BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA ex rel.
PAMELA JEAN GAMES-NEELY, Prosecuting Attorney,

Petitioner,

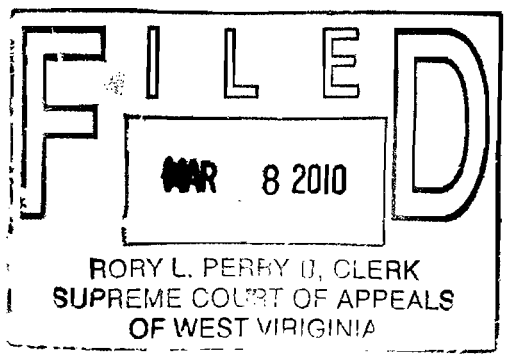
v.

DOCKET NO.:
(Berkeley County Case No.: 09-F-165)

HONORABLE GRAY SILVER III,
Circuit Judge, 23rd Judicial Circuit,
and JAMES L. BLACKFORD III,

Respondent.

**PETITION FOR WRIT OF PROHIBITION**
**AND MEMORANDUM OF LAW**




Christopher C. Quasebarth
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State Bar No. 4676
380 W. South Street, Ste. 1100
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304-264-1971

COPY

## MEMORANDUM OF ADDRESSES FOR RULE TO SHOW CAUSE SERVICE

Respondent Judge:

Honorable Gray Silver III, Judge
Berkeley County Circuit Court
380 W. South Street, Ste. 4400
Martinsburg, West Virginia 25401

Respondent Blackford:

Brett Basham, Esq.
Assistant Public Defender
313 Monroe Street
Martinsburg, West Virginia 25401

Petitioner:

State of West Virginia
Christopher C. Quasebarth
Chief Deputy Prosecuting Attorney
380 W. South Street, Ste. 1100
Martinsburg, West Virginia 25401

## I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

TRIAL IN THIS MATTER IS SCHEDULED TO COMMENCE ON TUESDAY, MARCH 9, 2010. This is a felony arson case where the Respondent James L. Blackford III is charged with one felony count of Arson First Degree, one felony count of Setting Fire to Lands, and one felony count of Arson Resulting in Serious Bodily Injury.

The Respondent Blackford recently filed a Motion to Dismiss Count I of the Indictment (Arson First Degree), on the premise that it is a lesser-included charge of Count III (Arson Resulting in Seriously Bodily Injury). The Petitioner opposed the motion, arguing that Arson First Degree is not a lesser-included offense. Alternatively, the Petitioner argued that, if Arson First Degree were a lesser-included offense, dismissal is not the proper remedy; rather, the remedy would be to require the Petitioner to elect which charge it would present to the jury at the close of the State's case.

On Friday, March 5. 2010, the Petitioner received a written order from the Respondent Circuit Court Judge dismissing outright Count I of the Indictment. It is from this Order that the Petitioner brings this Petition. The Petitioner respectfully moves this Honorable Court to grant this Petition and issue a writ prohibiting the Respondent Judge from enforcing his order and remanding the matter to the Respondent Judge for trial on the Indictment as handed down by the Grand Jury. [1]

## II. STATEMENT OF THE FACTS

1. The Respondent Blackford was indicted in the October 2009 term of court with three counts: felony Arson First Degree, in violation of **W. Va. Code** § 61-3-1(a); felony Setting Fire to Lands, in violation of **W. Va. Code** § 61-3-6; and Arson Resulting in Serious Bodily Injury, in

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[1]On Friday, March 5, 2010, the State filed and argued a Motion for Stay, to allow time to file a Petition for Writ with this Court, and a Motion for Reconsideration. The undersigned is informed that the Respondent Circuit Court Judge took the matters under advisement and told the parties that he would render a ruling by noon on Monday, March 8, 2010. The undersigned is further informed that the Respondent Circuit Court Judge effectively denied the stay when he also told the parties that if he did not hear from this Honorable Court by 5:00 p.m., Monday, March 8, 2010, trial would commence on Tuesday, March 9, 2010. At the time of the filing of this Petition, the Petitioner has no received no order other than the one entered on March 5, 2010, dismissing Count I.

violation of **W. Va. Code** § 61-3-7(b). [Indictment, 10/09; State v. Blackford, Case No.: 09-F-165, Attachment A.]

2. The Indictment was the result of the investigation into the April 7, 2009, burning of a large three-story barn (approximately 200' x 75') on farm property belonging to Anna May Kelly. That farm property abuts the Bedington Fire Department in Berkeley County, West Virginia, where the Respondent Blackford was then a firefighter. The Respondent Blackford was present at the firehall that day and was involved in fighting the fire. The barn was wholly consumed by the blaze and a total loss. Firefighter Kenneth Ayers suffered serious and permanent head, face and arm injuries while fighting the fire when hit by a falling wall when the roof collapsed. The source of the fire was determined to be incendiary. [Fire Marshall Report, Attachment B.]

3. The Respondent Blackford's activities at the firehall shortly before the fire was reported were suspicious. He was observed having gone in and out of the firehall shortly before the fire was reported, and on his final return immediately before the fire was reported he was observed to have been acting differently and appeared to have been running. During a subsequent non-custodial interview, investigation the Respondent Blackford initially stated to investigators that he had been outside the firehall and heard some four-wheelers near the barn and that they had driven off quickly and out of sight. [Id.]

4. During a later non-custodial *Mirandized* interview, the Respondent Blackford gave a different statement, telling investigators the following. He and a man named "Brian," whose last name the Respondent Blackford did not know, met near the barn to smoke crack cocaine. Brian had the bottom of a plastic bottle that he filled with rubbing alcohol and lit on fire. The Respondent Blackford accidentally hit Brian's hand, knocking the fire to the ground and catching grass on fire. The Respondent Blackford was unable to put the fire out. Brian ran away. The Respondent Blackford returned to the firehall and told no one of the fire. [Id.]

5. During a later non-custodial *Mirandized* pre-polygraph interview the Respondent Blackford gave a third different statement, telling investigators the following. The Respondent Blackford was at the firehall. He saw a man named "Brian" walking across the field and met Brian near the barn. Brian asked if he wanted to smoke. Brian had the bottom of a plastic bottle

that he filled with rubbing alcohol and lit on fire to light the blunt. Something spooked Brian and he dropped the lit bottle fire to the ground, catching grass on fire. The Respondent Blackford stomped the fire and thought it was out. Brian left. The Respondent Blackford returned to the firehall and told no one of the fire. [Respondent Blackford's Hand-written Statement, )part of State Police Polygraph Report, Attachment C.]

7. In that same pre-polygraph statement the Respondent Blackford stated that he told no one about his involvement in the fire prior to that time because he was scared. He offered a description of Brian but did not know Brian's last name. [Id.]

8. In the *Mirandized* post-polygraph interview the Respondent Blackford offered another version of the story, saying that he met Brian earlier in the day and that they agreed to meet later to smoke marijuana. When they later met, Brian had the bottom of a plastic bottle that he filled with rubbing alcohol and lit on fire. The Respondent Blackford was spooked by the sound of the firehall door closing and he knocked the lit bottle from Brian to the ground, catching grass on fire. The Respondent Blackford stomped the fire and thought it was out. Brian left. The Respondent Blackford returned to the firehall and told no one of the fire. [Polygraph Report, Attachment C.]

6. After the Respondent Blackford was arrested for the arson, a man named Brian was brought to the police station. The Respondent Blackford denied that that Brian was the Brian at the barn. The police have been unable to locate anyone else that may have been at the barn with the Respondent Blackford. [Fire Marshall Report, Attachment B.]

7. Two weeks before the scheduled trial date the Respondent Blackford filed a Motion to Dismiss Count I of the Indictment, asserting that Arson First Degree is a lesser-included offense of Arson Resulting in Serious Bodily Injury, thus posing a double jeopardy issue. [Motion to Dismiss Count I of the Indictment Based on Double Jeopardy, 2/22/10, Attachment D.]

8. The Petitioner responded, arguing that Arson First Degree is not a lesser-included offense. Alternatively, the Petitioner argued that, if Arson First Degree were a lesser-included offense, dismissal is not the proper remedy; rather, the remedy would be to require the Petitioner to elect which charge it would present to the jury at the close of the State's case. [State's

Response to Motion to Dismiss, 3/3/10, Attachment E.]

9. After a March 3, 2010, hearing before the Respondent Circuit Court Judge where argument was heard on the matter, the Respondent Blackford filed a responsive pleading. [Defendant's Reply to State's Response to Motion to Dismiss, 3/4/10, Attachment F.] [2]

10. By written order entered at 4:24 p.m. on Thursday, March 4, 2010, and received by the State on Friday, March 5, 2010, the Respondent Circuit Court Judge granted the Motion to Dismiss. [Order Granting Defendant's Motion to Dismiss Count I of the Indictment Based on Double Jeopardy, 3/4/10, Attachment G.]

11. On Friday, March 5, 2010, the Petitioner filed and argued a Motion for Stay and Continuance, to allow time to file a Petition for Writ with this Court, and a Motion for Reconsideration. [Attachments H and I.] The undersigned is informed that the Respondent Circuit Court Judge took the matters under advisement at a hearing on that date and told the parties that he would render a ruling by noon on Monday, March 8, 2010. The undersigned is further informed that the Respondent Circuit Court Judge also told the parties that if he did not hear from this Honorable Court by 5:00 p.m., Monday, March 8, 2010, trial would commence on Tuesday, March 9, 2010. The stay is effectively denied as no further order is entered as of the time of the filing of this Petition.

12. The Petitioner respectfully moves this Honorable Court to grant this Petition and issue a writ prohibiting the Respondent Judge from enforcing his order and remanding the matter to the Respondent Judge for trial on the Indictment as handed down by the Grand Jury.

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[2] The Respondent Blackford's bail was also revoked at the March 3, 2010, hearing upon evidence that he violated the terms of his bail by traveling out of state without permission and consuming alcoholic beverages.

## III. THE ISSUES PRESENTED

**A. WHETHER THE CIRCUIT COURT EXCEEDED ITS LEGITIMATE POWER IN DISMISSING COUNT I OF THE INDICTMENT CHARGING ARSON FIRST DEGREE, IN VIOLATION OF W. VA. CODE § 61-3-1(a), AS A LESSER-INCLUDED OFFENSE WHEN THE CLEAR EXPRESSION OF LEGISLATIVE INTENT DEMONSTRATES THAT ARSON RESULTING IN SERIOUS BODILY INJURY, IN VIOLATION OF W. VA. CODE § 61-3-7(b), AS CHARGED IN COUNT III OF THE INDICTMENT, IS TO BE AN AGGREGATED SENTENCE?**

**B. WHETHER THE CIRCUIT COURT EXCEEDED ITS LEGITIMATE POWER IN DISMISSING COUNT I OF THE INDICTMENT CHARGING ARSON FIRST DEGREE, IN VIOLATION OF W. VA. CODE § 61-3-2, AS A LESSER-INCLUDED OFFENSE OF ARSON RESULTING IN SERIOUS BODILY INJURY, IN VIOLATION OF W. VA. CODE § 61-3-7(b), AS CHARGED IN COUNT III OF THE INDICTMENT, RATHER THAN SIMPLY REQUIRE THE STATE TO ELECT WHICH CHARGE TO PRESENT TO THE PETIT JURY AT THE CLOSE OF THE STATE'S CASE-IN-CHIEF?**

## IV. AUTHORITIES RELIED UPON

*United States Constitution* Art. V.....14.

*West Virginia Constitution*, Art. III, § 5.....14.

State ex rel. Caton v. Sanders, 215 W. Va. 755, 601 S.E.2d 75 (2004).....7, 8.

Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979).....7.

State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996).....7, 8, 13.

State ex rel. Games-Neely v. Sanders, 220 W.Va. 230, 641 S.E.2d 153 (2006).....7-8.

SER Bosley v. Willett, 204 W. Va. 662, 515 S.E.2d 825 (1999).....8.

State ex rel. Kees v. Sanders, 192 W. Va. 602, 453 S.E.2d 436 (1994).....8.

State v. Penwell, 199 W. Va. 111, 483 S.E.2d 240 (1996).....8-9, 10, 11, 12, 13, 16.

State v. Gill, 187 W. Va. 136, 416 S.E.2d 253 (1992).....9, 13, 14, 16.

State v. Elliott, 186 W.Va. 361, 412 S.E.2d 762 (1991).....13.

State v. George W.H., 190 W.Va. 558, 439 S.E.2d 423 (1993).....13, 14.

State v. Lewis, 188 W.Va. 85, 422 S.E.2d 807 (1992).....13.

State v. Walker, 188 W.Va. 661, 425 S.E.2d 616, 622 (1992).....15, 16.

**W. Va. Code** § 61-3-1(a).....9, 11, 12, 13, 14.

**W. Va. Code** § 61-3-1(b).....9.

**W. Va. Code** § 61-3-6.....9, 12.

**W. Va. Code** § 61-3-7.....10, 11, 12.

**W. Va. Code** § 61-3-7(a).....12.

**W. Va. Code** § 61-3-7(b).....10, 11, 12, 13, 14.

**W. Va. Code** § 61-2-12.....10.

**W. Va. Code** § 61-2-10.....10.

**W. Va. Code** § 61-8D-5.....13.

**W. Va. Code** § 61-8B-1, *et seq.*,.....13.

**W. Va. Code** § 58-5-30.....13.

**W. Va. Code** § 61-2-1.....15.

## V. ARGUMENT

**A. WHETHER THE CIRCUIT COURT EXCEEDED ITS LEGITIMATE POWER IN DISMISSING COUNT I OF THE INDICTMENT CHARGING ARSON FIRST DEGREE, IN VIOLATION OF W. VA. CODE § 61-3-1(a), AS A LESSER-INCLUDED OFFENSE WHEN THE CLEAR EXPRESSION OF LEGISLATIVE INTENT DEMONSTRATES THAT ARSON RESULTING IN SERIOUS BODILY INJURY, IN VIOLATION OF W. VA. CODE § 61-3-7(b), AS CHARGED IN COUNT III OF THE INDICTMENT, IS TO BE AN AGGREGATED SENTENCE?**

1. The Legal Standard.

The standard followed by this Court in determining whether to exercise its discretion to grant the extraordinary remedy of a writ of prohibition is

> to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

Syl. Pt. 3, in part, State ex rel. Caton v. Sanders, 215 W. Va. 755, 601 S.E.2d 75 (2004), *citing* Syl. Pt. 1, Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979).

This Court applies five factors when determining whether to entertain and issue a writ:

> [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.

Syl. pt. 4, State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996). *See also*: State

ex rel. Games-Neely v. Sanders, 220 W.Va. 230, 232-233, 641 S.E.2d 153, 155-156 (2006).

The extraordinary writ of prohibition is exercised under the following circumstances: "'Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for [a petition for appeal] or certiorari.' Syllabus Point 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953). " Syl. Pt. 1, SER Bosley v. Willett, 204 W. Va. 662, 515 S.E.2d 825 (1999).

Prohibition does not lie to prevent a simple abuse of discretion:

> '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).

Syl. Pt. 1, State ex rel. Caton v. Sanders, *supra*; Syl. Pt. 2, State ex rel. Kees v. Sanders, 192 W. Va. 602, 453 S.E.2d 436 (1994).

2. Discussion.

The case *sub judice* presents four of the five factors from State ex rel. Hoover v. Berger, *supra*, to determine whether to entertain and issue a writ of prohibition: (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; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. *Id.* This Court is respectfully requested to grant the Petition.

Factor Three, a clear error as a matter of law, demonstrated by the Respondent Circuit Court Judge's order dismissing Count I of the Indictment, is given substantial weight by this Court. The Respondent Judge's order dismissing Count I of the Indictment is a clear error of law. Count I, Arson First Degree, is not a lesser-included offense of Count III, Arson Resulting in Serious Bodily Injury. *See* Syl. Pts. 1-3, State v. Penwell, 199 W. Va. 111, 483 S.E.2d 240

(1996); Syl. Pts. 7-8, State v. Gill, 187 W. Va. 136, 416 S.E.2d 253 (1992), for standards for determining legislative intent when ascertaining whether one criminal offense is a lesser-included of another offense. Applying the standards from Penwell and Gill, the Respondent Judge clearly erroneously applied the law in disimissing Count I of the Indictment.

The Respondent Blackford is indicted for three felony offenses: felony Arson First Degree, in violation of **W. Va. Code** § 61-3-1(a) [3]; felony Setting Fire to Lands, in violation of **W. Va. Code** § 61-3-6 [4]; and felony Arson Resulting in Serious Bodily Injury, in violation of **W.**

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[3] **W. Va. Code** § 61-3-1(a) reads:

> (a) Any person who willfully and maliciously sets fire to or burns, or who causes to be burned, or who aids, counsels, procures, persuades, incites, entices or solicits any person to burn, any dwelling, whether occupied, unoccupied or vacant, or any outbuilding, whether the property of himself or herself or of another, shall be guilty of arson in the first degree and, upon conviction thereof, be sentenced to the penitentiary for a definite term of imprisonment which is not less than two nor more than twenty years. A person imprisoned pursuant to this section is not eligible for parole prior to having served a minimum of two years of his or her sentence or the minimum period required by the provisions of section thirteen, article twelve, chapter sixty-two of this code, whichever is greater.

A "barn" is an "outbuilding" for purposes of this offense. **W. Va. Code** § 61-3-1(b).

[4] **W. Va. Code** § 61-3-6 reads:

> If any person willfully, unlawfully and maliciously sets fire to any woods, fence, grass, straw or other thing capable of spreading fire on lands, he or she shall be guilty of a felony and, upon conviction, shall be sentenced to the penitentiary for a definite term of imprisonment which is not less than one year nor more than five years or fined not to exceed five thousand dollars, or both. He or she shall, moreover, be liable to any person injured thereby, or in consequence thereof, for double the amount of damages sustained by such person. A person imprisoned pursuant to this section is not eligible for parole prior to having served a minimum of one year of his or her sentence or the minimum period required by the provisions of section thirteen, article twelve, chapter sixty-two of this code, whichever is greater.

investigation the Respondent Blackford, **Va. Code** § 61-3-7(b) [5].

In Penwell this Court affirmed that defendant's convictions for both felony Aggravated Robbery, in violation of **W. Va. Code** § 61-2-12, and felony Assault During the Commission of a Felony, in violation of **W. Va. Code** § 61-2-10, arising from the same incident. This Court first reasoned that since Aggravated Robbery carries a greater penalty (a determinate prison sentence of not less than ten years) than Assault During the Commission of a Felony (an indeterminate sentence of two-to-ten years), Aggravated Robbery cannot be a lesser-included offense of Assault During the Commission of a Felony. Penwell, 483 S.E.2d 240, 245.

Likewise, in the case *sub judice* Arson First Degree, with its statutory penalty of a determinate sentence between two and twenty years, carries a greater penalty than Arson Resulting in Serious Bodily Injury, with its penalty of a determinate sentence between three and

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[5] **W. Va. Code** § 61-3-7 reads:

> (a) Any person who violates the provisions of sections one, two, three, four, five or six of this article, which violation causes bodily injury, but does not result in death, to any person shall be guilty of a felony, and upon conviction thereof, shall be sentenced to the penitentiary for a definite term of imprisonment which is not less than two nor more than ten years, or fined not more than five thousand dollars, or both. A person imprisoned pursuant to this section is not eligible for parole prior to having served a minimum of two years of his or her sentence or the minimum period required by the provisions of section thirteen, article twelve, chapter sixty-two of this code, whichever is greater.
>
> (b) Any person who violates the provisions of sections one, two, three, four, five or six of this article, which violation causes serious bodily injury which maims, disfigures, or disables any person, but does not result in death, shall be guilty of a felony and, upon conviction thereof, shall be sentenced to the penitentiary for a definite term of imprisonment which is not less than three nor more than fifteen years, or fined not more than ten thousand dollars, or both. A person imprisoned pursuant to this section is not eligible for parole prior to having served a minimum of three years of his or her sentence or the minimum period required by the provisions of section thirteen, article twelve, chapter sixty-two of this code, whichever is greater.

fifteen years. Applying the Penwell analysis, Count I, Arson First Degree, is not a lesser included offense of Count III, Arson Resulting in Serious Bodily Injury. The Respondent Judge was clearly wrong when he ruled that Arson First Degree is a lesser-included offense and then dismissed Count I of the Indictment.

Moreover, this Court in its Penwell holding reasoned that there are scenarios where the State could prove the commission of Aggravated Robbery that do not implicate the elements of Assault During the Commission of a Felony, but the State could not prove Assault During the Commission of a Felony during an Aggravated Robbery without proving each and every element of the offense of Aggravated Robbery. Therefore, this Court concluded

> that by enacting the offense of assault during the commission of a felony, the legislature clearly intended to impose punishment in addition to that specified for the underlying felony, if the criminal actor shot, cut, stabbed, or wounded another person during the attempt to commit or the commission of the underlying felony and to classify that additional conduct as felonious. In short, W.Va.Code § 61-2-10 acts as an enhancement statute where conduct otherwise defined as felonious is executed in such a manner that another person-a victim of the underlying felony or a witness or other bystander-is shot, cut, stabbed, or wounded in the process.

Penwell, 483 S.E.2d 240, 245.

Similarly, in the case *sub judice* the Petitioner can prove the elements of the felony offense of Arson First Degree, **W. Va. Code** § 61-3-1(a), ("willfully and maliciously sets fire to or burns, or who causes to be burned, or who aids, counsels, procures, persuades, incites, entices or solicits any person to burn, any dwelling, whether occupied, unoccupied or vacant, or any outbuilding, whether the property of himself or herself or of another") of Ms. Kelly's barn without proving the single additional element of serious bodily injury to Mr. Ayers necessary to the felony offense of Arson Resulting in Serious Bodily Injury, **W. Va. Code** § 61-3-7(b). However, the Petitioner cannot prove each of the elements of Arson Resulting in Serious Bodily Injury to Mr. Ayers, **W. Va. Code** § 61-3-7(b), in this Arson First Degree context, without first proving each of the elements of Arson First Degree as to the burning of Ms. Kelly's barn by the Respondent Blackford.

Therefore, just as this Court found in Penwell, by enacting the offense of Arson Resulting in Serious Bodily Injury, the legislature clearly intended to impose punishment *in addition* to that specified for the underlying felony of Arson, if the arson "causes serious bodily injury which maims, disfigures, or disables any person, but does not result in death," and to classify that additional conduct as felonious. **W. Va. Code** § 61-3-7(b) acts as an enhancement statute where the arson conduct listed as underlying offenses thereto results in serious bodily injury which maims, disfigures or disables any person, and the sentence is intended by the legislature to be aggregated.[6] [7]

Since the clear legislative intent is that **W. Va. Code** § 61-3-7(b) acts as an enhancement statute to the underlying enumerated felony arson offenses, Arson First Degree, **W. Va. Code** § 61-3-1, cannot be a lesser-included offense. The legislature clearly intended a conviction of **W. Va. Code** § 61-3-7(b) to result in an aggregated sentence, not to act as an offense subsuming Arson First Degree. The Respondent Judge was clearly wrong when he ruled that Arson First Degree is a lesser-included offense of Arson Resulting in Serious Bodily Injury and dismissed

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[6]As further evidence that the legislature intended the offense of Arson Resulting in Serious Bodily Injury to be an enhancement statute, the State notes that the lesser offense of Arson Resulting in Bodily Injury, **W. Va. Code** § 61-3-7(a), carries the exact same determinate sentence as Arson First Degree, **W. Va. Code** § 61-3-1(a). With that sentence, it makes no logical sense that Arson First Degree could be a lesser-included offense of Arson Resulting in Bodily Injury. Arson Resulting in Bodily Injury, however, is clearly a lesser-included offense of Arson Resulting in Serious Bodily Injury. Arson First Degree was enacted by the legislature in 1935, whereas the offenses of Arson Resulting in Serious Bodily Injury and Arson Resulting in Bodily Injury, **W. Va. Code** § 61-3-7, were not enacted by the legislature until 1997.

[7]Curiously, the Respondent Blackford did not move to dismiss, and the Respondent Judge made no finding that, Count II, felony Setting Fire to Lands, in violation of **W. Va. Code** § 61-3-6, as a lesser-included offense of Count III, Arson resulting in Bodily Injury, although just like the Arson First Degree charged in Count I, it is a statutory underlying arson offense upon which Arson Resulting in Serious Bodily Injury may be based. The Petitioner acknowledges that the sentence for Setting Fire to Lands is less than that for Arson Resulting in Serious Bodily Injury, but asserts that the rest of the Penwell analysis reflects a clear legislative intent that Setting Fire to Lands is not a lesser-included offense of Arson Resulting in Serious Bodily Injury but that a conviction for the latter may be used as an aggregated sentence where serious bodily injury is also proved.

Count I of the Indictment. [8]

As this Court recognized in Penwell: "In light of our conclusion that the legislative intent to create two separate offenses can be discerned from the language of the statutes under discussion here, we need not proceed to the next step suggested in [*State v.*] *Gill* [187 W. Va. 136, 416 S.E.2d 253 (1997)],[9] the application of the *Blockburger* [*v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)] test." Penwell, *supra*, 483 S.E.2d 240, 245.

The Respondent Judge is clearly erroneous and exceeds his legitimate power in ordering the dismissal of Count I, Arson First Degree, by concluding that it is a lesser-included offense of Count III, Arson Resulting in Serious Bodily Injury. State v. Penwell, *supra*; State v. Gill, *supra*. The Petitioner respectfully moves this Honorable Court to grant this Petition and issue a writ prohibiting the Respondent Judge from enforcing that order and further remanding the matter for trial on all counts of the Indictment. State ex rel. Hoover v. Berger, *supra*.[10]

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[8]*See also*: Syl. Pt. 3, State v. Elliott, 186 W.Va. 361, 412 S.E.2d 762 (1991)(no merging of felony murder charge and underlying felony where there are separate and disctinct victims.)

[9]This Court in State v. Gill, *supra*, 187 W. Va. 136, 416 S.E.2d 253 (1997), holds that there is a clear legislative intent for imposing mutiple punishments for separate sexual offenses under **W. Va. Code** § 61-8D-5 and **W. Va. Code** § 61-8B-1, *et seq*., although they arise from the same sexual incident. *See also*: State v. George W.H., 190 W.Va. 558, 439 S.E.2d 423 (1993).

[10]Factors One and Two from State ex rel. Hoover v. Berger, *supra*, are also present in the current case. The Petitioner has no other remedy aside from this writ to correct the problem, nor can it be addressed on appeal, since the State has no right of appeal in a criminal case. Syl. Pts. 3 and 4, State v. Lewis, 188 W.Va. 85, 422 S.E.2d 807 (1992); **W. Va. Code** § 58-5-30. The State files this as a Petition for Writ of Prohibition rather than the limited appeal allowable under **W. Va. Code** § 58-5-30 as the Respondent Judge did not find the Indictment to be "bad or insufficient." If this Honorable Court finds that a Petition for Writ of Prohibition is not the appropriate remedy in this case, the State requests this Court to accept this Petition as a Petition for Appeal under **W. Va. Code** § 58-5-30.

Finally, also present is Factor Five from State ex rel. Hoover v. Berger, supra. This Court has not previously addressed the issue presented of the legislative intent for aggregated sentences for the felony offenses of Arson First Degree, in violation of **W. Va. Code** § 61-3-1(a), and Arson Resulting in Serious Bodily Injury, in violation of **W. Va. Code** § 61-3-7(b).

**B. WHETHER THE CIRCUIT COURT EXCEEDED ITS LEGITIMATE POWER IN DISMISSING COUNT I OF THE INDICTMENT CHARGING ARSON FIRST DEGREE, IN VIOLATION OF W. VA. CODE § 61-3-2, AS A LESSER-INCLUDED OFFENSE OF ARSON RESULTING IN SERIOUS BODILY INJURY, IN VIOLATION OF W. VA. CODE § 61-3-7(b), AS CHARGED IN COUNT III OF THE INDICTMENT, RATHER THAN SIMPLY REQUIRE THE STATE TO ELECT WHICH CHARGE TO PRESENT TO THE PETIT JURY AT THE CLOSE OF THE STATE'S CASE-IN-CHIEF?**

1. The Legal Standard.

The standard followed by this Court in determining whether to exercise its discretion to grant the extraordinary remedy of a writ of prohibition is the same noted in Argument A, *supra.*

2. Discussion.

Even were this Court to find that Arson First Degree, **W. Va. Code** § 61-3-1(a), is a lesser-included offense of Arson Resulting in Serious Bodily Injury, **W. Va. Code** § 61-3-7(b), the Respondent Judge still was clearly wrong in dismissing Count I of the Indictment as a lesser-included offense of Count III implicating double jeopardy.[11]

This Court holds in Syl. Pts. 1 and 2, State v. Gill, *supra*, 187 W. Va. 136, 416 S.E.2d 253 (1997), that:

> 1. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution consists of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.
>
> 2. "The Double Jeopardy Clause in Article III, Section 5 of the *West Virginia Constitution*, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for

[11]"The Fifth Amendment to the United States Constitution provides, in part: '[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb[.]' Section 5 of Article III of the West Virginia Constitution states, in part: 'No person shall ... be twice put in jeopardy of life or liberty for the same offense.'" State v. George W.H., *supra*, 190 W.Va. 558, 439 S.E.2d 423, 431 n.9 (1993).

the same offense." Syllabus Point 1, *Conner v. Griffith*, 160 W.Va. 680, 238 S.E.2d 529 (1977).

Even were there lesser-included offenses involved in the case *sub judice*, proceeding to trial on the Indictment does not implicate the Double Jeopardy clauses. This is so because this prosecution is not a second prosecution for the same offense after either acquittal or conviction nor is it the imposition of multiple punishments for the same offense. Until that point is reached, there can be no assertion of the right of double jeopardy. The Respondent Judge acted prematurely and without legal authority in dismissing Count I.

Were there lesser-included offenses indicted, the proper remedy would have been to require the Petitioner to elect as to which charge it was presenting to the jury. The Respondent Blackford did not move for the Petitioner to so elect, but the Petitioner offered to so elect at the close of its case-in-chief if the Respondent Judge determined that Count I is a lesser-included offense of Count III. In prosecutions for murder under **W. Va. Code** § 61-2-1, where the State is pursuing a felony murder theory, the State is permitted to wait until the close of evidence to elect whether to present to the jury a Felony Murder theory, and at that time dismiss the underlying qualifying offense, or pursue a standard First Degree Murder theory . *See* State v. Walker, 188 W.Va. 661, 425 S.E.2d 616, 622 (1992).

In Walker, this Court holds that a criminal defendant has the right to ask for an earlier election, but the court has a discretionary decision to order the election "only if the defendant can make a strong, particularized showing of how he will be prejudiced if the prosecutor either does not elect at all or waits until the end of the trial to decide what the exact charges will be." Id. The Respondent Blackford did not move for election in the case *sub judice*. The Respondent Blackford did not make a "strong, particularized showing" of prejudice. The discretionary decision of the Respondent Judge was never triggered under a Walker theory. Yet, the Respondent Judge clearly erred in dismissing Count I of the Indictment rather than wait to force an election by the Petitioner during the trial proceedings.

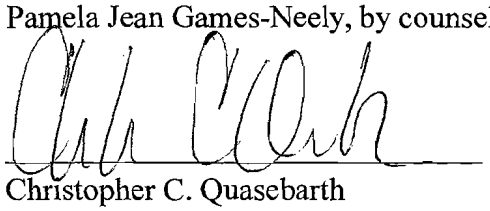
The Respondent Judge is clearly erroneous and exceeds his legitimate power in ordering the dismissal of Count I, Arson First Degree, by concluding that it is a lesser-included offense of

Count III, Arson Resulting in Serious Bodily Injury, and then not allowing the Petitioner's to elect the charge to present to the jury at the close of the State's case-in-chief. State v. Penwell, *supra*; State v. Gill, *supra*; State v. Walker, *supra*. The Petitioner respectfully moves this Honorable Court to grant this Petition and issue a writ prohibiting the Respondent Judge from enforcing that order and further remanding the matter for trial on all counts of the Indictment. State ex rel. Hoover v. Berger, *supra*.

**VI. PRAYER FOR RELIEF.**

WHEREFORE, your Petitioner prays that this Honorable Court: 1) issue a rule to show cause directing the Respondents to show cause if they can as to why the Writ of Prohibition should not be granted; 2) grant the Writ of Prohibition to prohibit the Respondent Circuit Court Judge from enforcing its order; and 3) enter a stay of the proceedings below, including the trial that is scheduled to commence Tuesday, March 9, 2010, at 9:00 a.m.

Respectfully submitted,
Pamela Jean Games-Neely, by counsel,



Christopher C. Quasebarth
Chief Deputy Prosecuting Attorney
State Bar No.: 4676
380 W. South Street, Ste. 1100
Martinsburg, West Virginia 25401
304-264-1971

**VERIFICATION**

I, the undersigned, hereby state that the facts alleged in the foregoing petition are true to the best of my knowledge, or if upon information and belief, are believed to be true.

CHRISTOPHER C. QUASEBARTH

Taken, sworn and subscribed to before me this 8th day of March, 2010.

NOTARY PUBLIC

My commission expires June 30, 2015.

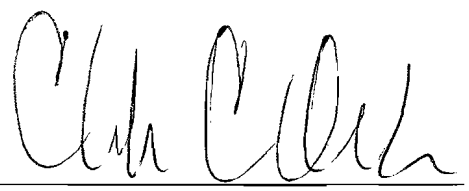
OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
K. JILL MILLER
BERKELEY COUNTY PROSECUTING ATTORNEY'S OFFICE
380 W. SOUTH STREET, SUITE 1100
MARTINSBURG, WV 25401
My Commission Expires June 30, 2015

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true copy of the foregoing PETITION FOR WRIT OF PROHIBITION AND MEMORANDUM OF LAW, AND MOTION FOR STAY on this the 8TH day of March, 2010, by _x_ hand-delivery, _x_ first-class mail, postage prepaid, __ facsimile:

Honorable Gray Silver III
Berkeley County Circuit Court
380 W. South Street, Ste. 4400
Martinsburg, West Virginia 25401

Brett Basham
Assistant Public Defender
313 Monroe Street
Martinsburg, West Virginia 25404



Christopher C. Quasebarth