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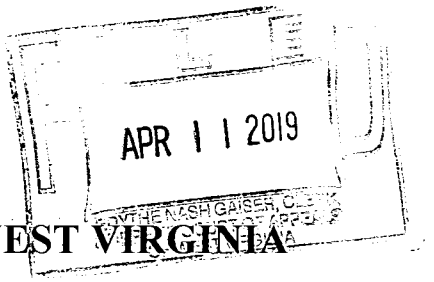

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ESTATE OF WAYNE A. JONES,

Petitioner,

v.

BERKELEY COUNTY PROSECUTING ATTORNEY,

Respondent.

CASE NO. 18-1045

INTERVENOR-RESPONDENTS' BRIEF

Appeal Arising from Orders Entered on September 18, 2018, October 22, 2018, and October 23, 2018 in Civil Action No. 18-P-318 in the Circuit Court of Berkeley County, West Virginia

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STATEMENT OF THE CASE

Petitioners are the brothers of Wayne A. Jones and the administrators of his Estate. Respondent is the Berkeley County Prosecuting Attorney. Intervenor-Respondents (the Police Officers) are five City of Martinsburg police officers – Pfc. Erik Herb, former Pft. Daniel North, Ptlm. William Staubs, Ptlm. Paul Lehman, and Pft. Eric Neely – who were involved in a shooting incident with Wayne A. Jones on March 13, 2013.[1] [001, 007, 125-129]

On **March 13, 2013**, Wayne A. Jones, died as a result of a shooting incident involving the Police Officers. [001, 007, 125-129] Following this incident, the Police Officers were placed on administrative leave during the subsequent West Virginia State Police investigation. [129] *See also* Appendix Record in Case No. 18-0927 [182-189].

On **June 13, 2013**, Petitioners filed a Complaint against the City of Martinsburg and the Police Officers in the United States District Court for the Northern District of West Virginia based upon the March 13, 2013 incident (Civil Action No. 3:13-CV-68). This law suit sought $100,000,000 in monetary damages, along with injunctive and declaratory relief. [007, 129-131] *See also* Appendix Record in Case No. 18-0927 [039-077].

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[1] This appeal is the second of two appeals Petitioners have filed with this Honorable Court based upon the March 13, 2013 incident. Petitioners also appealed the dismissal of a "back up" wrongful death and civil rights case they filed in the Circuit Court of Berkeley County, West Virginia (Civil Action No. 16-C-490) more than three years after the March 13, 2013 incident and nearly two years after the United States District Court for the Northern District of West Virginia dismissed their original civil case (Civil Action No. 3:13-CV-68). *See generally* Case No. 18-0927. Petitioners have omitted several key facts from their rendition of the March 13, 2013 incident (e.g. Wayne A. Jones resisted arrest, stabbed one officer with a concealed knife, and ignored multiple commands to drop his weapon before he was shot). [051-053, 125-129] The Police Officers dispute Petitioners' selective presentation of the facts and biased characterization of the incident. However, because the Circuit Court correctly denied Petitioners' Petition/Application to Empanel a Special Grand Jury, Petitioners' Petition for Disclosure of Grand Jury Proceedings, and Petitioners' Motion to Alter or Amend Order Granting Motion to Intervene, it is not necessary to discuss the disputed facts in detail. Even when Petitioners' mischaracterization of the March 13, 2013 incident is taken as true, the Circuit Court correctly denied their Petitions and Motion. Accordingly, the Police Officers' Statement of the Case is limited to the dispositive facts and procedural history which demonstrate the propriety of the Circuit Court's decisions.

In **October 2013**, the Berkeley County Prosecuting Attorney presented the circumstances of the March 13, 2013 incident to the regular Berkeley County grand jury. This October 2013 grand jury found no probable cause for any criminal charges related to the March 13, 2013 incident or Wayne A. Jones' death and, accordingly, declined to issue an indictment against any of the Police Officers. [002, 007, 129]

On **May 21, 2014**, Petitioners filed a second Complaint against the City of Martinsburg and the Police Officers in the United States District Court for the Northern District of West Virginia based upon the March 13, 2013 incident (Civil Action No. 3:13-CV-68). This law suit also sought monetary damages, along with injunctive and declaratory relief. [007, 129-131] *See also* Appendix Record in Case No. 18-0927 [079-137].

On **October 15, 2014**, after complete discovery, the District Court granted the Police Officers summary judgment finding, *inter alia*, that they shot Wayne A. Jones while he was resisting arrest, after he struck one officer in the head, and after he stabbed another officer with a knife. *See* Appendix Record in Case No. 18-0927 [139-159]. Petitioners appealed this ruling to the United States Court of Appeals for the Fourth Circuit. [129-131] *See also* Appendix Record in Case No. 18-0927 [173].

On **September 15, 2016**, while their civil case was pending in the Court of Appeals, Petitioners filed a new Complaint against the City of Martinsburg and the Police Officers in the Circuit Court of Berkeley County, West Virginia, based upon the same March 13, 2013 incident (Civil Action No. 16-C-490). [115-117] *See* Appendix Record in Case No. 18-0927 [161-171].

On **December 2, 2016**, after a remand from the Court of Appeals to "consider the discretionary factors in Rule 36(b)," the District Court denied Petitioners' request to withdraw certain factual admissions (e.g. Wayne Jones had a knife before the shooting incident) and

confirmed its summary judgment ruling for Respondents. [129-131] *See also* Appendix Record in Case No. 18-0927 [173-180].

On **July 20, 2017**, Petitioners filed a First Amended Complaint against the City of Martinsburg and the Police Officers in the Circuit Court based upon the same March 13, 2013 incident (Civil Action No. 16-C-490). *See* Appendix Record in Case No. 18-0927 [182-189]. This First Amended Complaint alleged: 1) intentional homicide; 2) negligence; 3) constitutional violations; 4) statutory violations; and 5) wrongful death. It sought monetary damages and equitable relief in the form of: 1) an injunction against "BRIM" (State Board of Risk and Insurance Management); 2) the appointment of a commissioner to investigate Respondent City of Martinsburg's police department; 3) the appointment of a special prosecutor to review the March 13, 2013 incident; and 4) the appointment of a special grand jury advocate to make a second presentation to a second grand jury.

On **September 19, 2017**, Petitioners filed a Petition for Disclosure of Grand Jury Proceedings in the same civil action (Civil Action No. 16-C-490). [115-117] *See also* Appendix Record in Case No. 18-0927 [257-259].

On **October 12, 2017**, the Circuit Court held a hearing on Petitioners' Petition for Disclosure of Grand Jury Proceedings, denied the Petition without prejudice, and stayed all parallel State Court proceedings "until the related appeal is resolved by the U.S. Court of Appeals for the Fourth Circuit." [120-121] *See also* Appendix Record in Case No. 18-0927 [285-287]. The Circuit Court allowed discovery to proceed in the case, but only by agreement of the parties, and allowed Petitioners to contact an expert witness the State of West Virginia presented to the October 2013 grand jury. [120] *See also* Appendix Record in Case No. 18-0927 [285].

On **March 5, 2018**, the Court of Appeals affirmed in part and reversed in part the District Court's summary judgment finding, *inter alia*, that "genuine issues of material fact remain which underlie the determination of whether the force the [Police Officers] used was excessive" and, therefore, "summary judgment was improper on the [Petitioners'] § 1983 claim against the [Police Officers] for use of excessive force in violation of the [Wayne A. Jones'] Fourth Amendment rights . . . ." [129-131] *See also* Appendix Record in Case No. 18-0927 [334-347].

On **April 10, 2018**, the District Court entered a Scheduling Order and set Petitioners' case for a jury trial on October 23, 2018. *See* Appendix Record in Case No. 18-0927 [353-358].

On **August 2, 2018**, the Circuit Court granted the Police Officers' Motion to Dismiss (Civil Action No. 16-C-490). *See* Appendix Record in Case No. 18-0927 [394-409].

On **August 9, 2018**, Petitioners filed a Petition/Application of the Estate of Wayne A. Jones to Empanel a Special Grand Jury for Consideration of a Complaint in the Circuit Court of Berkeley County, West Virginia (Civil Action No. 18-P-318). [001-005] Their Petition acknowledged "this matter was previously presented to a sitting grand jury by a prior prosecuting attorney, which prior grand jury did not return an indictment." Nevertheless, their Petition sought to empanel a second grand jury to consider the March 13, 2013 shooting incident a second time on the grounds that the first grand jury (i.e. the October 2013 Berkeley County grand jury) was somehow tainted "by contact with a prosecuting attorney and law enforcement witnesses." [002]

On **September 4, 2018**, Petitioners filed a second Petition for Disclosure of Grand Jury Proceedings (Civil Action No. 18-P-318). [007-010] Their Petition acknowledged "the circumstances surrounding the March 13, 2013 shooting death of Wayne Jones by defendants was (sic) previously presented to a Berkeley County, West Virginia grand jury by a prior prosecutor"

and "the grand jury did not issue an indictment." [007] Their Petition also alleged that "subsequent investigation by Petitioner suggests that the vote of the grand jury was close."[2] [007]

On **September 5, 2018**, the State of West Virginia, by Respondent Berkeley County Prosecuting Attorney, filed a Response to Petition/Application to Empanel Special Grand Jury. [012-020] Respondent generally recognized "the right of a private citizen to present a complaint to a grand jury," but opposed Petitioners' proposed second presentation and proposed procedures for such presentation.

On **September 6, 2018**, the Police Officers filed a Motion to Intervene in Civil Action 18-P-318 so they could oppose Petitioners' Petition/Application of the Estate of Wayne A. Jones to Empanel a Special Grand Jury for Consideration of a Complaint. [022-057] The Police Officers included with their Motion to Intervene a Brief in Opposition to Petition/Application of the Estate of Wayne A. Jones to Empanel a Special Grand Jury for Consideration of a Complaint for the Circuit Court's consideration. [035-057]

On **September 7, 2018**, the District Court again granted the Police Officers summary judgment finding, *inter alia*, that Wayne A. Jones "possessed a knife," "resisted arrest," "fled from the officers," and was, ultimately, shot after he "attempted to stab one of the officers." [135] The District Court determined "it was not clearly established that an officer would violate an individual's Fourth Amendment" rights and, thus, the "officers are entitled to qualified immunity." [136] Because the Fourth Circuit previously affirmed the remainder of the District Court's prior order granting summary judgment, and the only claims remaining were Petitioners'

[2] Grand jury proceedings are secret. W. Va. Code § 52-2-15(a). Petitioners never explained how their "subsequent investigation" revealed the vote of the October 2013 Berkeley County grand jury following its consideration of the March 13, 2013 incident. This does, however, suggest a violation of West Virginia Code § 52-2-15(a) and a criminal offense under West Virginia Code § 52-2-15(b) ("A person who knowingly violates subsection (a) of this section is guilty of a misdemeanor and, upon conviction, shall be fined not more than $1,000 or confined in jail not more than thirty days, or both fined and confined.").

§ 1983 claims against the Police Officers, the District Court also dismissed Petitioners' entire case with prejudice. [125-140] *See also* Appendix Record in Case No. 18-0927 [461-476].

On **September 13, 2018**, the Circuit Court entered a Trial Court Rule 22 Scheduling Order directing Petitioners to file a response to the Police Officers' Motion to Intervene "within ten (10) days of entry of this Order." [059]

On **September 18, 2018**, the Circuit Court entered an Order Granting Motion to Intervene which filed the Police Officers' Brief in Opposition to Petition/Application of the Estate of Wayne A. Jones to Empanel a Special Grand Jury for Consideration of a Complaint; specifically found "no reason for conducting a hearing on this issue"; and permitted Petitioners, the Police Officers, and Respondent "to participate fully in all proceedings." [062-069]

On **September 20, 2018**, Petitioners filed a Rebuttal in Opposition to State's Response to Petition/Application to Empanel Special Grand Jury and a Motion for Hearing on Petitioners' Petition/Application to Empanel Special Grand Jury. [071-076]

On **September 21, 2018**, Respondent filed a Response to Petition for Disclosure of Grand Jury Proceedings. [078-104] Respondent opposed disclosure because Petitioners did not need grand jury materials to avoid injustice in another proceeding; did not demonstrate the need for disclosure outweighed the policy of grand jury secrecy; did not narrow their request to only grand jury materials necessary to avoid injustice; and, overall, did not demonstrate any "particularized need" for grand jury materials. [078-104]

On **September 24, 2018**, the Police Officers filed a Response to Petition for Disclosure of Grand Jury Proceedings. [106-140] The Police Officers also opposed production of grand jury materials because Petitioners did not need grand jury materials to avoid injustice in another proceeding; did not demonstrate the need for disclosure outweighed the policy of grand

jury secrecy; did not narrow their request to only grand jury materials necessary to avoid injustice; and, overall, did not demonstrate any "particularized need" for grand jury materials. [106-140]

On **September 28, 2018,** Petitioners filed a Rebuttal to State's Response to Petition for Disclosure of Grand Jury Proceedings and a Rebuttal to Intervenors' Response to Petition for Disclosure of Grand Jury Proceedings. [142-148]

On **September 28, 2018**, Petitioners filed a Motion and Memorandum Pursuant to Rule 59(e) to Alter or Amend the Court's Order Entered September 19, 2018 Granting Motion to Intervene. Petitioners argued the Police Officers – who could be subject to indictment should a *second* grand jury be empaneled to consider the March 13, 2013 incident a *second* time – did not have sufficient interest in the outcome of their Petition to warrant intervention. [150-156]

On **October 11, 2018**, the Police Officers filed a Response to Petitioners' Motion to Alter or Amend Order Granting Motion to Intervene. [158-168] The Police Officers' Response reiterated their specific interest in the outcome of the proceedings (i.e. potential criminal indictment) and the legal presumption in favor of intervention. [158-168]

On **October 15, 2018**, Petitioners' filed a Rebuttal to Intervenors' Response to Petitioners' Motion to Alter or Amend Order Granting Motion to Intervene. [175-175]

On **October 22, 2018**, the Circuit Court entered an Order Denying Petitioners' Motion to Vacate Order Granting Motion to Intervene. [177-183]

On **October 22, 2018**, the Circuit Court also entered an Order Denying Petition for Disclosure of Grand Jury Proceedings. [185-191]

On **October 23, 2018**, the Circuit Court entered an Order Denying Petition/Application of the Estate of Wayne A. Jones to Empanel a Special Grand Jury for Consideration of a Complaint. [193-211]

Petitioners now appeal the Circuit Court's denial of their Petition/Application of the Estate of Wayne A. Jones to Empanel a Special Grand Jury for Consideration of a Complaint, their Petition for Disclosure of Grand Jury Proceedings, and their Motion to Alter or Amend the Court's Order Entered September 19, 2018 Granting Motion to Intervene.

SUMMARY OF ARGUMENT

Article III, Section 17 of the West Virginia Constitution guarantees people access to the courts of this State. *It does not, however, guarantee people repeated access to the courts of this State until they obtain the result they desire.* This is what Petitioners truly seek in the present case: repeated access and a specific result. The Circuit Court wisely recognized this as an abuse of the grand jury process and correctly acted in its "gatekeeper" role to deny the Petition/Application of the Estate of Wayne A. Jones to Empanel a Special Grand Jury for Consideration of a Complaint.

In October 2013, the Berkeley County Prosecuting Attorney presented the circumstances of the March 13, 2013 shooting incident and Wayne A. Jones' death to a Berkeley County grand jury. The duly sworn citizens who heard this presentation found no probable cause to charge any of the Police Officers with any crime related to the incident. Unhappy with this result, and hoping to build a $100,000,000 civil case, Petitioners asked the Circuit Court to allow a *second* grand jury to consider the incident a *second* time in hopes of undermining the first grand jury's "no probable cause" finding.

Unlike State ex rel. Miller v. Smith, 168 W. Va. 745, 285 S.E.2d 500 (1981) – where a prosecuting attorney refused to present evidence of an alleged crime to a grand jury and a citizen was allowed to make his own presentation – the Berkeley County Prosecuting Attorney presented the March 13, 2013 incident to a duly sworn grand jury. She made this presentation as a representative of the State of West Virginia, including Petitioners. Her presentation is entitled

to a presumption of fairness, skillfulness, and good faith. *See* Harman v. Frye, 188 W. Va. 611, 620, 425 S.E.2d 566, 575 (1992) ("There is a presumption that prosecuting attorneys and law enforcement officers will perform their duties with integrity, and will evaluate or investigate [] criminal complaints fairly and skillfully.").

After considering the Berkeley County Prosecuting Attorney's presentation, Berkeley County's duly sworn grand jury determined there was no probable cause to charge any of the Police Officers with a crime related to the March 13, 2013 shooting incident. The October 2013 grand jury made this determination as representatives of the State of West Virginia, including Petitioners. Their deliberations are also entitled to a presumption of fairness, diligence, and good faith. *See* State ex rel. Miller v. Smith, 168 W. Va. 745, 756-757, 285 S.E.2d 500, 506 (1981) ("Once their oath is administered, [] grand jurors become officers of the court with the duty to 'diligently inquire and true presentment make of all such matters as may be given you in charge or come to your knowledge ....'").

Contrary to their arguments, Petitioners have already been granted access to the courts of this State through the Berkeley County Prosecuting Attorney and the October 2013 grand jury. Petitioners simply did not obtain the result they desired (i.e. an indictment of the Police Officers). This does not, however, justify a "do over" under the guise of the "open courts" provision of the West Virginia Constitution.

People should not be allowed to use the criminal complaint procedure, or the grand jury process, as a retaliatory measure to prosecute personal grievances or as a tool to advance their civil case for monetary damages. *See* Harman v. Frye, 188 W. Va. 611, 618, 425 S.E.2d 566, 573 (1992) (reviewing several state court decisions which expressed these "strong concerns"). Likewise, people must be protected from being forced to defend against frivolous or vindictive

prosecutions. Id. Imagine the impact of repeated and unlimited grand jury presentations on people who have already been exonerated by a grand jury, particularly police officers who subject themselves to criticism and put themselves in harm's way for our protection every single day.

Because a grand jury "is an arm or agency of the court by which it is convened" and "has no independent existence," the circuit court has both the power and the obligation to curb proposed abuse of the grand jury. State ex rel. Doe v. Troisi, 194 W. Va. 28, 34-35, 459 S.E.2d 139, 145-146 (1995). The Circuit Court correctly exercised its discretion and "gatekeeper" control over the grand jury by refusing Petitioners' request for a biased and improper *second* presentation of the March 13, 2013 incident to a *second* grand jury. The Circuit Court also correctly exercised its discretion by refusing Petitioners' request to review all transcripts of the October 2013 grand jury's consideration of this incident. Because the Circuit Court did not abuse its discretion, this Honorable Court should likewise refuse Petitioners' proposed abuse of the court system, disregard for the work of the Berkeley County Prosecuting Attorney, and attempt to undermine the October 2013 Berkeley County grand jury.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary because the Circuit Court properly exercised its discretion as the "gatekeeper" of the grand jury and correctly denied Petitioners' request for a *second* presentation of the March 13, 2013 incident to a *second* grand jury. However, oral argument may be useful to this Honorable Court because: 1) Petitioners have requested oral argument; 2) the dispositive issues have not been authoritatively decided; and 3) the decisional process may be aided by oral argument. W. Va. R. App. P. 18(a).

Should this Honorable Court determine oral argument is necessary, Rule 20 argument is appropriate because: 1) this case involves issues of first impression which present an opportunity to provide specific guidance to Circuit Courts for exercising their discretion as

"gatekeepers" of the grand jury; and 2) this case involves issues of fundamental public importance regarding: a) when it is appropriate to allow a citizen to make a presentation to a grand jury; b) what procedures a citizen must follow if allowed to make a presentation to a grand jury; c) when it is appropriate to allow a second presentation to a second grand jury after a first grand jury has found "no probable cause" for an indictment; and d) when it is appropriate to allow disclosure of otherwise confidential grand jury materials. W. Va. R. App. P. 20(a).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION AS "GATEKEEPER" OF THE GRAND JURY AND CORRECTLY DENIED PETITIONERS' PETITION TO EMPANEL A SECOND GRAND JURY FOR A SECOND PRESENTATION OF THE MARCH 13, 2013 SHOOTING INCIDENT.

"[C]ourts have inherent power over their own process to prevent abuse, oppression, and injustice." State ex rel. Casey v. Wood, 156 W. Va. 329, 334, 193 S.E.2d 143, 145 (1972) *citing* Krippenorf v. Hyde, 110 U.S. 276, 4 S. Ct. 27, 28 L. Ed. 145 (1884). A "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, 145 *citing* United States v. Smyth, D.C., 104 F. Supp. 283 (N.D. Cal, S.D. 1952). Accordingly, "circuit judges are the gatekeepers to the grand jury" and "a citizen may only exercise his right to appear before the grand jury by first making an application to the circuit judge." Camastro v. Smith, No. 5:12CV157, 2013 WL 4478177, at *5 (N.D. W. Va. Aug. 19, 2013) *citing* State ex rel. Miller v. Smith, 168 W. Va. 745, 285 S.E.2d 500 (1981).

A Circuit Court's grand jury "gatekeeper" role and the corresponding citizen's application requirement demonstrate a Circuit Court is *not* required to grant access to every citizen who wishes to present a case to a grand jury. Rather, as the designated "gatekeeper," a circuit court has discretion to consider a citizen's application and determine whether that citizen should be permitted to make a presentation to a grand jury under the circumstances.

> Where the law commits a determination to a trial judge and his discretion is exercised with judicial balance, the decision should not be overruled unless the reviewing court is actuated, not by a desire to reach a different result, but by a firm conviction that an abuse of discretion has been committed.

Covington v. Smith, 213 W. Va. 309, 322-323, 582 S.E.2d 756, 769-770 (2003) *citing* Intercity Realty Co. v. Gibson, 154 W. Va. 369, 377, 175 S.E.2d 452, 457 (1970) (additional citations omitted). The Circuit Court certainly exercised its "gatekeeper" role with "judicial balance" in this case. Therefore, this Honorable Court should review the Circuit Court's denial of Petitioners' Petition for a *second* grand jury under an abuse of discretion standard and should *only* overturn the Circuit Court's decision if it has a "firm conviction" that the Circuit Court abused its discretion under the particular circumstances of this case.

A. The Circuit Court Correctly Determined There is No Legal Authority Which Entitles Petitioners to Make a Second Presentation to a Special Grand Jury Five Years After the Prosecuting Attorney Made a Presentation to a Regular Grand Jury and That Duly Sworn Grand Jury Found No Probable Cause to Charge Any of the Police Officers with Any Crime Related to the March 13, 2013 Shooting Incident.

Petitioners cite three sources of legal authority to support their Petition and their appeal: 1) Article III, Section 17 of the West Virginia Constitution; 2) State ex rel. Miller v. Smith, 168 W. Va. 745, 285 S.E.2d 500 (1981) and its progeny; and 3) West Virginia Code § 52-2-1, § 52-2-9, and § 52-2-14. None of these legal authorities entitle Petitioners to undermine the work of the Berkeley County Prosecuting Attorney or the October 2013 Berkeley County grand jury by making a *second* presentation of the March 13, 2013 shooting incident to a *second* grand jury in hopes of obtaining their desired result.

1. Article III, Section 17 of the West Virginia Constitution guarantees people access to the courts of this State; however, it does not guarantee people repeated access to the courts of this State until they obtain the result they desire.

Article III, Section 17 of the West Virginia Constitution states:

> The 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.

This "open courts" provision does not guarantee a person multiple attempts or a specific result. It merely guarantees a person access to the courts of this State.

Petitioners have already been granted access to the courts of this State. Criminal offenses are offenses against the State. The prosecuting attorney is the constitutional officer charged with prosecuting criminal offenses against the State and its citizens. State ex rel. Miller v. Smith, *supra* at 752, 504 ("the prosecutor, as the officer charged with prosecuting such offenses, has a duty to vindicate the victims and the public's constitutional right of redress for a criminal invasion of rights"). In this case, the Prosecuting Attorney fulfilled her constitutional duty as the State's representative – *and the Petitioners' representative* – by presenting the March 13, 2013 shooting incident to the October 2013 grand jury.

"There is a presumption that prosecuting attorneys and law enforcement officers will perform their duties with integrity, and will evaluate or investigate [] criminal complaints fairly and skillfully." Harman v. Frye, 188 W. Va. 611, 620, 425 S.E.2d 566, 575 (1992). Petitioners did not present any reason for the Circuit Court to question this presumption or conclude the Prosecuting Attorney's presentation to the October 2013 grand jury was so flawed, skewed, or unfair that they were denied meaningful access to the courts of this State. Thus, the Circuit Court correctly refused to reverse the presumption and assume, as Petitioners do, that the Prosecuting Attorney's presentation was inherently flawed or improper.[3]

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[3] Petitioners' argument that the Prosecuting Attorney's presentation to the October 2013 grand jury was inherently biased due to her association with law enforcement officers ignores this presumption and common sense. As a natural function of her work, a prosecuting attorney is required to associate with law enforcement officers. If such association were sufficient to overcome the presumption of good faith and invalidate a prosecuting attorney's presentation to a grand jury, it would be impossible for any prosecuting

There is also a presumption that grand jurors will perform their duties fairly and diligently. "Once their oath is administered, [] grand jurors become officers of the court with the duty to 'diligently inquire and true presentment make of all such matters as may be given you in charge or come to your knowledge ....'" State ex rel. Miller v. Smith, *supra* at 756-757, 506; *see also* State v. Vance, 207 W. Va. 640, 535 S.E.2d 484 (2000) ("Members of the grand jury are not necessarily biased by personal acquaintance with the victim, defendant, or witnesses, but rather, the jurors may be asked to affirm that they can evaluate the case in an unbiased fashion and act impartially."). Petitioners did not present any reason for the Circuit Court to question this presumption or conclude the October 2013 grand jury violated its oath when, after hearing the Prosecuting Attorney's good faith presentation and the Court's instructions of law, the grand jury found no probable cause to charge any of the Police Officers with any crime related to the March 13, 2013 shooting incident. Thus, the Circuit Court also correctly refused to reverse the presumption and assume, as Petitioners do, that the October 2013 grand jury somehow shirked its duties and ignored its statutory oath.[4]

While the October 2013 grand jury's "no probable case" finding is obviously not the result Petitioners desired, there is no dispute the Prosecuting Attorney provided Petitioners access to the courts of this State for purposes of determining whether charges should go forward against the Police Officers. This is all the West Virginia Constitution guarantees. It does not guarantee Petitioners an indictment or multiple presentations to multiple grand juries until they

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attorney to present any case involving a police officer to a grand jury. The Circuit Court was correct to reject Petitioners' suggestion this perceived bias alone should overcome the presumption of good faith and entitle them to a *second* presentation to a *second* grand jury.

[4] "You shall diligently inquire and true presentment make of all such matters as may be given you in charge or come to your knowledge touching the present service. You shall present no person through malice, hatred or ill will, nor leave any unpresented through fear, favor, partiality or affection, but in all your presentments you shall present the truth, the whole truth and nothing but the truth. So help you God." W. Va. Code § 52-2-5.

obtain the result they desire. The Circuit Court correctly recognized that the "open courts" provision of the West Virginia Constitution does not entitle Petitioners to a *second* presentation of the March 13, 2013 shooting incident to a *second* grand jury and properly exercised its "gatekeeper" discretion to deny Petitioners' Petition.

2. State ex rel. Miller v. Smith and its progeny do not guarantee people access to a second grand jury when a prosecuting attorney has already provided them access to the courts of this State by making a presentation to a grand jury.

Petitioners rely upon three West Virginia cases which discuss a citizen's access to a grand jury under Article III, Section 17 of the West Virginia Constitution: 1) State ex rel. Miller v. Smith, *supra*; 2) Harman v. Frye, *supra*; and 3) State ex rel. R.L. v. Bedell, 192 W. Va. 435, 452 S.E.2d 893 (1994). The Circuit Court correctly recognized that none of these cases supports Petitioners' claim they have a constitutional entitlement to multiple presentations to a grand jury, particularly after a prosecuting attorney has already made a presentation to a grand jury for them.

Syllabus Point 1 of State ex rel. Miller v. Smith, *supra*, holds:

> By 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. W. Va. Const. Art. 3, § 17.

Petitioners would have this Honorable Court conclude Miller creates an absolute, unlimited constitutional right for any person to present any matter to any grand jury as many times as he wishes until he obtains the result he desires. This argument severely overstates the Miller holding and ignores the specific facts of the case which demonstrate clear limitations on the holding.

In Miller, petitioner claimed he was the victim of a malicious wounding by two police officers in Clay County, West Virginia. Petitioner prosecuted two criminal warrants against the police officers, which were dismissed by a magistrate. Petitioner then submitted his evidence to the prosecuting attorney. Based upon his own investigation, *the prosecuting attorney refused*

to present the matter to a Clay County grand jury. Petitioner then advised the prosecuting attorney he would make his own presentation to the next regular grand jury. The prosecuting attorney advised petitioner he would not allow an independent presentation. Regardless, petitioner and his corroborating witness appeared at the Courthouse on the first day the next grand jury convened. The presiding judge refused to intervene in the dispute. Ultimately, the prosecuting attorney agreed to allow petitioner access to the grand jury, but advised he would discourage the grand jury from hearing petitioner's presentation. Following the prosecuting attorney's comments to the grand jury, it voted not to hear petitioner's presentation. Petitioner then sought a writ of prohibition to prevent the prosecuting attorney's interference with his presentation to the grand jury. Id.

None of these facts exist in the present case. Unlike the prosecuting attorney in Miller, the West Virginia State Police investigated the Police Officers; the Berkeley County Prosecuting Attorney made a presentation to the October 2013 grand jury; and the Prosecuting Attorney did nothing to interfere with Petitioners' access to the Court for a determination of whether any criminal charges were warranted against any Intervenor. Miller presents an entirely different situation; one where the petitioner was denied any investigation or determination of probable cause and, thus, denied any access to the courts of this State. In stark contrast, there was no such denial of access to the courts of this State in the present case. The Prosecuting Attorney discharged her duties and so did the October 2013 grand jury. Petitioners were granted access to the grand jury and the courts of this State through the Prosecuting Attorney. Therefore, Miller cannot serve as authority for Petitioners' faulty argument that the "open courts" provision of the West Virginia Constitution entitles them to make multiple presentations to a grand jury.

Harman v. Frye, *supra*, is one of the cases which affirms Syllabus Point 1 of State ex rel. Miller v. Smith, *supra*. However, it undermines Petitioners' request for a second grand jury

because it emphasizes the critical distinction between Miller and the present case: a prosecuting attorney refusing to make a presentation to a grand jury, thereby denying a petitioner access to the courts of this State.

In Harman, the Supreme Court of Appeals considered a magistrate's petition for writ of mandamus to compel the Circuit Court to appoint a special prosecutor in a cross-warrant action involving private citizens' battery complaints stemming from a fight. The magistrate also asked the Supreme Court to modify Rule 3 of the Rules of Criminal Procedure for Magistrate Courts by declaring that private citizen complaints for both misdemeanor and felony cases must be approved by an attorney for the State or investigated by an appropriate law enforcement agency before being presented to a magistrate for a probable cause determination. The Supreme Court agreed, holding that "[e]xcept where there is a specific statutory exception, a magistrate may not issue a warrant or summons for a misdemeanor or felony solely upon the complaint of a private citizen without a prior evaluation of the citizen's complaint by the prosecuting attorney or an investigation by the appropriate law enforcement agency." Id at Syllabus Point 1.

The Supreme Court of Appeals' reasoning for this holding is instructive in the present case. The Harman Court specifically reasoned that adopting a rule requiring private citizens to first bring their complaints to a prosecuting attorney would not leave those private citizens without a remedy, or deny them access to the courts of this State, because "*if the prosecutor refuses to initiate criminal proceedings*," they still have the right to apply to the circuit court and make a presentation to a grand jury under Syllabus Point 1 of Miller. Id (emphasis added). This qualification is critical – "*if the prosecutor refuses to initiate criminal proceedings*" – and explains why Miller and its progeny do not support Petitioners' request for a *second* grand jury presentation. Unlike Miller, the Berkeley County Prosecuting Attorney did not refuse to

initiate criminal proceedings with regard to the March 13, 2013 incident. She presented the circumstances of the March 13, 2013 incident to a grand jury *for Petitioners*. Thus, Petitioners were already granted access to the courts of this State and cannot seek a *second* presentation to a *second* grand jury simply because they do not like the October 2013 grand jury's decision.

State ex rel. R.L. v. Bedell, 192 W. Va. 435, 452 S.E.2d 893 (1994), is also one of the cases which affirms Syllabus Point 1 of State ex rel. Miller v. Smith, *supra*. Like Harman, it undermines Petitioners' request for a second grand jury because it also demonstrates the important distinction between Miller and the present case: a prosecuting attorney refusing to make a presentation to a grand jury, thereby denying a petitioner access to the courts of this State.

In R.L., the Supreme Court of Appeals considered a petitioner's request for dismissal of an indictment which did not contain the prosecuting attorney's attestation to the grand jury foreperson's signature as required by West Virginia Code § 62-9-1. The Supreme Court of Appeals held the indictment was not defective, even though it did not contain the prosecuting attorney's attestation, *because the prosecuting attorney did not present charges to the grand jury*. Rather, the victim made a direct presentation to the grand jury without the prosecuting attorney's assistance. Id.

The R.L. Court simply recognized a citizen's right to petition the circuit court to present a complaint to a grand jury as established in Syllabus Point 1 of Miller. The context of its holding, however, demonstrates the importance of a prosecutor failing or refusing to make a presentation to a grand jury and, thus, denying access to the courts of this State. In R.L., the Supreme Court of Appeals was willing to excuse a technical defect in the form of the indictment because a private citizen, not the prosecuting attorney, made the grand jury presentation. Again, this explains why Miller and its progeny do not authorize Petitioners' request for a second grand

jury presentation after the October 2013 grand jury found no probable cause for any criminal charges against any Intervenor. Unlike Miller, Harman, and R.L., the Prosecuting Attorney presented the March 13, 2013 shooting incident to a grand jury for Petitioners. Thus, Petitioners were already granted access to the courts of this State and cannot seek a *second* presentation to a *second* grand jury simply because they do not like the October 2013 grand jury's decision.

3. West Virginia Code § 52-2-1, § 52-2-9, and § 52-2-14 do not guarantee people the right make multiple presentations to a grand jury until they obtain the result they desire.

Petitioners cite three separate statutes as authority for their Petition and their appeal, but only one has any bearing on their request for a second grand jury presentation. West Virginia Code § 52-2-1 simply establishes a circuit court's power to convene or excuse a grand jury. West Virginia Code § 52-2-14 simply establishes the conditions of grand juries convened by the circuit court. Meanwhile, West Virginia Code § 52-2-9 provides:

> Although a bill of indictment be returned not a true bill, another bill of indictment against the same person for the same offense *may* be sent to and acted on by the same or another grand jury.

W. Va. Code § 52-2-9 (emphasis added). This statute merely recognizes in permissive, *not mandatory*, language that, under certain unspecified circumstances, a grand jury "may" consider a second presentation of an offense after a "no true bill" (i.e. "no probable cause") determination has been returned. Petitioners erroneously present this statute as mandatory when it clearly is not. The Circuit Court correctly recognized this when it denied their Petition. Contrary to Petitioners' argument, West Virginia Code § 52-2-9 does not entitle them to a *second* grand jury presentation or a *second* opportunity to enhance their civil case against the Police Officers.

A grand jury has two primary responsibilities: 1) to determine whether there is probable cause to believe a crime has been committed; and 2) to protect citizens against unfounded criminal accusations. State ex rel. Miller v. Smith, *supra* at 751, 504 *citing* United States v.

Calandra, 414 U.S. 388, 94 S. Ct. 613, 38 L.Ed.2d 561 (1974) ("Thus, historically the grand jury serves a dual function: it is intended to operate as a sword, investigating cases to bring to trial persons accused on just grounds, and as a shield, protecting citizens against unfounded, malicious, or frivolous prosecutions."). The October 2013 grand jury has already fulfilled both responsibilities. It determined there is no probable cause to charge any of the Police Officers with any crime related to the March 13, 2013 incident. It also determined the Police Officers should be protected from unfounded criminal accusations. The duly sworn Berkeley County citizens who heard the Prosecuting Attorney's presentation and reached these conclusions should not be undermined simply because Petitioners desire another result. As "gatekeeper" of the grand jury, the Circuit Court correctly recognized that allowing Petitioners a *second* presentation to a *second* grand jury would not only undermine the diligent work of the October 2013 grand jury resulting in a "no probable cause" finding (i.e. its "sword" function), but would also undermine the protection against unfounded criminal accusations afforded the Police Officers by the October 2013 grand jury (i.e. its "shield" function).[5] This Honorable Court should also protect the dual purpose of the grand jury demonstrated by this case.[6]

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[5] If a second grand jury were to find probable cause to charge a Police Officer with some crime related to the March 13, 2013 shooting incident, the Circuit Court would be left with competing decisions: a first grand jury finding there was "no probable cause" and a second grand jury finding there was probable cause. Who would break the tie in such a case? Why should the second grand jury's determination be more valid than the first grand jury's? Why should the Police Officers be deprived of the protection afforded them by the first grand jury under these circumstances? The Circuit Court also correctly recognized the conundrum a *second* presentation to a *second* grand jury could create and properly declined to invite inconsistent grand jury determinations.

[6] After observing that "the function of the federal grand jury has shifted away from that of a shield between the citizenry and the government, towards that of a sword in the hands of the United States Attorney," the Miller Court emphasized the importance of the grand jury as a shield:

> Such a shift in the function of the federal grand jury corrupts its historically developed fundamental principles. Fortunately, the West Virginia Constitution protects us from such abuse, for under the state constitution it is our sworn duty to support the fundamental principles upon which our legal institutions are founded. W. Va. Const. Art. 3, § 20; Art. 4, § 5. *Heeding this constitutional directive, we are therefore bound to preserve the dual*

B. The Circuit Court Correctly Determined Petitioners' Untimely Attempt to Have a Second Grand Jury Consider the March 13, 2013 Shooting Incident Was an Abuse of the Court's Grand Jury Process.

"[A] grand jury's powers are not limitless and a circuit court not only has the power, but has an obligation, to curb a grand jury's overreaching." State ex rel. Doe v. Troisi, *supra* at 34, 145 *citing* State ex rel. Casey v. Wood, *supra* at 333, 145. A circuit court also has the power, and the obligation, to curb prosecutorial abuse of the grand jury. Id at 34-35, 145-146. Accordingly, a circuit court not only has the power, but also the obligation, to curb a private citizen's proposed abuse of the grand jury process where he petitions the court to make a second presentation to a second grand jury after a prior grand jury has already found "no probable cause" for criminal charges. In this case, the Circuit Court correctly recognized Petitioners' proposed abuses of the grand jury process when it denied their Petition.

First, Petitioners' request was not timely. They delayed nearly five years before making their request for a *second* grand jury (October 2013 to August 2018). Petitioners' delay alone was sufficient abuse of the grand jury process to justify the denial of their Petition.

Second, Petitioners sought to benefit from their delay. The Police Officers relied on the finality of the October 2013 grand jury's "no probable cause" determination to waive their Fifth Amendment privilege against self-incrimination and give deposition testimony in the Petitioners' civil case. Petitioners refiled their Petition with the Circuit Court only two months before their October 23, 2018 civil trial in the District Court. Had the civil trial proceeded in the District Court, this threat would have effectively prevented the Police Officers from testifying during their civil trial and defending both themselves and the City of Martinsburg against

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> *function of the grand jury as both sword and shield. We cannot permit its degradation into a De Torquemadian engine of persecution.*

State ex rel. Miller v. Smith, *supra* at 752, 504 (emphasis added). This Honorable Court should likewise recognize the importance of the grand jury as a shield.

Petitioners' $100,000,000 civil claims. The Police Officers would have been required to invoke their Fifth Amendment privilege while the specter of a second grand jury presentation was hanging over their heads. Petitioners' obvious attempt to benefit from their five-year delay amplified their abuse of the grand jury process and further justified the denial of their Petition.

Third, Petitioners' proposal for a *second* grand jury was contrary to established West Virginia law. Petitioners proposed a *second* presentation to a *second* grand jury "untainted by contact with a prosecuting attorney and law enforcement witnesses" which would provide a "fresh, fair, and unbiased review of the circumstances." *See* Petition, pg. 2, ¶ 8 [002]. The prosecuting attorney is the constitutional officer charged with prosecuting criminal offenses against the State and its citizens. State ex rel. Miller v. Smith, *supra* at 752, 504 ("the prosecutor, as the officer charged with prosecuting such offenses, has a duty to vindicate the victims and the public's constitutional right of redress for a criminal invasion of rights"). It is her duty to present evidence to a grand jury. Petitioners cannot force the Prosecuting Attorney to abdicate her duty by assuming some bias or prejudice resulting from her necessary association with law enforcement officers. Likewise, Petitioners cannot dictate what evidence the Prosecuting Attorney should, or should not, present to a grand jury and certainly cannot dictate that law enforcement officers cannot testify. Petitioners' attempts to control a *second* grand jury presentation were further evidence of their abuse of the grand jury process and further justification for the denial of their Petition.

Fourth, Petitioners' proposal for a *second* grand jury would have invalidated the entire grand jury process. Petitioners argued their counsel should be permitted to serve as a grand jury witness, a grand jury advocate, and/or a stand-in for the Prosecuting Attorney as part of their proposed *second* presentation to a *second* grand jury.[7]

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[7] For example, Petitioners' First Amended Complaint in Civil Action No. 16-C-490 specifically sought appointment of a special prosecutor to review the March 13, 2013 incident and appointment of a

> It has long been established in West Virginia that the discussion of evidence before the grand jury, relating to an alleged crime the grand jury is then considering, by persons not sworn to testify as witnesses, will vitiate an indictment returned by the grand jury, whether they were actually influenced by such discussion or not. Syllabus Point 4, State v. Wetzel, 75 W. Va. 7, 83 S.E. 68 (1914). This rule applies equally to the prosecuting attorney as it does to any other witness not sworn to testify. A prosecuting attorney can only appear before the grand jury to present by sworn witnesses evidence of alleged criminal offenses, and to render court supervised instructions, W. Va. Code § 7-4-1 (1976 Replacement Vol.); *he is not permitted to influence the grand jury in reaching a decision, nor can he provide unsworn testimonial evidence.*

State ex rel. Miller v. Smith, *supra* at 754, 505 (emphasis added); *see also* State v. Knotts, 187 W. Va. 795, 421 S.E.2d 917 (1992) ("A prosecuting attorney who attempts to influence a grand jury by means other than the presentation of evidence or giving of court supervised instructions, exceeds his lawful jurisdiction and usurps the judicial power of the circuit court of the grand jury."); State v. Wetzel, 75 W. Va. 7, 83 S.E. 68 (1914) ("It is the policy of the law to preserve inviolate the secrecy of proceedings before the grand jury, and the discussion of evidence before them, relating to an alleged crime which they are then considering, by persons not sworn to testify as witnesses, will vitiate an indictment returned by them, whether they were actually influenced by such discussion or not. The law seeks to guard against even the possibility of such influence."). Any grand jury presentation by Petitioners' counsel, *an advocate who has a clear pecuniary interest in the outcome of the grand jury presentation and Petitioners' separate $100,000,000 civil case*, would be highly improper. If a prosecuting attorney had a direct financial interest in a criminal prosecution, she would be required to recuse herself. Certainly, Petitioners' counsel could not make a grand jury presentation which would be improper for a prosecuting attorney.

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special grand jury "advocate" to make the *second* presentation to a *second* grand jury. *See* Appendix Record in Case No. 18-0927 [182-189].

Petitioners' attempts to advocate through a second grand jury presentation were further evidence of their abuse of the grand jury process and further justification for the denial of their Petition.

Finally, Petitioners have consistently presented misleading versions of the facts to the Circuit Court. Their habit of making an incomplete, self-serving presentation of the March 13, 2013 incident confirmed their true intent to abuse the grand jury process by presenting only selected facts to a second grand jury in hopes of undermining the October 2013 grand jury and bolstering their civil case.

This Honorable Court should consider both the limits of West Virginia law discussed above and this context for Petitioners' Petition as it evaluates the Circuit Court's exercise of discretion and, specifically, whether the Circuit Court exercised its grand jury "gatekeeper" role with "judicial balance" when it denied the Petition. The Circuit Court was rightfully skeptical of Petitioners' self-serving assumptions which sought to impugn both the Prosecuting Attorney and the October 2013 grand jury. The Circuit Court was also rightfully skeptical of Petitioners' timing and motives for their Petition. Under these circumstances, it cannot be said with "firm conviction" the Circuit Court abused its discretion by denying Petitioners' attempt to have a *second* grand jury consider the March 13, 2013 incident a *second* time in hopes of obtaining their desired result.[8] The Circuit Court was certainly justified in denying the Petition under these circumstances.

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[8] Petitioners base their entire argument for a second grand jury presentation on a faulty assumption that the October 2013 grand jury must have ignored the evidence due to some "whitewash" effort by a biased Prosecuting Attorney. In People v. Dykes, 86 A.D. 2d 191, 195-196, 449 N.Y.S. 2d 284, 287-288 (1982) the New York Court aptly observed:

> [A] District Attorney is not entitled, and should not be permitted, to resubmit a case merely because he is dissatisfied with or disagrees with the conclusion of the Grand Jury. To allow a District Attorney to resubmit a case simply because he does not agree with the Grand Jury finding is to place in his hands a power of indiscriminate and uncontrolled submission which CPL 190.75 was designed to prevent. As this court stated in People v. Martin: "That the prosecutor is still required to make an application to the court shows that his dissatisfaction with the first Grand Jury's action is not in itself sufficient reason to permit resubmission."

Id (internal citations omitted). The same is true in the present case.

II. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION AS "GATEKEEPER" OF THE GRAND JURY AND CORRECTLY DENIED PETITIONERS' PETITION FOR DISCLOSURE OF CONFIDENTIAL GRAND JURY PROCEEDINGS.

Petitioners rely on West Virginia Code § 52-2-15(c)(2)(A) and Rule 6(e)(3)(C)(i) of the West Virginia Rules of Criminal Procedure as the sole authority for their Petition for Disclosure of Grand Jury Proceedings. West Virginia Code § 52-2-15(c)(2)(A) provides:

> (2) Disclosure otherwise prohibited by this section of matters occurring before the grand jury may also be made:
>
> (A) When so directed by a court preliminarily to or in connection with a judicial proceeding;

W. Va. Code § 52-2-15(c)(2)(A).[9] While this statute authorizes disclosure of otherwise confidential grand jury materials, it provides little guidance for when a Circuit Court should allow such disclosure. This is left solely to the Circuit Court's discretion. As with a citizen's application to present a complaint to a grand jury, a Circuit Court must, therefore, exercise its grand jury "gatekeeper" discretion. *See* State ex rel. Casey v. Wood, *supra*, and State ex rel. Miller v. Smith, *supra*. Accordingly, this Honorable Court should review the Circuit Court's decision under an abuse of discretion standard and *only* overturn the Circuit Court's decision if it has a "firm conviction" the Circuit Court failed to exercise "judicial balance" under the circumstances. *See* Covington v. Smith, *supra*.

A. The Circuit Court Wisely Applied Federal Standards for Disclosure of Confidential Grand Jury Materials to Exercise its Discretion with "Judicial Balance."

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[9] Rule 6(e)(3)(C)(i) also provides:
(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made:
(i) when so directed by a court preliminarily to or in connection with a judicial proceeding
W. Va. R. Crim. P. 6(e)(3)(C)(i).

"It is well recognized that secrecy is a hallmark of a grand jury's core function." Cruse v. Blackburn, No. CV 3:17-00485, 2017 WL 3065217, at *1 (S.D. W. Va. July 19, 2017) *citing* Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218, 99 S. Ct. 1667, 60 L.Ed.2d 156 (1979). Recognizing this essential public policy, the Circuit Court carefully acted with "judicial balance" in its consideration of Petitioners' Petition for Disclosure of Grand Jury Proceedings. Despite a lack of guidance under West Virginia law, the Circuit Court refrained from exercising its grand jury "gatekeeper" discretion in a vacuum. Instead, the Circuit Court wisely followed the Federal standards applied in Cruse v. Blackburn, *supra*, as articulated in United States v. Sells Engineering, Inc., 463 U.S. 418, 443, 103 S. Ct. 3133, 77 L.Ed.2d 743 (1983) ("The party requesting disclosure of the confidential grand jury material, however, bears the burden to establish "a strong showing of particularized need ... before any disclosure will be permitted.") and Douglas Oil Co. v. Petrol Stops Northwest, *supra*, and Gilbert v. United States, 203 F.3d 820, 823 (4th Cir. 2000) ("To demonstrate a particularized need, the Fourth Circuit has stated that a party must establish 'that (1) the material 'is needed to avoid a possible injustice in another judicial proceeding,' (2) 'the need for disclosure is greater than the need for continued secrecy,' and (3) the 'request is structured to cover only material so needed.'") This Honorable Court should adopt the same standards and find the Circuit Court acted prudently by utilizing these standards to exercise its discretion.

B. The Circuit Court Correctly Determined Petitioners Cannot Satisfy Basic Standards for Disclosure of Confidential Grand Jury Materials, and, Therefore, Properly Denied Their Petition.

The Cruse Court explained the circumstances under which disclosure of confidential grand jury materials may be proper. "Similar to Rule 6(e) of the Federal Rules of Criminal Procedure, West Virginia Code § 52-2-15(c)(2)(A) provides that disclosure of matters occurring before the grand jury may be made when so directed by a court preliminarily to or in

connection with a judicial proceeding." Id. (internal quotations omitted). "The party requesting disclosure of the confidential grand jury material, however, bears the burden to establish a 'strong showing of particularized need . . . before any disclosure will be permitted.'" Id *quoting* United States v. Sells Engineering, Inc., *supra*. To inform this "strong showing of particularized need," the moving party "must establish that (1) the material is needed to avoid a possible injustice in another judicial proceeding, (2) the need for disclosure is greater than the need for continued secrecy, and (3) the request is structured to cover only material so needed." Id *quoting* Douglas Oil Co. v. Petrol Stops Northwest, *supra*, and Gilbert v. United States, *supra*.

Under Cruse, Petitioners must first demonstrate "the material is needed to avoid a possible injustice in another judicial proceeding." Id. Petitioners failed to satisfy the first Cruse factor because there was no other pending judicial proceeding, and even if there were, the grand jury materials were not necessary to avoid a possible injustice. The District Court dismissed Petitioners' Federal civil case just before the Circuit Court ruled on Petitioners' Petition. The Circuit Court dismissed Petitioners' identical "back-up" State civil case just before the it ruled on Petitioners' Petition. Thus, the only remaining proceeding was the instant civil case (Civil Action No. 18-P-318) in which Petitioners filed their Petition for a Second Grand Jury and their Petition for Disclosure of Grand Jury Proceedings. Following the dismissal of Petitioners' civil cases, there was no longer *another* proceeding in which Petitioners could claim a possible injustice. Moreover, Petitioners had access to extensive discovery in their District Court case and, thus, no practical need for grand jury transcripts. Therefore, the Circuit Court correctly determined Petitioners did not satisfy the first Cruse factor.

Under Cruse, Petitioners must also demonstrate "the need for disclosure is greater than the need for continued secrecy." Id. Petitioners' only argument to the Circuit Court on this

factor was that "[c]ontinued secrecy benefits nothing. It potentially protects wrongdoers. It erodes the public confidence in law enforcement and the judicial system." Petition, ¶ 11 [008] This argument is so conclusory it could be applied to every grand jury proceeding ever conducted. It would essentially become an argument which "swallows the rule" and completely abolishes grand jury secrecy. The fact remains that "secrecy is a hallmark of a grand jury's core function." Id. Petitioners failed to demonstrate any actual need for disclosure of grand jury materials, much less a need for disclosure which was greater than the need for continued confidentiality. Therefore, the Circuit Court correctly determined Petitioners did not satisfy the second Cruse factor.

Finally, under Cruse, Petitioners' request must be "structured to cover only material so needed." Id. Petitioners initially sought "production of a transcript of witness testimony before the prior grand jury" without any further specification. Petition, ¶ 13 [008]. When confronted with this Cruse requirement, Petitioners provided the following "clarification" which did not narrow the scope at all:

> [Petitioners do] not seek the following: the identity of the grand jurors, the oath of the grand jurors, instructions to the grand jury, nor the result of the grand jury deliberations. [Petitioners do] request the transcription of the testimony of the presenting Prosecuting Attorney and every witness that testified.

Petitioners' Rebuttal, ¶ C [144]. Petitioners' request for confidential grand jury materials was clearly *not* "structured to cover only material so needed," nor did it even articulate any particularized need. In fact, Petitioners' request was the exact opposite; they asked the Circuit Court to disclose all testimony related to the October 2013 grand jury's consideration of the March 13, 2013 incident and Wayne A. Jones' death. Given Petitioners' overly broad request and refusal to narrow it, the Circuit Court correctly determined they did not satisfy the third Cruse factor.

"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." State ex rel. Pinson v. Maynard, 181 W. Va. 662, 663, 383 S.E.2d 844, 845 (1989) *quoting* Syllabus Point 2, Barker v. Fox, 160 W. Va. 749, 238 S.E.2d 235, 235 (1977)). Petitioners do not allege willful or intentional fraud. Therefore, West Virginia law does not support Petitioners' attempt to "inquire into the evidence considered by the [October 2013] grand jury," ostensibly to question the validity of their "no probable cause" finding. Moreover, the available standards for disclosure of grand jury materials do not support Petitioners' attempt to avoid the sound policy of grand jury confidentiality. Petitioners bear the burden of satisfying the Cruse factors or, at the very least, demonstrating some "strong showing of particularized need." They failed to do so in this case. Considering the cursory, non-specific arguments Petitioners presented, the Circuit Court certainly did not abuse its discretion by rejecting their Petition and upholding grand jury confidentiality.[10]

III. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION TO GRANT THE POLICE OFFICERS' MOTION TO INTERVENE AND DENY PETITIONERS' MOTION TO VACATE ORDER GRANTING MOTION TO INTERVENE.

The Supreme Court of Appeals has explained its standard of review for a Circuit Court's ruling on a motion to intervene as follows:

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[10] Petitioners' opening Brief suggests, *for the first time*, that the Circuit Court should have conducted an *in camera* review of the entire grand jury transcript because "the putative target defendants of the first grand jury presentation apparently testified *ex parte* before the same grand jury which was purportedly and ostensibly investigating these same putative defendants." Petitioners' Brief, pg. 15. Notably, Petitioners cite no portion of the record to support their inference that any of the Police Officers testified before the October 2013 grand jury. Instead, Petitioners seize upon language from the Circuit Court's Order Denying Petition for Disclosure of Grand Jury Proceedings – "this Court will not sanction the disclosure of prior grand jury testimony of the defendant officers" – and present it to this Honorable Court out of context. [190] In the Circuit Court's Order, the paragraph preceding this quote discusses Petitioners' ability to obtain testimony from the Police Officers during discovery in their civil case as contemplated in the Cruse case. When the Circuit Court's statement about "prior grand jury testimony of the defendant officers" is read in this context, it is more likely understood as a theoretical statement, rather than a revelation of who actually testified before the October 2013 grand jury. Regardless, it would not have been improper for one or more of the Police Officers to testify before the October 2013 grand jury. In and of itself, this would do nothing to invalidate the grand jury's "no probable cause" finding or the entirety of the grand jury process.

> In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Syllabus Point 1, Stern v. Chemtall, Inc., 217 W. Va. 329, 331, 617 S.E.2d 876, 878 (2005) (internal citations omitted). Petitioners do not take issue with the Circuit Court's underlying factual findings. Rather, they simply disagree with the Circuit Court's ultimate decision allowing the Police Officers to intervene and oppose their Petition to Empanel a Second Grand Jury and Petition for Disclosure of Grand Jury Proceedings. Therefore, this Honorable Court should review the Circuit Court's decision under an abuse of discretion standard.

A. The Circuit Court Did Not Abuse Its Discretion by Allowing the Police Officers to Intervene as a Matter of Right.

Rule 24(a) of the West Virginia Rules of Civil Procedure allows the Police Officers to intervene in this case as a matter of right:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

W. Va. R. Civ. P. 24(a). "Doubts regarding the propriety of permitting intervention should be resolved in favor of allowing it, because this serves the judicial system's interest in resolving all related controversies in a single action." Stern v. Chemtall Inc., *supra* at 337, 884 *citing* State ex rel. Ball v. Cummings, 208 W. Va. 393, 403, 540 S.E.2d 917, 927 (1999).

There is no doubt each Police Officer has an "interest relating to the . . . transaction which is the subject of the action" (i.e. Petitioners' proposed second grand jury presentation).

> To justify intervention of right under West Virginia Rule of Civil Procedure 24(a)(2), the interest claimed by the proposed intervenor must be direct and substantial. A direct interest is one of such immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment to be rendered between the original parties. A substantial interest is one that is capable of definition, protectable under some law, and specific to the intervenor. In determining the adequacy of the interest in a motion to intervene of right, courts should also give due regard to the efficient conduct of the litigation.

Syllabus Point 4, State ex rel. Ball v. Cummings, *supra*. Each of the Police Officers was directly involved in the March 13, 2013 shooting incident and, therefore, could be the subject of a criminal prosecution should Petitioners be permitted a second grand jury presentation. Furthermore, each Police Officer, as a defendant in Petitioners' civil case (Civil Action No. 3:13-CV-68), would be compelled to assert his Fifth Amendment privilege against self-incrimination and, thus, would effectively be prevented from testifying at any civil trial while there is a potential for a second grand jury presentation.[11] The right to be free from improper criminal prosecution, and all attendant costs, and the right to defend oneself against civil liability are certainly "direct and substantial" interests of "immediate" character which are "capable of definition" and "protectable under some law" as required by Rule 24(a)(2).

There is also no doubt each Police Officer "is so situated that the disposition of the action may as a practical matter impair or impede [his] ability to protect that interest."

> In determining whether a proposed intervenor of right under West Virginia Rule of Civil Procedure 24(a)(2) is so situated that the disposition of the action may impair or impede his or her ability to protect that interest, courts must first determine whether the proposed intervenor *may* be *practically* disadvantaged by the disposition of the action. Courts then must weigh the degree of practical disadvantage against the interests of the plaintiff and

[11] Petitioners' civil case is currently on appeal to the Fourth Circuit Court of Appeals. Therefore, this concern is still valid. Should the Court of Appeals reverse the District Court, and should this Honorable Court allow a *second* presentation of the March 13, 2013 incident, the Police Officers would be prevented from providing testimony in their own defense by the ongoing threat of criminal prosecution.

> defendant in conducting and concluding their action without undue complication and delay, and the general interest of the public in the efficient resolution of legal actions.

Syllabus Point 5, State ex rel. Ball v. Cummings, *supra* (emphasis in original). The Circuit Court rightfully granted each Police Officer an opportunity to show why Petitioners' second grand jury presentation was unwarranted and unsupported in the law *before* he was potentially subjected to an indictment. Without this opportunity, each Police Officer would have been denied the ability to address Petitioners' potential abuse of the court system *before* he was required to suffer the cost of defending against criminal charges and *before* he was forced to decide whether he could defend himself against civil liability in the District Court. In each case, unjust and irreparable harm could have been done to each Police Officer and was easily avoided, as a practical matter, by allowing the Police Officers to assert their defenses directly in this action.

Finally, there is no doubt the Police Officers' interests are not "adequately protected by existing parties." Petitioners are the only true parties to their Petition. They certainly have not represented Intervenors' interests. The Berkeley County Prosecuting Attorney is not a party to this action; however, the Circuit Court recognized the Prosecuting Attorney's interest in this action, implicitly recognized the Prosecuting Attorney's right to intervene, and ordered the Prosecuting Attorney to respond to the Petition. The Police Officers, as the people who could be subject to an indictment, had a much greater practical interest in this action and, thus, no less right to intervene than the Prosecuting Attorney.

"In order to demonstrate inadequate representation under West Virginia Rule of Civil Procedure 24(a)(2), a private person seeking to intervene of right in a legal action in which a government agency represents the public interest generally must assert some specialized or private interest justifying intervention." Syllabus Point 6, State ex rel. Ball v. Cummings, *supra*. Although the Prosecuting Attorney opposed the Petition, this was not sufficient for the Police

Officers because the Prosecuting Attorney's interests are different than the Police Officers' interests. The Prosecuting Attorney is the constitutional officer charged with the responsibility of instituting prosecutions and securing convictions on behalf of the State. State ex rel. Skinner v. Dostert, 166 W. Va. 743, 750, 278 S.E.2d 624, 630 (1981). She has the responsibility "to seek justice, not merely to convict." Id. at 751, 631. Thus, the Prosecuting Attorney is most interested in protecting the integrity of the grand jury and criminal justice processes (i.e. whether a private citizen may insist upon a second presentation to a special grand jury five years after a prosecuting attorney made a presentation and a regular grand jury found no probable cause for criminal charges). Meanwhile, the Police Officers are most interested in the practical outcome of the Petition (i.e. whether they will be subjected to criminal charges and whether they will be able defend themselves against civil liability in the District Court). This is certainly a "specialized or private interest justifying intervention."

The Police Officers clearly met each element of "intervention of right" under Rule 24(a) of the West Virginia Rules of Civil Procedure. Therefore, the Circuit Court did not abuse its discretion by granting their Motion to Intervene.

B. The Circuit Court Did Not Abuse Its Discretion by Allowing the Police Officers to Intervene as a Matter of Discretion.

Rule 24 of the West Virginia Rules of Civil Procedure also allows the Police Officers to intervene in this case as a matter of court discretion:

> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. [. . .] In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

W. Va. R. Civ. P. 24.

There is no doubt each Police Officer's "claim or defense" has a "question of law or fact in common" with the Petition. Both the Police Officers and Petitioners raise the legal issue of whether Petitioners, as citizens, are constitutionally entitled to make a *second* presentation of the March 13, 2013 incident to a *second* grand jury *five years after* the Prosecuting Attorney made a presentation to a grand jury and that grand jury found no probable cause for any criminal charges against any of the Police Officers. Moreover, the Police Officers' intervention did not unduly delay or prejudice, but rather fairly balanced and enhanced, the Circuit Court's consideration of the Petition and this significant legal issue.

The Police Officers clearly met each element of "intervention of discretion" under Rule 24(a) of the West Virginia Rules of Civil Procedure. Therefore, the Circuit Court did not abuse its discretion by granting their Motion to Intervene.

C. The Circuit Court Did Not Abuse Its Discretion by Denying Petitioners' Motion to Alter or Amend Order Granting Motion to Intervene under Rule 59(e) of the West Virginia Rules of Civil Procedure.

This Honorable Court reviews the appeal of a Rule 59(e) motion to alter or amend a judgment under the same standard applicable to the underlying judgment upon which the motion is based and from which the appeal is filed. Affiliated Const. Trades Foundation v. University of West Virginia Bd. of Trustees, , 210 W. Va. 456, 557 S.E.2d 863 (2001). Therefore, the same abuse of discretion standard applicable to the Circuit Court's decision to grant the Police Officers' Motion to Intervene is also applicable to Petitioners' Motion to Alter or Amend Order Granting Motion to Intervene.

Rule 59(e) states: "Any motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment." W. Va. R. Civ. P. 59(e). In Syllabus Point 2 of Mey v. The Pep Boys–Manny, Moe & Jack, 228 W. Va. 48, 717 S.E.2d 235 (2011), the Supreme Court of Appeals explained that:

> [a] motion under Rule 59(e) of the West Virginia Rules of Civil Procedure should be granted where: (1) there is an intervening change in controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy a clear error of law or (4) to prevent obvious injustice.

Id. Petitioners did not identify or address any of the Rule 59(e) criteria for alteration, amendment, or vacation of a court order. Rather, they simply argued the Circuit Court "prematurely issued its Order Granting Motion to Intervene" and, thus, "defeated Petitioners' ability to adequately and timely respond to the subject motion." Motion, pg. 1, ¶ 3. [150] Following this justification, Petitioners proceeded to argue the merits of the Police Officers' Motion to Intervene and, specifically, their untenable position that the Police Officers should *not* be allowed to participate in proceedings which could ultimately result in complete disregard for the October 2013 grand jury's work and criminal indictments against them. Accordingly, Petitioners' Motion was akin to a motion for reconsideration of the Circuit Court's prior ruling.

Motions for reconsideration are not favored in the law. Such "motions may not be used . . . to raise arguments which could have been raised prior to the issuance of the judgment, nor may they be used to argue a case under a novel legal theory that the party had the ability to address in the first instance." Robinson v. Wix Filtration Corp. LLC, 599 F.3d 403, 411 (4th Cir. 2010). Likewise, such motions may not be used to ask the court to "rethink what the court has already thought through - rightly or wrongly." Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99 (E.D. Va. 1983). This is precisely what Petitioners asked the Circuit Court to do in the present case – "rethink what the court has already thought through." Petitioners offered the Court no new facts, no new law, and no meritorious argument whatsoever to justify denying the Police Officers an opportunity to be heard on their pending Petition – a Petition which clearly could have a direct and profound impact on the Police Officers (i.e. a nullification of the October

2013 grand jury's "no true bill" decision and criminal indictments against one or more of the Police Officers). Therefore, the Circuit Court correctly denied Petitioners' Motion under to Rule 59(e).

Petitioners argued the Police Officers did "not meet the criteria for intervention as a matter of right" under Rule 24(a) of the West Virginia Rules of Civil Procedure, but failed to address the Rule 24(a) criteria. Motion, pg. 1, ¶ 4A. [150] Likewise, Petitioners argued the Police Officers did "not meet the criteria for permissive intervention" under Rule 24(b) of the West Virginia Rules of Civil Procedure, but failed to address the Rule 24(b) criteria. Motion, pg. 1, ¶ 4B. [150] Petitioners also failed to explain how they could overcome the presumption in favor of intervention. *See* Stern v. Chemtall Inc., *supra*, *citing* State ex rel. Ball v. Cummings, *supra* ("Doubts regarding the propriety of permitting intervention should be resolved in favor of allowing it, because this serves the judicial system's interest in resolving all related controversies in a single action."). Given Petitioners' failure to address basic procedural standards and applicable law, the Circuit Court did not abuse its discretion by denying their Motion under Rule 59(e).

IV. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION OR COMMIT PREJUDICIAL OR REVERSIBLE ERROR BY RULING ON THE POLICE OFFICERS' MOTION TO INTERVENE BEFORE RECEIVING PETITIONERS' RESPONSE BRIEF OR BY DECLINING TO HOLD HEARINGS ON PETITIONERS' MOTIONS.

Petitioners complain they were denied due process of law because the Circuit Court granted the Police Officers' Motion to Intervene seven days *before* they were scheduled to file a response brief under the Court's Rule 22 Scheduling Order. Then, Petitioners claim prejudice from the Court's premature ruling because "the Motion to Intervene should have been denied to avoid the evil represented by [the Police Officers'] attempts to obstruct justice by generating delay and expense." Petitioners' Brief, pg. 26. These arguments are logically inconsistent and plainly wrong. How could a *premature* ruling (i.e. seven days early) by the Circuit Court "obstruct justice

by generating delay?" Likewise, how could a ruling by the Circuit Court which eliminated the need for Petitioners' counsel to file a response brief "obstruct justice by generating . . . expense?"

Rule 22.04 of the Trial Court Rules directs Circuit Courts to decide all motions "expeditiously." W. Va. Trial Ct. R. 22.04. Most likely, the Circuit Court recognized the merits of the Police Officers' Motion to Intervene and the presumption in favor of intervention under West Virginia law, then decided there was no need for Petitioners to suffer the delay or expense of filing a response brief. Petitioners cannot demonstrate any prejudice resulting from the Circuit Court's prompt ruling on the Police Officers' Motion to Intervene. The result would have been the same regardless of whether Petitioners filed their response brief or not.

Petitioners also complain they were denied access to the courts of this State because the Circuit Court declined to hold hearings on their various motions. As a result, Petitioners claim the Circuit Court "ruled in a vacuum without all available information" including "evidence [which] could have been produced." Petitioners' Brief, pg. 27. This argument begs the question: Why did Petitioners fail to include "all available information" including "evidence [which] could have been produced" in their various motions? Even in their opening Brief before this Honorable Court, Petitioners are still reluctant to specify the "evidence [which] could have been produced" at a hearing for the Circuit Court.

Rule 22.03 of the Trial Court Rules provides that Circuit Courts "*may* require or permit hearings on motions." W. Va. Trial Ct. R. 22.03 (emphasis added). This provision is discretionary, not mandatory. In the present case, the Circuit Court exercised its discretion and chose not to hold a hearing on Petitioners' motions. This was well within the Circuit Court's authority under Rule 22.03. If Petitioners truly believed a hearing would be useful to the Circuit Court, they should have included more of the missing, but "available," information and evidence

in their actual motions for the Court's consideration. Under the circumstances, this Honorable Court should not find the Circuit Court abused its discretion or committed any error.

CONCLUSION

West Virginia law directs Circuit Courts to consider a citizen's application for presentation of a complaint to a grand jury to ensure open access to the courts of this State. Circuit Courts are, thus, required to exercise their grand jury "gatekeeper" discretion "with judicial balance" when determining whether this goal has been met. Given that the Berkeley County Prosecuting Attorney presented the March 2013 shooting incident to a duly-sworn grand jury, it cannot be said Petitioners were denied access to the court of this State. Therefore, it also cannot be said the Circuit Court failed to act "with judicial balance" or somehow abused its discretion when it denied Petitioners' Petition for a *second* presentation to a *second* grand jury in hopes of undermining the October 2013 grand jury.[12]

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[12] The Police Officers respectfully suggest this Honorable Court could provide useful guidance to Circuit Courts considering a citizen's application to present a complaint to a grand jury under the "open courts" provision of Article 3, Section 17 of the West Virginia Constitution by adopting the following Syllabus Points:

- The right of a citizen to present a complaint to a grand jury under the "open courts" provision of Article 3, Section 17 of the West Virginia Constitution is not absolute. Before a citizen may present her complaint to a grand jury, she must first exhaust all other methods of presenting a criminal complaint (e.g. reporting the facts to a law enforcement officer, reporting the facts to a prosecuting attorney, presenting a complaint to a magistrate). A citizen should not be permitted to present a complaint to a grand jury after a prosecuting attorney has presented her complaint to a prior grand jury and the prior grand jury has found "no probable cause" for an indictment.
- If a citizen has exhausted all other methods of presenting a criminal complaint, and still has not been granted access to the courts of this State, either personally or through a duly-acting representative of the State, only then may she file an application with the Circuit Court to present her complaint directly to a grand jury.
- The Circuit Court, acting in its role as "gatekeeper" for the grand jury, must then consider the citizen's application and determine whether, in its discretion, the citizen's proposed presentation is appropriate for a grand jury. In making this determination, the Circuit Court should consider the following non-exclusive list of factors: 1) the amount of time which has elapsed between the alleged crime and the proposed presentation; 2) the presence or absence of corroborating evidence proffered by the citizen; and 3) the reasons, if available, that a police officer, a prosecuting attorney, and/or a magistrate refused to initiate criminal proceedings on behalf of the citizen.
- Should a Circuit Court determine a citizen's proposed presentation is appropriate for a grand jury, the Circuit Court should establish clear guidelines for the citizen's presentation which comport

West Virginia law allows Circuit Courts to order disclosure of otherwise confidential grand jury materials. It does not, however, provide specific guidance for such disclosure. Circuit Courts are thus required to exercise their grand jury "gatekeeper" discretion "with judicial balance" when weighing the important public policy of grand jury confidentiality against some "strong showing of particularized need." Given that the Circuit Court carefully applied Federal standards for disclosure of grand jury materials to Petitioner's request, and that Petitioners' conducted full discovery in the District Court, it cannot be said the Circuit Court failed to act "with judicial balance" or somehow abused its discretion by denying Petitioner's unsupported, blanket request for grand jury testimony related to the March 13, 2013 incident.[13]

West Virginia law favors intervention to ensure related controversies are resolved in a single action and interested parties are not prejudiced by exclusion from the judicial process. Circuit Courts are, thus, required to exercise their discretion with a strong preference for hearing all perspectives on a disputed issue in one case. Given that the Police Officers are the direct targets

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with West Virginia law regarding grand jury presentations (e.g. the citizen may only present evidence through a sworn witness; the citizen must refrain from making comments or arguments in lieu of sworn testimony; the citizen must otherwise refrain from providing "unsworn testimonial evidence").

- On appeal, a Circuit Court's decision to grant or deny a citizen's application for presentation of a complaint to a grand jury under the "open courts" provision of Article 3, Section 17 of the West Virginia Constitution shall be reviewed under an abuse of discretion standard and shall only be reversed when the Circuit Court has failed to exercise its discretion with judicial balance and the appellate court has a firm conviction that an abuse of discretion has been committed.

[13] The Police Officers respectfully suggest this Honorable Court could provide useful guidance to Circuit Courts considering a request for disclosure of confidential grand jury materials under West Virginia Code § 52-2-15(c)(2)(A) and Rule 6(e)(3)(C)(i) of the West Virginia Rules of Criminal Procedure by explicitly adopting Federal standards with the following Syllabus Points:

- The party requesting disclosure of confidential grand jury materials bears the burden of establishing "a strong showing of particularized need" before any disclosure will be permitted. United States v. Sells Engineering, Inc., 463 U.S. 418, 443, 103 S. Ct. 3133, 77 L.Ed.2d 743 (1983) \
- To demonstrate a particularized need, a party must establish that 1) the material is needed to avoid a possible injustice in another judicial proceeding; 2) the need for disclosure is greater than the need for continued secrecy; and 3) the request is structured to cover only material so needed. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218, 99 S. Ct. 1667, 60 L.Ed.2d 156 (1979); Gilbert v. United States, 203 F.3d 820, 823 (4th Cir. 2000).

of Petitioners' request for a second grand jury to charge them with some crime related to the March 13, 2013 shooting incident, it cannot be said the Circuit Court abused its discretion by following the presumption in favor of intervention, granting the Police Officers' Motion to Intervene, denying Petitioners' Motion to Amend, and, ultimately, considering the Police Officers' perspectives on this highly disputed issue.

WHEREFORE Intervenor-Respondents – Pfc. Erik Herb, Pft. Daniel North, Ptlm. William Staubs, Ptlm. Paul Lehman, and Pft. Eric Neely – respectfully request this Honorable Court to deny Petitioners' appeal and affirm the Circuit Court's September 18, 2018 Order Granting Motion to Intervene, October 22, 2018 Order Denying Petitioners' Motion to Vacate Order Granting Motion to Intervene, October 22, 2018 Order Denying Petition for Disclosure of Grand Jury Proceedings, and October 23, 2018 Order Denying Petition/Application of the Estate of Wayne A. Jones to Empanel a Special Grand Jury for Consideration of a Complaint.

DATED the 9th day of April 2019.

INTERVENOR-RESPONDENTS
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PFT. DANIEL NORTH
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ESTATE OF WAYNE A. JONES, *Petitioner,* v. BERKELEY COUNTY PROSECUTING ATTORNEY, *Respondent.*	CASE NO. 18-1045

CERTIFICATE OF SERVICE

I certify that I served the foregoing INTERVENOR-RESPONDENTS' BRIEF upon all parties, or their counsel of record, by mailing and/or hand delivering a true and accurate copy as follows:

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on the 11th day of April 2019.

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