*, No. CV 16-2076 JGB (SS), 2017 WL 2676539, at *5 (C.D. Cal. May 31, 2017), *report and recommendation adopted*, No. CV 16-2076 JGB (SS), 2017 WL 2681693 (C.D. Cal. June 20, 2017) ("Generally, the Fourteenth Amendment's Due Process Clause restricts the activities of the states and the Fifth Amendment's Due Process Clause restricts the actions of the federal government. However, the two clauses are analogous to each other. Cases interpreting the Fifth Amendment's Due Process Clause in the context of claims for excessive preindictment delay are relevant here.").

"Courts apply the actual prejudice test stringently." *United States v. Butz*, 982 F.2d 1378, 1380 (9th Cir. 1993); *United States v. Evans,* No. 22-CR-63 (RCL), 2022 WL 16758553, at *3 (D.D.C. Nov. 8, 2022) (same); *see also United States v. Hunter*, 197 F.3d 862, 865 (7th Cir. 1999) (describing a defendant's burden to demonstrate actual prejudice as a result of preindictment delay as "quite stringent"); *United States v. LeQuire*, 943 F.2d 1554, 1560 (11th Cir. 1991) ("A stringent standard is employed when examining the issue of prejudice [for pre-indictment delay]."). Consequently, it is a rare case where a defendant can establish a claim of due process violating preindictment delay based on a showing of actual prejudice. *See, e.g*., *United States v. Barken*, 412 F.3d 1131, 1134 (9th Cir. 2005) ("The defendant's burden to show actual prejudice is heavy and is rarely met."); *State v. Benson*, 514 P.3d 491, 495 (Or. 2022) (citation omitted) ("Due process violations caused by a preindictment delay are unusual" and an "'indictment is rarely dismissed because delay by the prosecution rises to the level of a Fifth Amendment due process violation.'"); *State v. Gonzales*, 794 P.2d 361, 367 (N.M. Ct. App. 1990) ("[P]rejudice is rarely found, and it is far easier to find cases that illustrate the lack of actual prejudice than cases that recognize actual prejudice[.]"), *aff'd*, 805 P.2d 630 (N.M. 1991); 42 C.J.S. *Indictments* § 30 at 480 (2017) ("The defendant's burden to show actual prejudice is heavy and is rarely met.").[6]

[6]Indeed, some courts have questioned whether lost testimony can ever satisfy the actual prejudice standard, *see United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985) ("In *United States v. Pallan*, 571 F.2d 497 (9th Cir.) *cert. denied*, 436 U.S. 911, 98 S. Ct. 2249, 56 L.Ed.2d 411 (1978), we emphasized that protection from lost testimony generally falls solely within the ambit of the statute of limitations. We further questioned whether such lost testimony would ever qualify for the level of prejudice necessary to establish a

Where, as here, the unavailability of witnesses is the basis of an actual prejudice claim, *Knotts* specifies that the defendant must "'identify the witness he would have called; demonstrate, with specificity, the expected content of that witness' testimony; establish to the court's satisfaction that he has made serious attempts to locate the witness; and, finally, show that the information the witness would have provided was not available from other sources.'" 223 W. Va. at 603, 678 S.E.2d at 856 (quoting *Jones*, 94 F.3d at 908). This Court has further specified that "[v]ague and conclusory allegations of prejudice [based on unavailable witnesses] are simply not sufficient," and "[n]ot only must 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." *State v. Cook*, 228 W. Va. 563, 568, 723 S.E.2d 338, 393 (2010) (per curiam).

In this case, the Respondent did not contend that his deceased (and prior to that, memory-impaired) parents (Nancy and Patrick Dougan, who were also R.C.'s grandparents) would have provided specific exculpatory testimony that would have been material to his defense. Similar to the defendant in *Cook*, the Respondent merely asserted in his motion to dismiss the indictment that his parents would have been able to offer testimony in his defense because they "had physical and legal custody of the alleged victim

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due process violation[.]")), while others have recognized that "[t]he standard for pre-indictment delay is nearly insurmountable, especially because proof of actual prejudice is always speculative." *United States v. Rogers*, 118 F.3d 466, 477 n.10 (6th Cir. 1997); *State v. Adams*, 45 N.E.3d 127, 149 (Ohio 2015) (similar), *overruled on other grounds by State v. Wilson*, No. 2025-0322, 2026 WL 3068074 (Ohio Oct. 14, 2026); *State v. Knickerbocker*, 880 A.2d 419, 423 (N.H. 2005) (similar).

and her siblings and were knowledgeable of people and events within their household." Despite this lack of specificity and without engaging with the *Knotts* factors, the circuit court agreed with the Respondent, finding that the deceased parents "acted in a parental role for the children of the household, and were custodians or guardians for" the victim. The Respondent's vague averments that his parents might have offered testimony helpful to his defense is based exclusively on their proximity to the alleged crimes and relationship with the alleged victim, R.C. This Court has recognized that such averments do not demonstrate actual prejudice. *See Cook*, 228 W. Va. at 569, 723 S.E.2d at 394 ("[A]s to the allegations of sexual abuse that allegedly occurred in the church parsonage, the mere fact of Appellant's mother's residence in the church parsonage does very little, standing on its own, to disprove the allegations.").

Child sexual abuse most often occurs in private, often the perpetrator is a member of the victim's family, and most children fail to report the abuse or delay in reporting the abuse. *State v. Chauvin*, 846 So.2d 697, 702 (La. 2003) (citing Dara Loren Steele, Note, *Expert Testimony: Seeking an Appropriate Admissibility Standard for Behavioral Science in Child Sexual Abuse Prosecutions*, 48 Duke L.J. 933, 938 (1999); *see also Valentine v. Konteh*, 395 F.3d 626, 641 (6th Cir. 2005) (Gilman, J., dissenting in part) (citing Bureau of Justice *Statistics, Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics* 5-7 (July 2000) ("Because of the nature of the crime, the sexual abuse of children typically occurs in private, in the

residence, and away from other adults."), *majority opinion rejected by State v. Darrell S.*, No. 22-859, 2024 WL 4892214, at *4 (W. Va. Nov. 26, 2024) (memorandum decision).

Any testimony from Nancy or Patrick Dougan that they did not witness sexual misconduct by the Respondent against R.C. or that R.C. did not report any abuse to them would not have been particularly strong evidence in the Respondent's favor; such testimony, if it existed, is certainly not the kind of evidence establishing substantial proof of actual prejudice as required to abort a prosecution under the stringent mandates of due process. We also observe that the Respondent is not left bereft of any evidence that could be offered by Nancy Dougan as she gave a deposition in this case before her demise concerning the allegations made against the Respondent. Moreover, others lived in the Dougans' residence at the time of the alleged abuse. *See supra* note 2. They are now adults. The circuit court did not articulate a plausible explanation why they could not also testify regarding the circumstances in the Dougans' residence, nor did it find that the Respondent had made serious attempts to locate these witnesses but was unable to do so.

Finally, the *Knotts* test is a sequential one, that is, if a defendant does not meet his initial burden of establishing actual prejudice, the inquiry ceases. *Cook*, 228 W. Va. at 567, 723 S.E.2d at 392 (citation omitted) ("Only after a defendant has established actual prejudice resulting from preindictment delay does the trial court proceed to the next step, which is to 'balance the resulting prejudice against the reasonableness of the delay.'").

Because the Respondent failed to carry his heavy burden of demonstrating actual prejudice, there is no basis to address the second part of the *Knotts* test.

In conclusion, this is not one of those rare cases where a criminal defendant has carried his initial heavy burden to prove actual prejudice, and the circuit court clearly erred in granting his motion to dismiss on grounds of preindictment delay. The State has, therefore, demonstrated its entitlement to a writ of prohibition to prohibit dismissal of the counts in the indictment related to R.C.

IV. CONCLUSION

For the reasons stated above, we grant the State's request for a writ of prohibition.

Writ Granted.