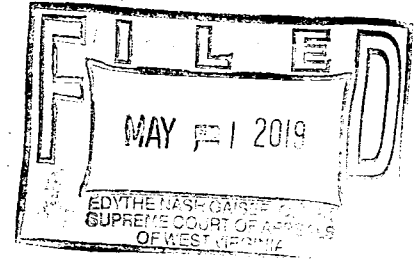


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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
CHARLESTON**

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**Case No. 18-1045**



**THE ESTATE OF WAYNE A. JONES,  
PETITIONER,**

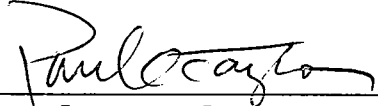
**Vs.**

**BERKELEY COUNTY PROSECUTING ATTORNEY, et al.,  
RESPONDENTS.**

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**PETITIONER'S REPLY BRIEF**

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\_\_\_\_\_  
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## STATEMENT OF THE CASE

Upon review of the briefs of Respondents, the court should note the following points, inaccuracies and omissions:

1. No knife has been produced. No police officer was medically treated for a stab wound. No resistance was being offered at the time Wayne Jones was shot.

To conclusively resolve these issues, the reader simply needs to view and hear the video of the moments before the Jones homicide. The video is the subject of Petitioner's Motion to Supplement the Appendix and in the custody of the Court.

2. The Respondent Intervenors have failed to address controlling case law squarely refuting their claim that they were or are entitled to intervene in this matter concerning the empaneling of a grand jury. As discussed below, this gives rise to certain adverse inferences which merit reversal of the Circuit Court order permitting intervention.

A ruling by this court which allows putative criminal defendants (here, Respondent Intervenors) to intervene in grand jury proceedings intended to investigate the potential criminal conduct of such putative defendants sets a dangerous precedent with the high potential to open a veritable pandoras box in future criminal investigations and proceedings. Under such a scenario, West Virginia grand juries will not be able to operate in secret under undisturbed circumstances. Respondent Intervenors fail to recognize that they are not, indeed no one is, above the law.

3. Respondent Intervenors make much ado about being deprived of the ability to protect their interests in the absence of their intervention. As discussed below, Respondent Intervenors contradict themselves when they argue that the first grand jury proceeding

protects them and should remain undisturbed because of its legitimacy<sup>1</sup>, then argue that intervention is necessary under Rule 24, WV R.Civ.P. because their interests are not protected<sup>2</sup>. This court should take due notice of such disingenuous “double talk” and give it the weight it deserves. The court should also recognize that Respondent Intervenors’ “double talk” and attempts at misdirection are prime illustrations of the evils of permitting intervention into grand jury proceedings by putative criminal defendants.

In the event they are indicted, Respondent Intervenors need not worry about their rights being protected. They will enjoy the exercise of all of the rights they denied Wayne Jones, a mentally ill, homeless man, stopped and killed after jay walking. A man innocent until proven guilty of jay walking who paid with his life for the incompetence of Respondent Intervenors.

4. This court cannot fully consider the circumstances of this case without reviewing the video of the Jones homicide and the transcripts of the first grand jury presentation. These are critical pieces of evidence that will likely have a conclusive effect on the issues presented by this case.

5. In principle, the Berkeley County Prosecuting Attorney acknowledges a citizen’s right to present its case to a grand jury.<sup>3</sup>

6. The Prosecutor’s primary concern with Petitioner’s request to empanel a special grand jury appears to be the cost, and the details of arranging such a presentation.<sup>4</sup>

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<sup>1</sup> Respondent Intervenors’ Brief at pg. 9

<sup>2</sup> Respondent Intervenors’ Brief at pg. 32

<sup>3</sup> App. Pg. 12, 13. Brief of Respondent Prosecuting Attorney at pg. 1. See also WV Code §52-2-9.

<sup>4</sup> App. Pg. 13

7. Petitioner will pay the costs associated with its request.<sup>5</sup> The details of such a request can be resolved between the parties and the circuit court, with guidance from this court.

8. The Prosecuting Attorney takes no position on the following issues raised by Petitioner: a) intervention by the individual police officers responsible for the homicide of Wayne Jones;<sup>6</sup> and b) the circuit court's misapplication of WV R.Civ.P. Rule 6;<sup>7</sup>

9. Petitioner is satisfied that grounds of error 4-7 have been adequately briefed and are ripe for this court's consideration.<sup>8</sup> Petitioner devotes this reply to grounds of error 1 - 3.<sup>9</sup>

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<sup>5</sup> App. Pg. 71

<sup>6</sup> Brief of Respondent Prosecuting Attorney at pg. 14.

<sup>7</sup> Brief of Respondent Prosecuting Attorney at pg. 14.

<sup>8</sup> Grounds of error 4-7 are:

4. It was reversible and prejudicial error for the court to mis-apply Rule 6, WV R.Civ.P., during motions practice.

5. Petitioner's constitutional right of access to the court was denied by the circuit court's refusal of Petitioner's requests for hearings.

6. There exists additional evidence that may be presented to a future grand jury.

7. The previous prosecuting attorney that handled the first grand jury proceeding was defeated in a re-election bid. The current prosecuting attorney, or a substitute prosecuting attorney, may have a different view of a special grand jury presentation.

<sup>9</sup> Grounds of error 1-3 are:

1. It was reversible and prejudicial error, and an abuse of discretion, for the circuit court to deny the underlying petition to empanel a special grand jury.

2. It was reversible and prejudicial error, and an abuse of discretion, for the circuit court to deny the petition for disclosure of grand jury proceedings.

3. It was reversible and prejudicial error, and an abuse of discretion, for the

## ARGUMENT

**1. It was reversible and prejudicial error, and an abuse of discretion, for the circuit court to deny the underlying petition to empanel a special grand jury.**

The Respondent Prosecuting Attorney essentially acknowledges a citizen's right to approach a second grand jury.<sup>10</sup> The primary concern of the Respondent Prosecuting Attorney appears to be the mechanics or particulars of empaneling a special grand jury,<sup>11</sup> and that the matter is not complex and involved enough to justify empaneling a special grand jury.<sup>12</sup> The Respondent Prosecuting Attorney correctly points out that there are no West Virginia guidelines for empaneling a special grand jury. In the absence of such guidelines, the Prosecuting Attorney can point to no law against Petitioner's request, either.

In reply, Petitioner suggests the procedural and appellate history of multiple cases arising from the circumstances underlying this case demonstrates the complex and involved nature of this matter. Further, Petitioner suggests that the sensitive nature of seeking the indictment of five (5) police officers is sufficiently complex and involved to justify empaneling a special grand jury. Additional justification is found in the great public interest in this matter.

Setting aside for the moment that Respondent Intervenors are prohibited from being involved in this matter,<sup>13</sup> their response opposing a special grand jury demonstrates both

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circuit court to grant the motion to intervene.

<sup>10</sup> App. Pg. 12, 13. See pg. 1 of the Prosecuting Attorney's response brief. See also WV Code §52-2-9.

<sup>11</sup> App. pg. 13

<sup>12</sup> Brief of Respondent Prosecuting Attorney at pg. 2

<sup>13</sup> Syl. Pt. 5, State v. M. J. Miller, 336 SE2d 910 (WV 1985); United States v. Dionisio, 410 U.S. 1, 16-17, 93 S.Ct. 764, 773, 35 L.Ed.2d 61, 81 (1973).

the reason they shouldn't be involved, and their fundamental misunderstanding of Petitioner's argument on the issue. That is to say, their response focuses on approaching a sitting grand jury., not the empaneling of a special grand jury, as requested by Petitioner. Respondent Intervenors attempt to couch Petitioner's efforts as endless attempts at a favorable result. The record demonstrates this is patently false. Petitioner is simply attempting a second grand jury presentation as specifically supported by statute and case law<sup>14</sup>. It should be noted that there is no limit in West Virginia on the number of requests that may be made to empanel subsequent grand juries.

The United States Court of Appeals for the Fourth Circuit has reviewed this matter and opined that there is a genuine issue of material fact as to whether excessive force was used in the Jones homicide. App. Pg. 93.<sup>15</sup> Petitioner respectfully suggests that it's not difficult to reach the same conclusion after reviewing and listening to the video of the shooting. Were over twenty (20) shots from five (5) police officers with large caliber handguns really necessary to subdue a face-down, prone, unarmed, unmoving human being, posing no threat?<sup>16</sup> This case cries out for a legitimate, unbiased, fair grand jury presentation.

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One whose conduct is being investigated by a grand jury has no right, constitutional or otherwise, to petition the grand jury or appear before it. Duke v. U.S., 90 F2d 840, cert. denied, 302 US 685, 58 S.Ct.33, 82 L.Ed. 528. (1937).

<sup>14</sup> Eg., WV Code §52-2-9.

<sup>15</sup> The Fourth Circuit doesn't agree with Respondent Intervenors' assessment of the underlying facts of this case, and possibly, this court will not agree after viewing and listening to the video.

<sup>16</sup> Capital punishment has been abolished in West Virginia. See WV Code §61-11-2.



**2. It was reversible and prejudicial error, and an abuse of discretion, for the circuit court to deny the petition for disclosure of grand jury proceedings.**

It was impossible for the circuit court, and is impossible for this court, to fully evaluate this issue of first impression in West Virginia,<sup>17</sup> and the prior issue of empaneling a special grand jury, without at least in camera review of a transcript of the first grand jury proceedings. Otherwise, the court is ruling in a vacuum without the benefit of all available information.

This court can clarify this issue by pronouncing standards and guidelines for disclosure of grand jury proceedings in related civil proceedings.

**3. It was reversible and prejudicial error, and an abuse of discretion for the circuit court to grant the motion to intervene.**

As noted, the Respondent Prosecuting Attorney takes no position on the issue of intervention.<sup>18</sup>

Critically, Respondent Intervenors (as putative criminal defendants) have failed to address controlling case law that expressly prohibits their involvement in any way, shape or form in this proceeding concerning a grand jury investigation of their potentially criminal conduct.<sup>19</sup> They have no standing to address these matters before the Court. Instead, through the contradictory double talk, misdirection and smokescreen contained

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<sup>17</sup> Specifically, the issue of first impression is the lack of standards or guidelines from this court regarding the disclosure of grand jury proceedings in related civil proceedings.

<sup>18</sup> Brief of Respondent Prosecuting Attorney at pg. 14.

<sup>19</sup> Syl.Pt. 5, *State v. M.J. Miller*, 336 SE 2d 910 (WV 1985); *U.S. v. Dionisio*, 410 U.S. 1, 16-17, 93 S.Ct. 764,773 35 L Ed 2 61,81 (1973).

One whose conduct is being investigated by a grand jury has no right, constitutional or otherwise, to petition the grand jury or appear before it. *Duke v. U.S.*, 90 F2d 840, cert. denied, 302 US. 685, 58 S.Ct. 33, 82 L Ed. 528 (1937).

in their brief, they demonstrate exactly why they should not be involved: they are obstructing justice and frustrating a legitimate inquiry into their conduct.

WV R.App.Pro. 10(d) is instructive on this point:

“Unless otherwise provided by the Court, the argument section of the respondent’s brief must specifically respond to each assignment of error, to the fullest extent possible. If the respondent’s brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner’s view of the issue.” (Emphasis added).

Consider WV R.Evid. 301:

“... the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption.”

Failure of Defendant to rebut the Plaintiff’s presumption compels the court to enter judgment for the Plaintiff. Skaggs v. Elk Run Coal Co., Inc., 479 SE2d 561 (WV 1996).

“When the basic fact has been established, the presumed fact must be assumed until evidence has been introduced that would support a finding of its non-existence.” Handbook on Evidence for West Virginia Lawyers, Sixth Ed., Vol. 1, §301.07.

This court is faced with the fact of Respondent Intervenors’ failure to rebut, or even address, controlling case law prohibiting their involvement in this case concerning a grand jury investigation of putative Defendants’ conduct. Instead, Respondent Intervenors chose to focus their brief on issues they are not entitled to address as putative criminal defendants. In short, Respondent Intervenors have failed to meet the requirement that they “... must specifically respond ...to the fullest extent possible...” to the facts and law prohibiting their involvement in this proceeding. This court should reverse the circuit court order permitting intervention.

Even if Respondent Intervenors were legally permitted to intervene in this matter, this court should note that they have failed to meet the standard for intervention of right

under Rule 24(a), WV R.Civ.P., because, as they suggest in Respondent Intervenors' comments regarding the first grand jury presentation, the prosecutor made a fair and skillful presentation<sup>20</sup> and Respondent Intervenors failed to demonstrate how a future special prosecuting attorney will fail to make a similar competent and fair presentation to the next grand jury.

Similarly, Respondent Intervenors have failed to meet the WV R. Civ. P. 24(b) standard for permissive intervention because of the undue delay and prejudice caused by their obstruction of Petitioner's efforts to have their case presented to a jury.

Rule 1, WV R.Civ.P., requires that the rules of civil procedure "...shall be construed and administered to secure the just, speedy and inexpensive determination of every action."

The burden of proof is on the intervenors to both demonstrate their ability to approach the court to seek to intervene generally (at which, as set forth above, they have completely failed), and, if able to approach the court and intervene, that they have satisfied the requirements of Rule 24, WV R.Civ.P. Boyles v. Boyles, 459 SE 2d 401 (WV 1995). Respondent Intervenors have failed to meet their burdens.

### **Conclusion**

On March 13, 2013, Wayne Jones was shot twenty-two (22) times at close range by five (5) Martinsburg Police Officers after a jay walking encounter. At the time of his homicide, the video of this shooting of an unarmed, mentally ill, homeless man demonstrates he was prone, face-down on the ground, not moving and posing no threat. To say that excessive force was used is an understatement - look at and listen to the video.

Petitioners have been attempting, for over six (6) years, to present these facts to any

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<sup>20</sup> Respondent Intervenors' brief at 9.

jury. Various public agencies have resisted Petitioner's efforts at every turn. Why? If the police have nothing to hide and are blameless (as they claim), then they should have no concern with a public examination of these events.

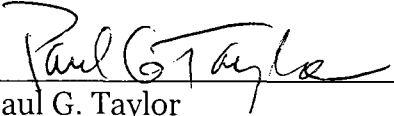
Petitioner's efforts are in keeping with our system of checks and balances and the principle that no one is above the law. West Virginia is based upon and promotes the rule of law. There should be no double standards. The Jones family is entitled to their day in court before a jury.

To this Court Petitioner prays: give us our day in court and let the chips fall where they may.

**Suppressio veri expressio falsi - A suppression of truth is equivalent to an expression of falsehood.**

Respectfully submitted:

Petitioner  
By counsel

  
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RESPONDENTS.**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 30<sup>th</sup> day of ~~May~~ <sup>April</sup>, 2019 a true and accurate copy of the foregoing PETITIONER'S REPLY BRIEF was deposited in the United States first class mail, postage pre-paid envelope addressed as follows:

Joseph Caltrider, Esq.  
101 South Queen Street  
Martinsburg, WV 25401

Berkeley County Prosecuting Attorney  
Berkeley County Judicial Center  
380 West South Street  
Martinsburg, WV 25401

Signed: Paul G. Taylor  
Paul G. Taylor  
(WV State Bar No. 5874)  
Counsel for Petitioner