IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2026 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 26-308

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

v.

THE HONORABLE C. RICHARD WILSON, JUDGE,
SECOND JUDICIAL CIRCUIT, CIRCUIT COURT OF TYLER COUNTY,
and JEREMY MICHAEL WEEKLEY,
Respondents.

Petition for Writ of Prohibition

WRIT GRANTED

Submitted: October 14, 2026
Filed: November 5, 2026

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JUSTICE WOOTON delivered the Opinion of the Court.

SYLLABUS OF THE COURT

1. "In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

2. "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 Pt. 5, *State v. Lewis*, 188 W. Va. 85, 422 S.E.2d 807 (1992), *superseded by statute on other grounds as stated in State v. Butler*, 239 W. Va. 168, 179 n.27, 799 S.E.2d 718, 729 n.27 (2017).

3. "It shall be the duty of the prosecuting attorney to attend to the criminal business of the State in the county in which he is elected and qualified . . . ." Syl. Pt. 4, in part, *State ex rel. Skinner v. Dostert*, 166 W. Va. 743, 278 S.E.2d 624 (1981).

4. "The prosecuting attorney is a constitutional officer who exercises the sovereign power of the State at the will of the people and he is at all times answerable to them. W.Va. Const., art. 2, § 2; art. 3, § 2; art. 9, § 1." Syl. Pt. 2, *State ex rel. Preissler v. Dostert*, 163 W. Va. 719, 260 S.E.2d 279 (1979).

5. "Before a prosecuting attorney may be disqualified from acting in a particular case and relieved of the duties imposed upon him by the Constitution and by statute, the reasons for his disqualification must appear on the record, and where there is any factual question as to the propriety of the prosecutor acting in the matter, he must be afforded notice and an opportunity to be heard." Syl. Pt. 3, *State ex rel. Preissler v. Dostert*, 163 W. Va. 719, 260 S.E.2d 279 (1979).

6. Because an elected prosecuting attorney's duties to handle criminal matters in his or her county emanate from the West Virginia Constitution, the question of

whether a circuit court's ruling is so flagrant as to deprive the State of its right to prosecute, encompasses cases where the State has erroneously been deprived of its right to prosecute a case by its duly elected prosecuting attorney. To the extent that Syllabus Point 5 of *State v. Lewis*, 188 W. Va. 85, 422 S.E.2d 807 (1992), may be read differently, it is hereby modified.

WOOTON, Justice:

In this petition for extraordinary relief, the State of West Virginia seeks a writ to prohibit the enforcement of an order entered by the Circuit Court of Tyler County on April 23, 2026. In that order, the circuit court disqualified the Office of the Tyler County Prosecuting Attorney[1] from the case *State of West Virginia v. Jeremy Michael Weekley*, Tyler Co. No. 48-2025-F-6. Although the circuit court concluded that the prosecutor's office did not commit any disqualifying act, the court nonetheless disqualified the prosecutor's office as "a preemptive action" to "eliminat[e] the filing of future motions that are merely repackaged motions already ruled upon by the" court.

We conclude that the circuit court exceeded its legitimate authority by disqualifying the Office of the Tyler County Prosecuting Attorney without a valid reason, and that this baseless disqualification impeded the prosecutor's ability to perform the constitutional and statutory duties of his office. Thus, we grant a writ of prohibition and remand with directions for the circuit court to permit the Tyler County prosecutor to remain as counsel for the State in *State v. Weekley*.

I. Facts and Procedural Background

On February 11, 2025, the Tyler County Grand Jury indicted Jeremy Michael Weekley for committing sex crimes against two minor girls. This petition for prohibition

[1] The elected Tyler County Prosecuting Attorney is D. Luke Furbee, Esq.

pertains to Count 1, charging him with sexual assault in the first degree against A.M.; and Count 2, charging him with sexual abuse by a custodian or person in a position of trust against A.M.[2] The Indictment alleged that the crimes charged in Counts 1 and 2 occurred "at the same time" "on or about the ___ day of February, 2018," without specifying the day. In February 2018, A.M. was eleven years old, and her mother was dating Mr. Weekley. A.M. did not disclose these allegations until 2023.

According to Mr. Weekley, prior to trial, A.M. and the prosecutor did not disclose the specific date in February 2018 when the alleged crimes occurred. However, when the case went to trial in January 2026, A.M. testified that the acts took place on the morning of February 24, 2018. She testified that the evening before, she had gotten sick while staying at a friend's home, so her mother picked her up and took her to Mr. Weekley's home for the night. A.M. testified that after her mother left for work in the morning, she was in bed in Mr. Weekley's home when he got into the bed, removed her clothing, and sexually penetrated her. On cross-examination, A.M. indicated that she did not remember the specific date of the assault until sometime in 2024 when she was looking through the camera roll on her phone and found photographs taken at her friend's home

[2] *See* W. Va. Code § 61-8B-3(a)(2) (sexual assault in the first degree) and W. Va. Code § 61-8D-5(a) (sexual abuse by a custodian or person in a position of trust). Other charges in the Indictment pertain to the other minor. Because this case involves children and sensitive matters, we follow our longstanding practice of using initials. *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).

the prior evening. A.M. testified that sometime in 2024, her mother provided the specific date of the assault to the prosecuting attorney's office.

Upon hearing this trial testimony, defense counsel moved to dismiss Counts 1 and 2 asserting that the State had never disclosed the specific date, February 24, 2018, to the defense. After hearing arguments, the circuit court denied the motion to dismiss but granted a mistrial so the parties could begin the trial again. Thereafter, the defense filed, inter alia, a motion to disqualify the Tyler County Prosecuting Attorney's Office because the defense wanted to call Assistant Prosecuting Attorney Kyle Elliot as a witness at trial on the issue of when A.M.'s mother provided him the specific date of the alleged assault. The State opposed the defendant's motions and filed a motion in limine to preclude Mr. Elliot from being called as a witness.

The circuit court heard arguments on this issue during the trial and again at a motions hearing held after the mistrial. Defense counsel argued that the delay in providing the exact date of the alleged crime in February 2018 hampered Mr. Weekley's ability to obtain alibi evidence. Defense counsel also argued that Assistant Prosecutor Elliot is a witness regarding the mother's disclosure of the date in 2024, and this issue raises a question of A.M.'s credibility. Mr. Elliot argued that A.M. was mistaken when testifying that her mother provided the date to the prosecution in 2024, noting that Mr. Weekley was not even under indictment until 2025. Mr. Elliot advised the circuit court that A.M.'s mother contacted him and he had her write out a statement that was timely provided to the

defense. In this statement, dated May 8, 2025, the mother described a conversation she had with Mr. Weekley as they were driving home from a basketball game:[3]

> On the evening of February 24th I attended a WVU basketball game with Jeremy Michael Weekley. My daughter had spent the night at his house with me and I had to leave her there and go to work that morning. She was in bed and Mr. Weekley was sleeping on the couch when I left. On the way home from Morgantown Mr. Weekley told me that he moved to the bed with [A.M.] after I had left. He stated she rolled over onto his arm and was riding his arm in her sleep. I asked him what he did and he said he did nothing, he just left his arm under her and waited for her to stop. Then he told me not to ask her about it.

The State provided the mother's written statement to the defense within a few weeks of May 8, 2025, i.e., approximately six months before the January 2026 trial. Furthermore, the State argued that it is not required to prove the specific day on which the crimes occurred.

In its April 23, 2026, order, the circuit court acknowledged that the mother's written statement referred to the day February 24, but not to the year, and the mother did not expressly state that A.M. believed the alleged crimes occurred on this date. Nonetheless, the circuit court found that the mother's statement included context and details that could assist Mr. Weekley's recollection, and these details and the nature of the

[3] The State did not include a copy of the mother's May 8, 2025, statement in the Appendix Record filed in our Court. However, defense counsel George Consenza read the statement into the record when making his motion to dismiss during the January 2026 trial, and the trial transcript is in the Appendix Record.

discussion "could lead a rational person to conclude that the statement related to the charged offenses."

The circuit court denied the defendant's motion to disqualify the Tyler County Prosecuting Attorney's Office on the grounds that Assistant Prosecutor Elliot was a necessary witness, and the court granted the State's motion to prohibit the defense from calling Assistant Prosecuting Attorney Elliot as a witness. In its April 23, 2026, order, the circuit court concluded that the date of the mother's disclosure of information to the prosecutor was not material to any element of a charged offense, and any testimony from Mr. Elliot would not be relevant to the jury's determination of A.M.'s credibility. Furthermore, the circuit court found no indication that the prosecutor's office had acted improperly with regard to disclosing the date of the alleged crimes. To emphasize this point, the circuit court added: "The Court seeks to impress upon the parties that there is no evidence to suggest the Tyler County Prosecutor's Office acted improperly related to the specific date disclosure or has failed to provide or disclose any evidence the Defendant is entitled to for his defense."

Paradoxically, the circuit court nonetheless proceeded to disqualify the Tyler County Prosecuting Attorney's Office from the case. In this same April 23, 2026, order, the circuit court found that

> good cause exists for removal of the Tyler County Prosecutor's Office from this prosecution and [the] appointment of a special prosecutor to moot any future argument that the State has

> withheld possible exculpatory evidence from the Defendant . . . . The appointment of a special prosecutor is a preemptive action only to assist in the timely prosecution of this case by eliminating the filing of future motions that are merely repackaged motions already ruled on by the Court. All parties are entitled to swift and fair justice. The Court seeks to accomplish such by the appointment. Additionally, the appointment renders moot the allegation Defendant was denied the opportunity to pursue an alibi defense. The Defendant now can explore if such evidence exists.

On May 27, 2026, the State filed this petition for a writ of prohibition challenging the circuit court's disqualification of the Office of the Tyler County Prosecuting Attorney.

II. Standard of Review

"A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W. Va. Code 53-1-1." Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977). In this case, the State asserts that the circuit court has exceeded its legitimate powers. Thus, we consider the following factors:

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

> raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). We examine additional factors when the State seeks a writ of prohibition in a criminal case:

> 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 by statute on other grounds as stated in State v. Butler*, 239 W. Va. 168, 179 n.27, 799 S.E.2d 718, 729 n.27 (2017). With this in mind, we turn to the parties' arguments.

III. Discussion

The State argues that the *Hoover* and *Lewis* factors are satisfied and a writ of prohibition should be granted because the circuit court flagrantly exceeded its legitimate powers by disqualifying the Tyler County Prosecuting Attorney's office without a valid reason. The State contends that this baseless disqualification prevents the Tyler County Prosecuting Attorney from performing the constitutional and statutory duties of his elected

office. In response, Mr. Weekley argues that pursuant to West Virginia Code § 7-7-8 (1987), a circuit court "shall" appoint a special prosecutor "if in the opinion of the court it would be improper for [the prosecuting attorney] or his assistants to act[.]"[4] Repeating the unsuccessful arguments he made below, Mr. Weekley asserts that it would be improper for the Tyler County Prosecuting Attorney's office to handle this case because Assistant Prosecuting Attorney Elliot is a potential witness.

Our review is guided by *State ex rel. Preissler v. Dostert*, where this Court granted a writ of prohibition after a circuit court sua sponte disqualified an elected prosecuting attorney and appointed a special prosecutor. *State ex rel. Preissler v. Dostert*, 163 W. Va. 719, 260 S.E.2d 279 (1979). The *Preissler* Court recognized that when applying West Virginia Code § 7-7-8, a circuit court cannot summarily disqualify a prosecuting attorney's office. *Id.* This is because the office of prosecuting attorney is a public office created by the West Virginia Constitution, and the duties of the office emanate from the West Virginia Constitution. *Id.* at 730, 260 S.E.2d at 286 (citing W. Va. Const. art. 9, § 1). An elected prosecuting attorney is mandated to "attend to the criminal business of the State in the county in which he or she is elected . . . ." Syl. Pt. 4, in part, *State ex rel. Skinner v. Dostert*, 166 W. Va. 743, 278 S.E.2d 624 (1981) (quoting W. Va. Code § 7-4-

[4] West Virginia Code § 7-7-8 provides, in relevant part: "If, in any case, the prosecuting attorney and his assistants are unable to act, or if in the opinion of the court it would be improper for him or his assistants to act, the court shall appoint some competent practicing attorney to act in that case."

1). A prosecuting attorney is selected by, and answerable to, the county electorate. "The prosecuting attorney is a constitutional officer who exercises the sovereign power of the State at the will of the people and he is at all times answerable to them. W. Va. Const., art. 2, § 2; art. 3, § 2; art. 9, § 1." *Preissler*, 163 W. Va. at 719, 260 S.E.2d at 280-81, Syl. Pt. 2.

In *Preissler*, this Court held that "[b]efore a prosecuting attorney may be disqualified from acting in a particular case and relieved of the duties imposed upon him by the Constitution and by statute, the reasons for his disqualification must appear on the record . . . ." *Id.* at 719, 260 S.E.2d at 281, Syl. Pt. 3, in part. These reasons must indicate a failure or inability to fulfill the duties of office because "[t]he prosecuting attorney is still bound by law to perform the duties of his office. He can be discharged from that obligation only by a clear and convincing showing of his failure to fulfill his official responsibilities." *Id.* at 731, 260 S.E.2d at 286. Even in situations where the elected prosecuting attorney seeks voluntary recusal, the prosecutor can only be "discharged from his constitutional obligations when it appears on the record that his reasons for disqualification are not frivolous or improper." *Id.* at 732, 260 S.E.2d at 287.

With regard to Mr. Weekley's case, the circuit court did *not* find that the Tyler County Prosecuting Attorney failed, or is unable, to fulfill his official responsibilities. *See id.* at 731, 260 S.E.2d at 286. The circuit court did *not* express the "opinion of the court [that] it would be improper for [the prosecuting attorney] or his assistants to act[.]" *See*

W. Va. Code § 7-7-8. Instead, the circuit court rather emphatically reached the opposite conclusion; it expressly found no evidence of prosecutorial misconduct regarding the mother's disclosure of the alleged crime date, and it ruled that the assistant prosecutor had no material testimony to give.

The circuit court reasoned that disqualifying the prosecutor's office from Mr. Weekley's case would "preemptively" stop the defendant from "repackaging" arguments the court had already considered and denied. The court reasoned that this would save time. However, this preemptive reason is wholly insufficient to override the Tyler County Prosecuting Attorney's constitutional and statutory mandate to pursue criminal cases in Tyler County on behalf of the State of West Virginia and the county electorate. "[P]rophylactic disqualifications untethered to the defendant's rights risk unnecessary encroachment on a coordinate branch of Government." *United States v. Allen*, 835 F. Supp. 3d 66, 77 (D.D.C. 2026) (citation omitted) (refusing an unsupported motion to disqualify the U.S. Attorney from a criminal prosecution).

In its order, the circuit court added that the appointment of a special prosecutor would allow Mr. Weekley to explore alibi evidence. The court did not explain this statement, and the statement makes no logical sense in light of the court's rulings finding no evidence of prosecutorial misconduct and preventing the defense from calling Mr. Elliot as a witness. Because the circuit court declared a mistrial, Mr. Weekley and his lawyer will have the same time and opportunity to investigate an alibi defense regardless

of whether the elected prosecutor or a special prosecutor pursues these charges. Moreover, armed with information he learned during the first trial, defense counsel will have another opportunity to cross-examine A.M. at a new trial regarding the date of the alleged assault, her recollection of the date and events, and her reasons for not coming forward sooner.

In response to this petition for a writ of prohibition, Mr. Weekley persists in arguing that the prosecutor's office must be disqualified because Assistant Prosecuting Attorney Elliot is a potential witness. With little explanation, Mr. Weekley contends that knowing about A.M.'s mother's communications with the assistant prosecutor would allow the jury to weigh A.M.'s credibility. However, decisions on the admissibility of testimony are left to the discretion of the trial judge. *See, e.g.*, Syl. Pt. 4, *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998) ("A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard."). To disqualify opposing counsel on the grounds that opposing counsel may be a witness, a party must prove, among other factors, that the "attorney will give evidence material to the determination of the issues being litigated . . . ." Syl. Pt. 3, in part, *Smithson v. U.S. Fidelity & Guar. Co.*, 186 W. Va. 195, 411 S.E.2d 850 (1991).

The circuit court was satisfied that the prosecutor's office did not withhold exculpatory evidence, and it is undisputed that the mother's written statement was provided to the defense shortly after it was made. Even if we assume that A.M. was correct when testifying that her mother disclosed the date to the prosecutor sometime in 2024, the

prosecutor's knowledge and actions are immaterial to weighing A.M.'s credibility. Based on the record before us, we conclude that the circuit court did not abuse its discretion when granting the State's motion in limine to exclude Assistant Prosecutor Elliot from being a trial witness. Defense counsel will be able to question A.M. and her mother at trial regarding A.M.'s delay in revealing the alleged assault, how A.M. was subsequently able to recall the date, and why the mother believes the assault occurred on the morning of the basketball game. The circuit court's ruling is bolstered by our long-standing law that the State need not prove the specific date of a sex crime. *See, e.g.*, *Frank A. v. Ames*, 246 W. Va. 145, 170, 866 S.E.2d 210, 235 (2021) (discussing how this Court's cases have made clear that time is not an element of sexually based offenses, and a specific date does not need to be included in an indictment or proved at trial).

We conclude that the circuit court committed clear error as a matter of law and exceeded its legitimate authority by disqualifying the elected prosecuting attorney and his staff when no valid reason for the disqualification appears on the record. *See Preissler*, 163 W. Va. at 719-20, 260 S.E.2d at 281, Syl. Pt. 3, in part ("Before a prosecuting attorney may be disqualified from acting in a particular case and relieved of the duties imposed upon him by the Constitution and by statute, the reasons for his disqualification must appear on the record").

Next we turn to the factors delineated in *Hoover v. Berger* for determining whether to grant a writ of prohibition. *See Hoover*, 199 W. Va. at 15, 483 S.E.2d at 15, Syl.

Pt. 4.[5] These factors are "general guidelines," and all of the factors need not be proven; the third factor, which is the existence of clear error as a matter of law, is "given substantial weight." *Id.*

The first and second *Hoover* factors examine whether the petitioning party has "no other adequate means, such as direct appeal, to obtain the desired relief" and "will be damaged or prejudiced in a way that is not correctable on appeal." *Id.* The State has satisfied these two factors. The State has no legal right to file a direct appeal regarding this disqualification issue, and if a special prosecutor takes the case to trial, there will be no available recourse. The State will have been deprived of the right to prosecute the case by its duly elected constitutional officer. As to the third *Hoover* factor, *see id.*, we have already concluded that the circuit court's disqualification ruling was clearly erroneous as a matter of law. Finally, the fifth *Hoover* factor directs us to examine whether the circuit court's "order raises new and important problems or issues of law of first impression." *Id.* We perceive that in the context of prosecutorial disqualifications, there is a tension created by our Court's opinion in *State v. Lewis*, 188 W. Va. 85, 422 S.E.2d 807, that should be addressed as a matter of first impression.[6]

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[5] The *Hoover* factors are quoted in section II of this opinion.

[6] We have no information regarding the fourth *Hoover* factor, which looks at whether the circuit court's error is often repeated or manifests a persistent disregard for the law. *Hoover*, 199 W. Va. at 15, 483 S.E.2d at 15, Syl. Pt. 4. However, the State is not required to prove all of the *Hoover* factors to obtain prohibition relief. *See id.*

The *Lewis* Court was tasked with deciding whether the State is ever permitted to file a petition for a writ of prohibition regarding a criminal case.[7] The Court recognized that "the State has no right of appeal in a criminal case, except as may be conferred by the Constitution or statute[,]" and the State's right to appeal is "confined to those cases where an indictment is held bad or insufficient[.]" *Id*. at 86, 422 S.E.2d 808, Syl. Pt. 3 & 4 (internal quotation marks and citations omitted). However, West Virginia Code § 53-1-1 (1923) prescribes that a writ of prohibition "shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court . . . having such jurisdiction, exceeds its legitimate powers." After analyzing our prior caselaw and the respective rights of the parties, the Court concluded that "the State is entitled to a limited right to seek a writ of prohibition in a criminal case." *Lewis*, 188 W. Va. at 94, 422 S.E.2d at 816. The Court created a test that also accounts for the criminal defendant's interests:

> 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.

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[7] The *Lewis* Court separately decided whether the West Virginia Legislature permitted the State to certify questions; however, that aspect of the *Lewis* opinion has been superseded by a statutory amendment. *See Butler*, 239 W. Va. at 179 n.27, 799 S.E.2d at 729 n.27.

Id. at 86, 422 S.E.2d at 808, Syl. Pt. 5. Mr. Weekley is not asserting that the State's petition for a writ of prohibition offends his Double Jeopardy or speedy trial rights, and the State promptly filed this petition within a few weeks of the circuit court's order. The issue is whether the circuit court's disqualification ruling was so flagrant as to deprive the State of its right to prosecute or ability to obtain a valid conviction. The State contends that, even though, technically, a special prosecutor could be appointed to pursue the charges against Mr. Weekley, the circuit court's disqualification ruling is so flagrant and unsupported as to justify a writ of prohibition.

When fashioning the court-created test in Syllabus Point 5, the *Lewis* Court was addressing a case about the admissibility of a co-defendant's out-of-court confession. *Id.* at 87, 422 S.E.2d at 809. The Court was not considering the disqualification of an elected prosecuting attorney. A rote application of the *Lewis* test would result in the State never being permitted to challenge a disqualification ruling, regardless of whether the defendant's rights are affected. This would be wholly contrary to the constitutional nature of a prosecutor's duties.[8] Therefore, we hold that because an elected prosecuting attorney's duties to handle criminal matters in his or her county emanate from the West Virginia Constitution, the question of whether a circuit court's ruling is so flagrant as to deprive the State of its right to prosecute, encompasses cases where the State has erroneously been

[8] *See, supra*, the discussion of *Preissler*, 163 W. Va. 719, 260 S.E.2d 279, and the constitutional basis for a prosecutor's duties.

deprived of its right to prosecute a case by its duly elected prosecuting attorney. To the extent that Syllabus Point 5 of *State v. Lewis* may be read differently, it is hereby modified.

In this case, we conclude that the State has satisfied the test in *Lewis* Syllabus Point 5. As discussed above, the circuit court's "preemptive" disqualification of the elected prosecuting attorney and his entire office, without a valid reason, was clearly erroneous. This decision was so flagrant as to violate the State's constitutional and statutory right to prosecute the case by its duly elected prosecuting attorney, while doing nothing to protect the defendant's rights.

Accordingly, we conclude that the State has established that under the factors of both *Hoover* and *Lewis*, it is entitled to the requested writ.

IV. Conclusion

For the foregoing reasons, we grant a writ of prohibition and remand this matter to the circuit court with directions to permit the Office of the Tyler County Prosecuting Attorney to remain as counsel for the State of West Virginia in *State v. Weekley*.

Writ granted.