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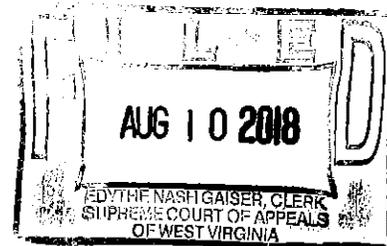
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 18-0271

EDWARD JESSE DREYFUSE,

Petitioner,

In re: Application to Present Complaint to the Grand Jury



RESPONSE BRIEF

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INTRODUCTION

The West Virginia Constitution has been interpreted to extend to private citizens a right to appear before the grand jury, independent of the prosecuting attorney, in order to pursue an indictment. This case concerns the novel question of the scope of the circuit courts' supervisory authority over the grand jury in this context.

Petitioner Edward Jesse Dreyfuss ("Petitioner") presented an application to the Circuit Court of Cabell County, seeking permission to appear before the Cabell County Grand Jury in an effort to procure the indictment of former prosecuting attorney (now sitting circuit judge) Christopher D. Chiles ("Chiles"), who Petitioner alleges suborned perjury during the criminal proceedings that led to Petitioner's conviction for burglary and murder. The circuit court summarily denied Petitioner's application. Petitioner appeals that denial, claiming that it represents a "clear violation and deprivation of the rights secured under the West Virginia Constitution, Article III § 17." Pet. Br. at 4.

While this Court has reaffirmed the important role of the private citizen right as part of our State Constitution's open courts provision, this right is not absolute. Petitioner's position—that circuit courts effectively have no discretion to screen or reject a private citizen's application—is inconsistent with this Court's jurisprudence concerning the judiciary's supervisory role over the grand jury. This Court's precedent makes clear that circuit courts have a "particular responsibility" to supervise the grand jury, both to prevent abuse of judicial processes and to ensure the fairness of a fundamental institution essential to our system of criminal justice. Consistent with this supervisory role, circuit courts necessarily possess the power to reject abusive or frivolous private citizen applications that, if granted, present a serious threat to the proper functioning of the grand jury.

The circuit court's denial of Petitioner's application was fully consistent with this role. Petitioner's application was initiated for an improper purpose and raises frivolous claims with no

arguable basis in either fact or law. The circuit court's refusal to grant Petitioner's application should be affirmed as a lawful exercise of circuit courts' inherent supervisory authority over the grand jury.

ASSIGNMENTS OF ERROR

Although his brief presents four separate assignments of error, Petitioner effectively raises only one claim—a challenge to the refusal of his private citizen application to appear before the Cabell County Grand Jury.

STATEMENT REGARDING ORAL ARGUMENT

This case presents an issue of first impression: What standard should be applied by circuit courts pursuant to their supervisory authority over the grand jury when considering a private citizen's application to appear and seek an indictment? Accordingly, oral argument pursuant to Rule 20 is warranted to address this novel issue. W. Va. R. App. P. 20.

STATEMENT OF THE CASE

In June of 2012, a four count indictment was returned against Petitioner in the Circuit Court of Cabell County, charging him with first-degree murder, burglary, and two counts of assault during the commission of a felony. *See Dreyfuse v. Pszczokowski*, 2017 WL 478564, at *1 (S.D.W. Va. Jan. 6, 2017) *report and recommendation adopted* 2017 WL 758950 (S.D.W. Va. Feb. 27, 2017). Petitioner rejected an offer to plead guilty to second-degree murder, Supp. App. at 115-16, so the case proceeded to trial, and on October 30, 2013, a jury convicted him of first-degree murder and burglary (the assault charges had been dismissed before trial), *see Dreyfuse*, 2017 WL 478564, at *1; *see also* Supp. App. at 128-29, 848-49. He received a 1 to 15 year sentence for the burglary conviction, and life without the possibility of parole for the murder conviction. *Dreyfuse*, 2017 WL 478564, at *1.

The evidence introduced at trial established that Petitioner viciously attacked Otis Clay Jr. (“Clay”) with an aluminum baseball bat because Petitioner believed (incorrectly) that the elderly, infirm, and mentally handicapped Clay may have been the source of fake crack cocaine that Petitioner purchased from another person living at Clay’s home. *See* Supp. App. 327, 337-38, 341-43, 359-60, 364, 443, 529. Although Clay survived the attack itself, complications arose during a surgery necessitated by injuries received in the attack, causing him to fall into a coma and eventually die. *Id.* at 595-96.

Multiple witnesses testified that they had either seen the attack itself or been involved in its immediate aftermath, and that there was “no doubt” that Petitioner had repeatedly struck Clay with a baseball bat. *See, e.g., id.* at 348, 492, 542; *see also id.* at 416-18, 445, 447. Most of the witnesses focused on the severe damage Petitioner inflicted on Clay’s leg and ribs—the beating notably resulted in a broken femur and dislocated kneecap. At least one witness, however, also testified that Petitioner struck Clay in the head, remarking that Petitioner “beat [Clay]’s brains out.” *Id.* at 488; *see also id.* at 487 (“I seen him busting his head and brains and everything. I cleaned his brains and blood up, I did.”). The medical evidence at trial also indicated that Clay received wounds to both his head and lower body. Furthermore, one of Clay’s treating surgeons testified that, among his other injuries, Clay suffered a cerebral concussion as a result of the attack, a type of “traumatic brain injury” that can result from blows to the head. *Id.* at 591, 615.

Petitioner declined to pursue (in fact, affirmatively withdrew) his direct appeal. Nevertheless, Petitioner has been an extremely active litigant in the wake of his conviction, instigating a variety of collateral proceedings including multiple state habeas petitions, a petition for review, a FOIA request, and at least one mandamus petition in this Court, as well as a petition seeking federal habeas relief—all related in some way to his murder conviction or the various related proceedings. *See Dreyfuse*, 2017 WL 478564, at *1-5. In connection with these proceedings he has filed a multiplicity of motions,

repeatedly sparred with his court-appointed attorneys, and sought the recusal of various judicial officials. *See id.* at *3 (detailing both Petitioner’s refusal to cooperate with his postconviction counsel and his attempts to disqualify the circuit judge presiding over his habeas petitions as well as then-Chief Justice Ketchum). At least one of Petitioner’s state habeas proceedings—in which he raises a perjury claim similar to the one he seeks to present before the grand jury—remains pending in the Circuit Court of Cabell County. *See* Supp. App. at 8-10 (docket sheet in Cabell County Case No. 16-C-1); *see also id.* at 33-109 (Amended Petition for a Writ of Habeas Corpus in case no. 16-C-1).

On November 17, 2017, Petitioner filed a private citizen application seeking to appear before the Cabell County Grand Jury. Supp. App. at 10. As outlined in his brief, Petitioner sought to appear before the grand jury to seek the indictment of Chiles—at the time, the prosecuting attorney of Cabell County, now circuit judge of the same—for suborning perjury. Pet. Br. at 5.¹ The basis for Petitioner’s application is his contention that Chiles suborned perjury when he elicited testimony from Huntington Police Officer Ryan Bentley (“Officer Bentley”) concerning Petitioner’s attack on Clay during Chiles’s presentment of that case to the grand jury. *Id.* Specifically, Petitioner contends that Officer Bentley perjured himself when he stated that Petitioner had inflicted a “major skull fracture” on the victim of an assault committed by Petitioner with a baseball bat. Pet. Br. at 5-6; *see also* Supp. App. at 21-25 (grand jury testimony of Officer Bentley).

On March 7, 2018, the Circuit Court of Cabell County issued a brief, summary order denying Petitioner’s application. Supp. App. at 16 (“Upon review of the application, the Court is of the opinion

¹ Petitioner’s application in circuit court swept with a broader brush, inasmuch as he stated that he “and the State of West Virginia are victims of felony offenses” committed by not only Chiles, but also Sean Hammers (the current Cabell County Prosecuting Attorney) and Officer Bentley. *See* Supp. App. at 11-12. Nevertheless, Petitioner’s brief on appeal addresses only his request to appear for the purposes of seeking the indictment of Chiles.

that the application should be denied.”). On March 29, 2018, the circuit court issued a virtually identical Amended Order that provided no further elaboration with respect to the court’s reasoning—its primary purpose appears to have been to make clear its refusal of the application was a final order. *Id.* at 17; *see also id.* at 1.

On March 26, 2018, Petitioner filed a Notice of Appeal with this Court. On April 4—without satisfying the conferral requirements set forth in this Court’s rules—he perfected his appeal by filing a brief, an appendix, and a motion to proceed upon a designated record. The State then sought, and this Court granted, an extension of time in order to facilitate the compilation of a Supplemental Appendix. The State now presents this brief responding to Petitioner’s claims on appeal.

SUMMARY OF THE ARGUMENT

Although in many respects an independent institution, the grand jury is ultimately an arm of the judiciary. Accordingly, this Court has routinely held that the circuit courts have both the power and the duty to supervise grand jury proceedings to prevent abuse of a judicial process and to ensure the fairness and integrity of a fundamental part of system of criminal justice.

In *State ex rel. Miller v. Smith*, this Court held that the “open courts” provision of the West Virginia Constitution extends a right to private citizens to appear before the grand jury, independent of a prosecuting attorney in order to pursue an indictment. In recognition of the judiciary’s supervisory role, the *Miller* court held individuals seeking to exercise this right must file an application with a circuit judge. This Court has not, however, specifically discussed what standard should be applied by a circuit court reviewing a private citizen application or what level of discretion a court has to refuse such an application. This case represents an opportunity to bring clarity to the law by answering this novel question.

Consistent with this Court's jurisprudence concerning their supervisory power over the grand jury, circuit courts must necessarily possess the power and requisite discretion to refuse private citizen applications that represent an abuse of process or are otherwise frivolous. An abusive application is one designed to vindicate an improper interest inuring to the sole benefit of the applicant or another third party, rather than the public at large. A frivolous application is one that lacks an arguable basis in either fact or law. Such applications threaten to waste scarce judicial resources, degrade the protective shield provided by the grand jury (by diluting the evaluative standard in the minds of the grand jurors), and ultimately create the potential for unwarranted indictments and the harms that flow therefrom. In service of the right secured in *Miller*—as well as the wider body of jurisprudence concerning the grand jury—circuit courts must be able lawfully reject applications that fall in either category.

The petition at issue in this case was both abusive and frivolous. There can be little doubt that Petitioner's application is intended to reinforce his currently pending petition for habeas relief which raises similar claims, rendering it abusive. Petitioner's intent notwithstanding, a review of the record demonstrates almost no factual support for his allegations, and what limited support he has proffered does constitute a *prima facie* case of a crime. Thus, his petition is also legally and factually frivolous. For either or both of these reasons, this Court should affirm the circuit court's refusal of his application.

ARGUMENT

West Virginia is one of a limited number of States that extends to private citizens a right, without needing to consult with or obtain the permission of a prosecutor, to appear before a grand jury in order to pursue an indictment.² Although in some States this privilege (or an analogous one) is conferred by

² See *Petition of Thomas*, 434 A.2d 503, 507 (Me. 1981); *Brack v. Wells*, 40 A.2d 319, 321 (Md. 1944); *King v. Second Nat. Bank & Tr. Co.*, 173 So. 498, 499 (Al. 1937); *State v. Sullivan*, 105 So. 631, 633 (La. 1925) (citing *State v. Stewart*, 14 So. 143, 145 (La.1893)); *Hott v. Yarbrough*, 245 S.W. 676 (Tex.

statute³ or flows from the common law,⁴ in West Virginia, this “private citizen right” has a constitutional foundation; it is derived from the “open courts” provision of our State Constitution, which provides that “[t]he courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.” W. Va. Const. Art. III, § 17.

This Court first recognized the private citizen right in *State ex rel. Miller v. Smith*, 168 W. Va. 745, 753, 285 S.E.2d 500, 504 (1981). There it held that “[b]y application to the circuit judge, whose duty is to insure access to the grand jury, any person may go to the grand jury to present a complaint to it.” Syl. pt. 1, 168 W. Va. at 745, 285 S.E.2d at 501 (citing W. Va. Const. Art. III, § 17). *Miller’s* recognition of this right followed a thorough examination of the history and origins of the grand jury, which led the Court to conclude that the grand jury is a “fundamental constitutional institution” long regarded as the “palladium of liberty.” *Id.* at 750, 285 S.E.2d at 503. The Court specifically emphasized its “dual function” as “both a sword, investigating cases to bring to trial persons accused on just grounds” and “a shield protecting citizens against unfounded malicious or frivolous prosecutions.” 168 W. Va. at

Comm’n App. 1922); *In re Lester*, 77 Ga. 143, 148 (1886); see also *State ex rel. Wild v. Otis*, 257 N.W.2d 361, 364 (Minn. 1977). Numerous other states expressly foreclose such appearances. See *In re Grand Jury Appearance Request by Loigman*, 870 A.2d 249, 258 n.6 (N.J. 2005) (collecting authority).

³ See, e.g., Me. Rev. Stat. tit. 15, § 1256; Colo. Rev. Stat. § 16-5-204(4)(l); Neb. Rev. Stat. § 29-1410.01; N.C. Gen. Stat. § 15A-626(d); Tenn. Code § 40-12-104; see also, e.g., Tex. Crim. Proc. Code § 20.09.

⁴ See, e.g., *Brack*, 40 A.2d at 322; cf. *Hale v. Henkel*, 201 U.S. 43, 59 (1906) (“Under the ancient English system, criminal prosecutions were instituted at the suit of private prosecutors, to which the King lent his name in the interest of the public peace and good order of society. In such cases the usual practice was to prepare the proposed indictment and lay it before the grand jury for their consideration.”); but cf. *In re Loigman*, 870 A.2d at 253 (noting that “[b]efore the advent of the professional prosecutor and [the] present-day [New Jersey] Constitution, private prosecutions before a grand jury may have been acceptable, but for more than a hundred years no such practice has existed” and ultimately holding that no such right to appear has been conferred by the New Jersey constitution or any statute, nor does the right exist as a matter of New Jersey common law).

751, 753, 285 S.E.2d at 503, 505. Noting our Constitution's admonition that "the blessings of liberty can be preserved . . . only by a firm adherence to justice . . . and by a frequent recurrence to fundamental principles," W. Va. Const. Art. III, § 20, this Court found that it was constitutionally "bound to preserve the dual function of the grand jury" and avoid its "degradation." *Miller*, 168 W. Va. at 752, 285 S.E.2d at 504; *see also State ex rel. Doe v. Troisi*, 194 W. Va. 28, 34, 459 S.E.2d 139, 145 (1995) (explaining that the grand jury is "charged with the duty to investigate the possibility of criminal behavior while 'protecting the innocent from unjust accusation.')" (quoting Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure*); *State ex rel. Pinson v. Maynard*, 181 W. Va. 662, 665, 383 S.E.2d 844, 847 (1989) ("Historically, the grand jury has been the sword of the government as well as the shield of the people, and this Court has on many occasions emphasized the importance of preserving this duality.").

Yet as the *Miller* court noted, "if the grand jury is available only to the prosecuting attorney and all complaints must pass through him," then it has ceased to serve one of its critical functions and becomes merely "a prosecutorial tool." *Miller*, 168 W. Va. at 752, 285 S.E.2d at 504. *Miller* thus held that the open courts provision requires that there be an avenue for a "citizen who alleges that his rights have been criminally invaded" to "seek redress through the courts." *Id.* at 753, 285 S.E.2d at 504. Because this is "a matter of constitutional right," *id.*, it is not enough that a prosecutor will vindicate that interests in the vast majority of cases. Rather, "the circuit court must guarantee that the grand jury is open to individual citizens seeking to redress wrongs by laying a complaint before it." *Id.*

This private citizen right has been expressly reaffirmed on several occasions. *State ex rel. R.L. v. Bedell*, 192 W. Va. 435, 452 S.E.2d 893 (1994); *Harman v. Frye*, 188 W. Va. 611, 425 S.E.2d 566 (1992); *Myers v. Frazier*, 173 W. Va. 658, 679, 319 S.E.2d 782, 804 (1984); *see also Comm. on Legal*

Ethics of the W. Virginia State Bar v. Sheatsley, 192 W. Va. 272, 278, 452 S.E.2d 75, 81 (1994) (Cleckley, J., concurring). While these cases confirm that the right exists and provide some limited insight to its application, *see, e.g., Bedell*, 192 W. Va. at 439, 452 S.E.2d at 897 (holding that indictment obtained by way of private citizen application is valid even in absence of attesting signature of a prosecuting attorney); *Frye*, 188 W. Va. at 621, 425 S.E.2d at 576 (suggesting that a private citizen can file a private citizen application without first seeking permission from a prosecuting attorney), none of them discuss what standard governs a circuit court's exercise of its supervisory power over the grand jury. In particular, this Court has never addressed when a circuit court may lawfully refuse a private citizen application. That question is squarely presented here. This Court should affirm the circuit court's denial of Petitioner's application because the supervisory authority circuit courts exercise over the grand jury must necessarily imbue them with the power to refuse applications that represent an abuse of process or are otherwise legally or factually frivolous.

I. A circuit court has a supervisory role over the grand jury, regardless whether a prosecuting attorney or private citizen appears before it.

Individual rights—constitutional or otherwise—are almost never absolute; rather, they are subject to reasonable limitation in appropriate circumstances. *See, e.g., Tiernan v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 135, 143, 506 S.E.2d 578, 586 (1998) (recognizing that “the right to free speech is not absolute”); *State ex rel. City of Princeton v. Buckner*, 180 W. Va. 457, 466–67, 377 S.E.2d 139, 148 (1988) (“the right to keep and bear arms guaranteed by [the West Virginia Constitution] is not unlimited.”). The right of a private citizen to appear before a grand jury is no different. Indeed, this Court has specifically stated, in another case interpreting our Constitution's open courts provision, that “prisoners have a Constitutional right to meaningful access to our courts subject to reasonable limitations imposed to protect courts from abuse.” *Mathena v. Haines*, 219 W. Va. 417, 422, 633 S.E.2d 771, 776

(2006); *cf. In re Samantha M.*, 205 W. Va. 383, 387, 518 S.E.2d 387, 391 (1999) (noting that “[a]lthough . . . a natural parent’s right to the custody of his child is constitutionally protected . . . that right is not absolute”).

Miller echoes this familiar refrain: The controlling Syllabus point makes clear that a private citizen’s right to appear before the grand jury is not absolute, as access is conditioned upon “application to [a] circuit judge.” Syl. pt. 1, *Miller*, 168 W. Va. at 745, 285 S.E.2d at 500. Furthermore, in *Bedell*, this Court noted that the Circuit Court of Harrison County had “issued an administrative order outlining the procedures to be followed by a person wishing to appear before a Harrison County Grand Jury” without any suggestion that the adoption and adherence to such a standard infringed in any way upon the right recognized in *Miller*. 92 W. Va. at 437 n.3, 452 S.E.2d at 895 n.3; *cf. Camastro v. Smith*, 2013 WL 4478177, at *5 (N. D. W. Va. Aug. 19, 2013) (“In *State ex rel Miller v. Smith*, the West Virginia Supreme Court of Appeals found that the **circuit judges are the gatekeepers to the grand jury**, and that a citizen may only exercise his right to appear before the grand jury by first making an application to the circuit judge.”) (emphasis added); *Cogar v. Strickler*, 570 F. Supp. 34, 36 (S.D. W. Va. 1983) (dismissing a Section 1983 claim against a circuit judge who relied on *Miller* to deny a private citizen application; the court held that because *Miller* requires an individual seeking to appear to “mak[e] an application to the circuit judge,” the respondent judge had not acted “in the clear absence of all jurisdiction” when he denied the application.).

That the exercise of the private citizen right is tempered by the sound discretion of a circuit judge is fully consistent with this Court’s jurisprudence concerning circuit courts’ supervisory power over the grand jury. In *State ex rel. Casey v. Wood*, for instance, this Court explained that “[the] grand jury has no independent existence, but is a part of and an adjunct to the court.” 156 W. Va. 329, 333, 193 S.E.2d 143, 145 (1972); *accord In re: Loigman*, 870 A.2d at 254 (“The grand jury is a judicial, investigative

body, serving a judicial function; it is an arm of the court, not a law enforcement agency or an alter ego of the prosecutor's office.”). And in *State ex rel. Hamstead v. Dostert*, it explicitly held that “a circuit court has supervisory powers over grand jury proceedings to preserve the integrity of the grand jury process and to ensure the proper administration of justice.” Syl. pt. 2, 173 W. Va. 133, 141, 313 S.E.2d 409, 417 (1984); accord *United States v. United States Dist. Court for S. Dist. of W. Va.*, 238 F.2d 713, 722 (4th Cir. 1956) (noting that although “the grand jury acts as an independent body” a federal district judge “has the supervisory duty to see that its process is not abused or used for purposes of oppression or injustice”).

The circuit court’s supervisory role does not disappear when it is a private citizen, rather than the prosecutor, who seek to appear before the grand jury—if anything, the underlying justification for supervision is heightened by the increased possibility of abuse. As the *Miller* court itself explained, “[i]f the grand jury is to be a meaningful institution, its integrity must be maintained”—and “[t]his can only be insured by **vigilance over the administration of justice, which is the duty of the courts.**” *Miller*, 168 W. Va. at 53-54, 285 S.E.2d at 505 (emphasis added) (citing *Casey*, 156 W. Va. at 334, 193 S.E.2d at 145). There can be little doubt then, given *Miller*’s reliance on the historic understanding of “the duty of the courts” vis-à-vis the grand jury—exemplified by *Casey*—that exercise of the private-citizen right is subject to circuit court oversight.

In *Casey*, this Court considered a writ of prohibition filed by the Kanawha County prosecuting attorney against a judge of the Intermediate Court of Kanawha County,⁵ contending that the judge

⁵ Prior to the adoption and ratification of the “Judicial Reorganization Amendment” in 1974, see *State ex rel. Frazier v. Meadows*, 193 W. Va. 20, 24 n.7, 454 S.E.2d 65, 69 n.7 (1994), the Intermediate Court of Kanawha County was a specialized, limited jurisdiction court – independent but subsidiary to the Kanawha County Circuit Court – that had “complete jurisdiction to try criminal cases.” *State v. Bouchelle*, 134 W. Va. 34, 42, 61 S.E.2d 232, 237 (1949). After the adoption of the Reorganization

exceeded his lawful authority when he limited the scope of testimony from two witnesses summoned to appear before the Kanawha County Grand Jury. *Casey*, 156 W. Va. at 333, 193 S.E.2d at 145. Refusing the writ, the Court explained that although “normally there is no limitation on the character of the evidence that may be presented to the grand jury” that did not mean “that the court which convened the grand jury does not have control over its process.” *Id.* Instead, as noted above, the Court expressly held that “[t]he grand jury is an arm or agency of the court by which it is convened and **such court has control and supervision over the grand jury.**” *Id.*, at 333-34, 193 S.E.2d at 145 (emphasis added).

Relying on these fundamental principles, *Miller* specifically reaffirmed the “special relationship” between the judiciary and the grand jury as part of the private-citizen right. 168 W. Va. at 756, 285 S.E.2d at 506 (“The grand jury is an integral part of the judicial system and enjoys a special relationship with the court by which it is convened.”) (citing *Casey*). And “[b]ecause of this special relationship the court has a **particular responsibility** to insure the fairness of grand jury proceedings.” *Id.*, 285 S.E.2d at 506 (emphasis added). Reposing discretionary authority in the circuit courts to review and screen private citizen applications gives full effect to this “particular responsibility.” It represents an appropriate balance between a citizen’s right to access the courts and the court’s responsibility to ensure fairness and integrity in the State’s judicial proceedings. And perhaps most importantly, it is fully consistent with the dual role of the grand jury: private citizens are able to act independent outside of traditional prosecutorial channels (sharpening the sword) but may ultimately appear only if a circuit

Amendment, the Intermediate Court was merged into a redesignated Circuit Court which had been afforded general trial-level jurisdiction. See *Harvey v. Harvey*, 171 W. Va. 237, 238 n.2, 298 S.E.2d 467, 468 n.2 (1982); *State v. Lacy*, 160 W. Va. 96 n.1, 100, 232 S.E.2d 519, 521 n.1 (1977). Accordingly, the supervisory power over the grand jury possessed by the Intermediate Court of Kanawha County has since been lodged in its circuit court successor.

judge determines that their application possesses some minimum threshold of merit (reinforcing the shield).

Petitioner argues that permitting a circuit judge to “inquire into the legality, or sufficiency, of the evidence on which the grand jury is to act, would be to substitute . . . the opinion of the court . . . for that of the grand jury, which would ultimately lead to the destruction of the grand jury system.” Pet. Br. at 11. But as explained in the next section, this Court’s jurisprudence does not demand—and nor should this Court adopt—a standard that requires a circuit court to make an independent determination of probable cause before granting a private citizen application, or otherwise supplant the grand jury’s role. The circuit court’s decision here reflects a different threshold, one that permits circuit courts to refuse abusive or frivolous applications. Such a standard is consistent with courts’ supervisory authority and general gatekeeping role, and honors both *Miller*’s command that the grand jury remain accessible and this Court’s jurisprudence providing that circuit courts have the power to ensure the integrity of grand jury proceedings.

II. The circuit court correctly denied Petitioner’s private citizen application pursuant to its supervisory power, which necessarily includes the authority to reject applications that misuse the power of the judiciary or waste judicial resources.

Given this Court’s repeated recognition of their supervisory role over the grand jury, circuit courts necessarily possess discretion to refuse private citizen applications in appropriate circumstances. After all, the power to review is empty without the power to reject. *See, e.g., Marbury v. Madison*, 5 U.S. 137 (1803); *cf. Conlin v. Scio Township*, 686 N.W.2d 16, 21 (Mich. App. 2004) (“A power is necessarily implied if it is essential to the exercise of authority that is expressly granted.”) (internal quotation marks omitted). And without it, *Miller*’s application requirement would be an empty formality.

However, this Court has never had occasion to address the extent or degree of discretion afforded to a circuit court when reviewing private citizen applications. *Cf. State v. Head*, 198 W. Va. 298, 305, 480 S.E.2d 507, 514 (1996) (Cleckley, J. concurring) (“[W]e cannot lose sight that the abuse of discretion standard has many faces and, in our application of the standard, it can range anywhere from careful scrutiny to almost no scrutiny.”). This case squarely presents that question. Relying on the principles that animate this Court’s jurisprudence concerning the judiciary’s supervisory role, this Court should affirm the circuit court’s order, and clarify the standards for reviewing private citizen applications.

A. The circuit court properly dismissed Petitioner’s application as part of its authority to reject an application that constitute an abuse of process.

At a bare minimum, circuit courts always have the power to refuse an application that would represent an abuse of judicial process. “If there is one principle firmly embedded in our jurisprudence, it is that the processes of the courts must be maintained to the highest point of integrity, and free from abuse. Unless that principle is rigidly maintained, courts of justice will become the subject of suspicion, and one of the bulwarks of our governmental system will be thereby undermined.” *Hunter v. Beckley Newspapers Corp.*, 129 W. Va. 302, 306-07, 40 S.E.2d 332, 335 (1946).

This Court has already recognized the potential for abuse when private citizens may appear before the grand jury without supervision or oversight from the prosecuting attorney. Writing just one year after *Miller* was decided, the Court noted that because “any citizen may appear before a county Grand Jury to seek an indictment . . . in West Virginia there are fewer impediments to frivolous criminal prosecutions than there are perhaps elsewhere.” *Powers v. Goodwin*, 170 W. Va. 151, 158, 291 S.E.2d 466, 473 (1982); *cf. Frye*, 188 W. Va. at 620, 425 S.E.2d at 575 (1992) (explaining its holding that private citizens cannot file misdemeanor criminal complaints without first consulting the prosecuting attorney was intended to “(1) protect citizens from the issuance of warrants based on frivolous, retaliatory

or unfounded complaints; (2) avoid the time and expense of having such complaints prosecuted; and (3) to foster a more effective and efficient administration of our criminal justice system.”).

The principles espoused in both *Casey* and *Miller* affirm that the existence of the private citizen right does not require turning a judicial blind eye to this potential for abuse. In *Casey*, this Court explained that a circuit court has both the inherent power to control its processes and a duty to “see that its process is not abused.” 156 W. Va. at 334, 193 S. Ed.2d at 145. *Miller* reiterated this principle, emphasizing that “courts have inherent power over their own process to prevent abuse, oppression, and injustice” in the very opinion establishing the private citizen right. *Id.* (citing *Krippendorf v. Hyde*, 110 U.S. 276, 283 (1884)). Indeed, nothing about the private citizen right warrants a different approach: Opening the grand jury to private citizens reflects our State’s commitment to a transparent, accessible judicial system, but that commitment is not a license for abuse. Here, too, circuit courts must possess sufficient discretion to reject abusive private citizen applications.

The common law tort of abuse of process provides a familiar and ready-made rubric for evaluating potentially abusive applications. See *Pote v. Jarrell*, 186 W. Va. 369, 373, 412 S.E.2d 770, 774 (1991) (per curiam) (“It is well established in West Virginia that a cause of action may lie for . . . abuse of process.”). “Generally, abuse of process consists of the willful or malicious misuse or misapplication of lawfully issued process to accomplish some purpose not intended or warranted by that process.” *Preiser v. MacQueen*, 177 W. Va. 273, 279, 352 S.E.2d 22, 28 (1985). Elaborating further, the *Preiser* explains that abuse of process occurs when an individual “misus[es], or misappl[ies] [a] process justified in itself for an end other than that which it was designed to accomplish.” *Id.* at n.8, 352 S.E.2d at 28 n.8 (quoting William Prosser, *Handbook of the Law of Torts* § 121 (1971)). Thus, when identifying abuse of process, “[t]he purpose for which the process is used . . . is the only thing of importance.” *Id.* If the individual has “an ulterior purpose,” one “aimed at an objective not legitimate

in the use of the process” such as “the use of the process as a threat or club” or as a form of “coercion to obtain a collateral advantage, not properly involved in the proceeding itself,” then that use of process is abusive. *Id.*; *see also, e.g., Pote*, 186 W. Va. 369, 412 S.E.2d 770 (affirming abuse of process verdict returned against a defendant who used threat of criminal action—and eventually filed a criminal complaint—against the plaintiff in an effort to coerce him to satisfy an unpaid business invoice); *In re: Loigman*, 870 A.2d at 256 (noting that “[i]n some cases, a private person might be bent on pursuing an ill-motive or vindictive agenda,” such as “political candidates, [who] on the eve of an election, might charge their opponents with fraud or some other nefarious activity and request admission to the grand jury”).

The “vindication of the public interest” is the primary and appropriate justification for the prosecution of a crime. *See State ex rel. Skinner v. Dostert*, 166 W. Va. 743, 752, 278 S.E.2d 624, 631 (1981). Accordingly, when a private citizen application or the circumstances surrounding it indicate that the person pursuing the application is primarily motivated by something else, a circuit court may exercise its “particular responsibility to insure the fairness of grand jury proceedings,” *Miller*, 168 W. Va. at 756, 285 S.E.2d at 506, by rejecting that application.

Here, the record demonstrates that Petitioner’s private citizen application was not motivated by a desire to vindicate the public interest. Rather, he intended to short-circuit the established methods of presenting a collateral attack on the validity of his first-degree murder conviction. Most notably, Petitioner’s pending state habeas petition already includes claims predicated on the same contention he seeks to present to the grand jury: That the State presented perjured testimony during his criminal proceedings. *See Supp. App.* at 33-34, 47-48, 70, 72; *see also Dreyfuse.*, 2017 WL 478564, at *2, 4-5 (discussing the various allegations of perjury raised by Petitioner in his state postconviction proceedings, as well as the similar claims raised in his petition seeking federal habeas relief). To the extent Petitioner’s

claims are not frivolous, he is fully entitled to pursue that claim through the regularly available postconviction process. But the specter of a criminal indictment is not an appropriate tool to develop facts for a separate case. Because the *sine qua non* of Petitioner's private citizen application is an attempt to reinforce the chances his collateral attack will succeed—not to vindicate the public's general interest in bringing criminal actors to justice—it represents a clear abuse of process.

B. The refusal of Petitioner's application was lawful because his application legally and factually baseless.

Even if this Court determines that Petitioner's application does not represent an abuse of process, this Court should still affirm the circuit court's decision its refusal because of his application was frivolous. Frivolous petitions, like abusive ones, threaten to disrupt the fundamental, two-part role of the grand jury recognized in *Miller* because they waste scarce judicial resources and potentially degrade the evaluative standard essential to the grand jury's proper performance. A circuit court that refuses a frivolous petition strikes the appropriate balance between access and oversight, as doing so ensures that private citizens are not arbitrarily denied an opportunity to appear (which would blunt the sword) without eliminating the power of circuit judges to reject wholly meritless applications that might flood the grand jury (and threaten to shatter the shield).

1. Courts across the nation have recognized and lamented the burden imposed upon our legal system by the prosecution of frivolous claims. *See, e.g., Iowa Supreme Court Attorney Disciplinary Bd. v. Daniels*, 838 N.W.2d 672, 679 (Iowa 2013) (“Frivolous claims place unnecessary burdens on the court system and diminish public confidence in our system of justice.”); *Holloway v. Hornsby*, 23 F.3d 944, 946 (5th Cir. 1994) (remarking that “[f]rivolous cases harm the justice system” and noting that “[w]hen frivolous complaints consume inordinate amounts of scarce judicial resources, valid complaints suffer from delay and all of the negative aspects of delay.”); *Natasha, Inc. v. Evita Marine Charters*,

Inc., 763 F.2d 468, 471 (1st Cir. 1985) (the expenditure of scarce judicial resources to address frivolous claims “hurts other litigants and interferes with the courts’ overall mission of securing justice”). This Court has, too. *See, e.g., McGinnis v. Cayton*, 173 W. Va. 102, 105, 312 S.E.2d 765, 768 (1984) (“courts cannot afford to entertain frivolous claims”).

Such concerns are only amplified in the context of criminal proceedings. Indeed, West Virginia recognizes the tort of malicious prosecution, *see, e.g., Syl pts. 1 & 2, Truman v. Fid. & Cas. Co. of N. Y.*, 146 W. Va. 707, 123 S.E.2d 59 (1961); *Syl. pt. 2, Hunter*, 129 W. Va. at 302, 40 S.E.2d at 333, which, existed at common law in part to discourage “wrongful or unjustifiable prosecution[s].” *Lewis v. Cont’l Airlines, Inc.*, 80 F. Supp. 2d 686, 697 (S.D. Tex. 1999); *Sheldon Appel Co. v. Albert & Oliker*, 765 P.2d 498, 501 (Cal. 1989) (“The common law tort of malicious prosecution originated as a remedy for an individual who had been subjected to a maliciously instituted criminal charge”).

While a private citizen’s presentment of a frivolous claim to a grand jury will not *necessarily* result in an “unjustifiable” prosecution, simply being subject to a criminal indictment can cause significant reputational harm even if the charge is ultimately determined to be baseless, *see, e.g., Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599 (1950) (recognizing that “[t]he impact of an indictment is on the reputation or liberty of a man.”); *State v. Straughan*, 87 So. 2d 523, 536 (La. 1956) (“the mere fact that an indictment has been found against a person is likely to do almost as much harm to his reputation as a conviction.”) (subsequent history omitted).⁶ The threat of an indictment also places an

⁶ *See also People v. Tutoni*, 505 N.Y.S.2d 504, 506 (NY. Co. Ct. 1986) (acknowledging that “where someone has already been named in an indictment, there is scant little a Court can do to undo the harm caused to petitioner’s reputation . . . [i]n so many words, the [reputational] damage . . . is already done.”); *Geyer v. Faiella*, 652 A.2d 1245, 1249 (N.J. Super. App. Div. 1995) (finding that “even where there is no arrest and the indictment is refused, being the target of a proposed indictment submitted to a grand jury . . . is a not insignificant burden and humiliation.”); *Dallas Morning News Co. v. Garcia*, 822 S.W.2d 675, 686 (Tex. App. 1991) (“harm to an individual’s reputation, whether administered through

indicted individual at an increased risk of what the Supreme Court of the United States has described as the “harrowing experience of a criminal trial,” *Crist v. Bretz*, 437 U.S. 28, 38 (1978).⁷ And “frivolous, retaliatory or unfounded [criminal] complaints” also harm the public interest because of the sheer “time and expense of having such complaints prosecuted.” *Frye*, 188 W. Va. at 620, 425 S.E.2d at 575. Thus, when a circuit court uses its supervisory authority to reject a frivolous private citizen application, it is acting in full vindication of the grand jury’s “shielding” function.

Of course, recognizing that circuit judges have the power to refuse frivolous applications begs the question: When is an application frivolous? Although eluding a concrete, universally-applicable definition, courts have long-applied this standard to consider whether claims are baseless—and rejected them, sometimes while issuing sanctions on an attorney who brings such a claim. Discussion of this concept often being with the foundation laid by the United States Supreme Court in *Neitzke v. Williams*, which held that a complaint filed *in forma pauperis* was frivolous if it “lack[ed] an arguable basis either in

indictment or on the front pages of a newspaper, is nevertheless harm and equally punishing”) (Chapa, J., concurring and dissenting); *cf. In re Grand Jury Proceedings*, 616 F.3d 1172, 1181 (10th Cir. 2010) (“we are sympathetic to Appellant’s concerns about the potential harm to reputation that can ensue if the grand jury returns a true bill”).

⁷ Further recognition of the serious harm inflicted that can result from a frivolous indictment can be seen in the existence of the “Hyde Amendment,” a federal statutory right permitting criminal defendants to recover “reasonable attorney’s fee and other litigation expenses, where [a] court finds that the position of the United States [in a criminal proceeding] was vexatious, frivolous, or in bad faith.” Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (reprinted in 18 U.S.C. § 3006A, historical and statutory notes); *see United States v. Bove*, 888 F.3d 606, 607 (2d Cir. 2018) (“The Hyde Amendment provides that a district court “may award to a prevailing [criminal defendant] . . . a reasonable attorney’s fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith”) (alteration in original); *see also United States v. Gladstone*, 141 F. Supp. 2d 438, 445 (S.D.N.Y. 2001) (“Recovery under the Hyde Amendment is intended for cases where, as Representative Hyde stated, ‘[U]ncle Sam sues you, charges you with a criminal violation, even gets an indictment and proceeds, but they are wrong. They are not just wrong, they are willfully wrong, they are frivolously wrong.’”); *United States v. Mitselmakher*, 2008 WL 5068609, at *7 (E.D.N.Y. Nov. 20, 2008) *aff’d*, 347 F. App’x 649 (2nd Cir. 2009) (same).

law or in fact.” 490 U.S. 319, 325 (1989); *see Adams v. Rice*, 40 F.3d 72, 74 (4th Cir. 1994) (remarking that in *Neitzke* “the Supreme Court . . . loosely defined frivolous claims” but “declined to fashion too precise a rule”); *see also, e.g., Deutsch v. United States*, 67 F.3d 1080, 1086 (3d Cir. 1995) (“In *Neitzke*, the Supreme Court began the task of defining the frivolous standard by looking to its definition of a legally frivolous appeal set forth in cases not dealing with applications [under the particular statute in question]”); *Wallace v. State*, 820 N.W.2d 843, 849 (Minn. 2012) (explaining that under Minnesota law, a postconviction petition is frivolous if it is “perfectly apparent, without argument, that the petition is without merit,” remarking that the definition espoused in *Neitzke* is very similar, and noting that the Illinois Supreme Court, relying on *Neitzke*, had “recently adopted a similar definition of ‘frivolous’”) (citing *People v. Hodges*, 912 N.E.2d 1204, 1209-12 (Ill. 2009)). For its part, Black’s Law Dictionary defines “frivolous” as “of little weight or importance,” and a “frivolous pleading” as one that is “clearly insufficient on its face” and a frivolous claim or defense as one where a proponent can “present no rational argument based upon the evidence or law in support of that claim or defense” Black’s Law Dictionary 668 (6th ed. 1990). The *Neitzke* definition recognizes two different flavors of frivolity—factually frivolous and legally frivolous. In accordance with that definition, circuit courts may lawfully refuse a private citizen application if the indictment being pursued is, for whatever reason, not legally cognizable *or* if the application is so bereft of factual support that, despite being cognizable in the abstract, the application cannot be colorable.

The first half of this standard sustains a circuit court’s discretion to reject applications predicated on a “indisputably meritless legal theory,” *see Pierce v. Stanley*, 2010 WL 1904558, at *1 (S.D.W. Va. May 7, 2010) (citing *Denton v. Hernandez*, 504 U.S. 25, 32 (1992)), such as an application seeking to indict someone for a crime that does not exist. *Cf. de Vaux v. Westwood Baptist Church*, 953 So. 2d 677, 683 (Fla. Dist. Ct. App. 2007) (explaining that under Florida law, an action may be deemed

frivolous when it is “completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law.”) (citation omitted); *Wallace*, 820 N.W.2d at 849. In the words of the United States Court of Appeals for the Fifth Circuit, courts should not be forced to “suffer in silence the filing of baseless, insupportable [papers] presenting no colorable claims” especially those that “consist of a hodgepodge of unsupported assertions, irrelevant platitudes, and legalistic gibberish.” *Crain v. Commissioner of Internal Revenue*, 737 F.2d 1417, 1418 (5th Cir. 1984).

The second half of the definition allows circuit judges to distinguish between *potentially* legitimate applications and those likely to do little more than waste the grand jury’s time due to the absence of evidentiary support. For example, an application that is, on its face, *entirely bereft* of factual support is frivolous because the grand jury is a fact-finding body and it is imperative that a private citizen seeking to appear be armed with factual support legally capable of sustaining an indictment. *See Mikes v. Straus*, 274 F.3d 687, 705 (2d Cir. 2001) (finding claim frivolous when it was “bereft of any objective factual support”). Devoid of factual support, permitting private citizen appearances in these situations would waste scarce judicial resources and raise the specter of an unjustified indictment.

Evaluating private citizen applications against some minimal threshold of plausibility would not unduly burden private citizen access to the grand jury. For instance, rather than engage in direct weighing of the factual support underlying a private citizen application—that is, make an independent assessment of probable cause—a circuit court assessing the potential frivolity of such an application need only determine if *any* rational grand jury could rely on the proffered facts to sustain an indictment. This standard, borrowed from the United States Supreme Court’s seminal decision in *Jackson v. Virginia*

443 U.S. 307, 319 (1979), which has in turn been wholeheartedly embraced by this Court,⁸ gives frivolity review enough “teeth” to preserve judicial resources and limit the danger of unwarranted indictments without unduly restricting private citizen access to the grand jury. Thus, when the factual basis offered in support of an application is so threadbare that no rational grand jury could find the probable cause necessary to return an indictment, circuit courts must possess the power to reject that application, as allowing the grand jury to consider it does nothing to advance the interests that animate *Miller*. Holding otherwise would be to ignore the “special” supervisory role recognized in *Miller* and this Court’s admonition that circuit courts have a “particular responsibility to insure the fairness of grand jury proceedings.” 168 W. Va. at 756, 285 S.E.2d at 506.

It is no answer to suggest that the grand jury simply can refuse to return an indictment if a private citizen is permitted to appear and make a factually insufficient presentation. First, the dangers flowing from the mere possibility of a faulty indictment are reason enough to support the screening and rejecting of such applications, especially since an indictment, once issued, is shielded from judicial scrutiny in all but the most exceptional cases. Syl. pt. 1, *Barker v. Fox*, 160 W. Va. 749, 238 S.E.2d 235 (1977) (“Except for willful, intentional fraud the law of this State does not permit the court to go behind an indictment to inquire into the evidence considered by the grand jury, either to determine its legality or its sufficiency.”); see also *SER Pinson*, 181 W. Va. at 666, 383 S.E.2d at 848 (“Absent a showing of fraud, an examination of the evidence presented to the grand jury would not be in the interests of the

⁸ *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995) (establishing the standard for appellate review of the sufficiency of the evidence underlying a criminal conviction). *Guthrie* and its progeny offer a deep well from which circuit courts can draw guidance when applying this sufficiency standard to private citizen applications.

efficient administration of justice nor the maintenance of the integrity of the grand jury system.”)⁹ But the potential degradation of the protective, shielding function of the grand jury is equally compelling.

As this Court explained in *Miller*, the primary function of the grand jury is to assess and determine if there exists probable cause sufficient to warrant the initiation of formal criminal proceedings against the accused. 168 W. Va. at 751, 285 S.E.2d at 504 (describing as a “primary responsibility[y]” of the grand jury “the determination of whether there is probable cause to believe a crime has been committed”). With probable cause as their guiding light, the standard applied by the lay members of a grand jury is decidedly qualitative and non-technical. See *In Interest of Moss*, 170 W. Va. 543, 548, 295 S.E.2d 33, 39 (1982) (“In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.”) (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)). As the United States Supreme Court explained in *Brinegar*, the guidepost for a finding of probable cause

⁹ The rule of *Barker* and *Pinson* is usually justified by noting that “if the evidence that satisfied the grand jury . . . was not sufficient to satisfy a court or a petit jury, [a wrongfully indicted] defendant [can still] be vindicated by an acquittal at trial.” *SER Pinson*, 181 W. Va. at 666, 383 S.E.2d at 848; see also *Noll v. Dailey*, 72 W.Va. 520, 79 S.E. 668, 669 (1913). However, *Barker*, which was decided before *Miller*, necessarily presupposes that the evidence presented to the grand jury comes from the prosecuting attorney—not a private citizen. This distinction matters. “Prosecutors routinely screen and investigate criminal complaints to determine whether there is probable cause to support the return of an indictment. Prosecutors are ethically bound not to seek an indictment in the absence of probable cause.” *In re: Loigman*, 870 A.2d at 257. A rule shielding indictments from direct judicial review can be justified by the reasonable assumption that public prosecutors strive to live up to their duty to pursue “criminal causes . . . for the public good.” *Dostert*, 166 W. Va. at 752, 278 S.E.2d at 631; see also *State v. Orth*, 178 W. Va. 303, 309 n.1, 359 S.E.2d 136, 142 n.1 (1987) (Brotherton, J., concurring) (“A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.”). Thus, a rule permitting circuit judges to screen applications made by private citizens – who labor under no such duty – is clearly distinguishable from the principle espoused by this Court in *Barker* and its progeny.

is whether or not “the facts and circumstances within [the factfinder’s] knowledge . . . [are] sufficient to warrant a man of reasonable caution in the belief that an offense has been . . . committed.” 338 U.S. at 175; *see also Carroll v. United States*, 267 U.S. 132, 161 (1925) (“The substance of all . . . definitions [of probable cause] is a reasonable ground for belief of guilt.”) (citations omitted).

Permitting private citizens to appear before the grand jury to offer factually frivolous presentations has the potential to distort and color the grand jury’s relative perspective on the weight of evidence necessary to sustain an indictment. A presentation by a public prosecutor may seem compelling simply by way of contrast when compared against a stream of barely-supported presentations made by legally untrained private citizens. The potential for the dilution of a standard already as amorphous and flexible as probable cause is no small cause for concern. A grand jury that squarely rejects a dozen factually insufficient private citizen applications only to return indictments in a dozen marginal cases bought by an overzealous public prosecutor—simply because the public prosecutor was able to marshal *some* scant evidence against the accused which, contrasted against the threadbare or nonexistent support provided during the private citizen presentments, seemed relatively substantial—is not acting as the “palladium of liberty” described in *Miller*. *See* 168 W. Va. at 751-53, 285 S.E.2d, 503-05 (decrying the shift of federal grand juries “away from th[eir role as] a shield between the citizenry and the government” toward that of being “a sword in the hands of the [government]” due to the “dominan[ce]” of the institution by the United States Attorney, and explaining that “[s]uch a shift . . . corrupts [a grand jury’s] historically developed fundamental principles.”).

2. Accordingly, even if this Court determines Petitioner’s application does not represent an abuse of process, the circuit court’s refusal of the application should be affirmed because his application was both legally and factually frivolous. With respect to the former, although Petitioner did identify an extant crime and thus his application is, on its face, legally sufficient, it is evident that his claim “lacks

an arguable basis . . . in law” because even a cursory evaluation of that claim reveals it is not cognizable. Simply put, there is ample testimonial evidence in the record of the underlying criminal proceedings to support Officer Bentley’s statement to the grand jury that Petitioner inflicted a skull fracture on Otis Clay when he viciously assaulted him with a baseball bat. Supp. App. 348, 416-18, 445, 447, 487-88, 492, 542. And, if Officer Bentley did not lie during his grand jury testimony, then-prosecutor Chiles cannot have suborned perjury when he called him as a witness during the grand jury proceedings. W. Va. Code § 61-5-1 (“To willfully testify falsely, under an oath or affirmation lawfully administered, in a trial of the witness or any other person for a felony, concerning a material matter or thing, is perjury and is a felony; to induce or procure another person so to do is subornation of perjury and is a felony.”).

Furthermore, even if Petitioner were correct that Clay’s medical records do not reveal the existence of a skull fracture—and the record makes clear that his is not—his claim would still be frivolous, because perjury requires “willfully” false testimony “regarding a material matter.” *Id.* In light of the testimonial evidence discussed above, it is easy to see how an investigating police officer (who is not a medical professional) could reasonably believe that the victim of a baseball bat attack where one witness claimed he had “cleaned [the victim’s] brains and blood up” had suffered a skull fracture. Thus, even if Officer Bentley’s testimony was false, it was not “willfully false” and cannot constitute perjury. *See generally State v. Crowder*, 146 W. Va. at 830, 123 S.E.2d at 54 (1961). Additionally, because perjury concerns only willfully false testimony on material matters, *see id.* at 828, 123 S.E.2d at 53, and because Officer Bentley’s account of the attack was not at all focused on the presence skull fracture (in fact, he mentions the skull fracture only once, and in passing), Supp. App. at 22, and was, independent of that singular reference, undoubtedly sufficient to establish probable cause, even a willful misrepresentation on his part with respect to the skull fracture would concern an immaterial matter, and thus would not constitute perjury.

Finally, it is also apparent that Petitioner's application is factually frivolous. No rational grand jury, considering the totality of the record evidence discussed above, could come to the conclusion that there were "reasonable grounds to believe" that Chiles knew that Officer Bentley was willfully lying when Bentley stated that Petitioner's attack on Clay had resulted in a skull fracture. As the transcript of the grand jury proceedings demonstrate, Chiles simply asked, without embellishment, for Officer Bentley to recount the findings of his investigation to the grand jury. Supp. App. at 21-22. Petitioner's application contains nothing demonstrating that Chiles knew or should have known that Officer Bentley's representation concerning the skull fracture (if false) was, in fact, false. Accordingly, his application was not supported by sufficient facts. Under the proper standard governing exercise of the judiciary's supervisory role over the grand jury, the circuit court had discretion to refuse Petitioner's legally and factually baseless petition.

CONCLUSION

For the reasons above, this Court should affirm the lower court's denial of Petitioner's application.

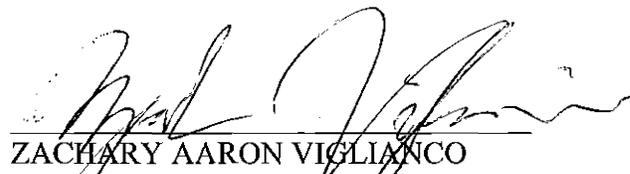
Respectfully submitted,

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