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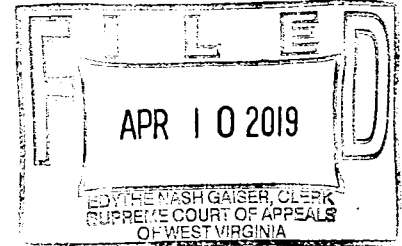
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 18-1045

THE ESTATE OF WAYNE A. JONES,
Petitioner

v.

BERKELEY COUNTY PROSECUTING ATTORNEY,
Respondent



RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

1. On March 13, 2013, Wayne A. Jones was fatally shot by Martinsburg Police Department officers while he was stabbing a police officer. *See* App. 1.
2. In October 2013, former Berkeley County Prosecuting Attorney Pamela Games-Neely presented the matter to the Berkeley County Grand Jury for its consideration. App. 194. No true bill was returned. Pet'r's Br. 2.
3. The Petitioner thereafter filed two civil actions in the Berkeley County Circuit Court and one the United States District Court for the Northern District of West Virginia pertaining to the Wayne Jones case.¹
4. On August 9, 2018, in the Circuit Court of Berkeley County, Petitioner filed a Petition/Application to Empanel a Special Grand Jury for Consideration of a Complaint. App. 1. The matter was assigned Berkeley County Circuit Court case number 18-P-318. App. 1.
5. On September 5, 2018, Berkeley County Prosecuting Attorney Catie Wilkes Delligatti filed a response in opposition. App. 12. On September 6, 2018, the Martinsburg Police Department officers moved to intervene, and thereafter filed an oppositional response brief. App. 22, 35. On September 18, 2019, the Court entered an order permitting intervention. App. 62.
6. On September 4, 2018, in the Circuit Court of Berkeley County, also under case number 18-P-318, Petitioner filed a Petition for Disclosure of Grand Jury Proceedings. App. 7. On September 21, 2018, Berkeley County Prosecuting Attorney Catie Wilkes Delligatti filed a response in opposition. App. 78. On September 24, 2018, Interveners also filed an oppositional response brief. App. 106.

¹ The Petitioner's suit in federal court has been appealed to the U.S. Court of Appeals for the Fourth Circuit and remanded back to the U.S. District Court for the Northern District of West Virginia three times. *See* Pet'r's Br. 18.

7. On October 22, 2018, the Berkeley County Circuit Court entered an order denying the Petition for Disclosure of Grand Jury Proceedings. App. 185. On October 23, 2018, the Berkeley County Circuit Court entered an order denying the Petition/Application to Empanel a Special Grand Jury.
8. On February 25, 2019, the Petitioner perfected the instant appeal.

SUMMARY OF ARGUMENT

The Berkeley County Circuit Court correctly denied the Petitioner's Application to Empanel a Special Grand Jury for Consideration of a Complaint, because the Petitioner is unable to establish that a special grand jury is warranted under West Virginia Code § 52-2-14. Specifically, the Petitioner has never set forth any evidence that the death of Wayne Jones is a matter of "such complexity and involvement [that it] may require a grand jury to sit for an extended period of time" for its consideration. W. Va. Code § 52-2-14.

The trial court also correctly denied the Petition for Disclosure of Grand Jury Proceedings, as the Petitioner did not demonstrate particularized need for disclosure under the three-pronged element test of *Douglas Oil v. Petrol Stops Northwest*. 441 U.S. 211, 222 (1979). First, the Petitioner's threadbare and perfunctory speculation regarding theoretical injustices avoided by disclosure do not demonstrate that the requested material is necessary to avoid injustice in another judicial proceeding. Second, the Petitioner cannot show that the need for disclosure outweighs the need for continued secrecy, particularly in consideration of the fact that the Petitioner in its parallel civil suits could have obtained much of the information now sought. Third, the Petitioner does not establish that the request for disclosure covers only necessary material, because it seeks complete transcript disclosure. Pet'r's Br. 20.

The Respondent takes no position with respect to whether it was appropriate for the circuit court to permit Martinsburg Police Department officers to intervene. The Respondent maintains its articulated stance that the Petitioner is not entitled to relief irrespective of intervention by other interested parties. For the same reason, the Respondent also takes no position regarding whether the circuit court properly applied West Virginia Rule of Civil Procedure 6 to the Petitioner's opportunity to respond to the motion to intervene.

The trial court correctly exercised its discretion not to grant the Petitioner hearings below, as the Petitioner was not entitled to hearings. The Petitioner offers no authority to suggest that the trial court ignored a mandate to grant the Petitioner hearings. Further, the Petitioner's claim that its access to the court was denied is belied by the fact that it filed a petition for one form of relief and then, under the same case number, filed a petition for another form of relief; lodged three rebuttals; submitted one motion for a hearing; and tendered one motion to amend an order.

The circuit court also did not err because the existence of "additional information" is irrelevant to the Petitioner's counsel's desire to present to a future grand jury. Counsel for the Petitioner, who apparently wishes to dictate how the Wayne Jones case is presented to the grand jury, has a vested financial interest in civil suits regarding Wayne Jones's death. The Petitioner should not be permitted to use a grand jury presentation to shore up that related civil litigation. To undertake the course encouraged by the Petitioner would be like having a judge preside over a criminal trial when the judge is the plaintiff in civil litigation against that same defendant. The Petitioner's suggested course is plainly wrong and would result in bad policy.

Lastly, the trial court did not err because the current prosecuting attorney does not have a different view regarding presentation of the Wayne Jones case to the grand jury. This matter was investigated by a neutral law enforcement agency, reviewed by the U.S. Attorney's Office, reviewed by the U.S. Department of Justice, and presented to a panel of sixteen grand jurors from Berkeley County. Further, this matter has been litigated in state and federal court. The Respondent relies upon these four prior investigations/presentations and repeated civil suits in declining to present this matter to a grand jury again.

The Respondent therefore respectfully requests that this Court affirm the Berkeley County Circuit Court's rulings denying the Application to Convene a Special Grand Jury and the Petition for Disclosure of Grand Jury Proceedings submitted below by Petitioner.

STATEMENT REGARDING ORAL ARGUMENT

The Respondent avers that the issues presented are easily settled by application of the plain controlling statutes, rules of criminal procedure, and case law interpreting the same; the facts and issues are adequately presented in the briefs and record on appeal; and that the decisional process would not be significantly aided by oral argument. As such, oral argument would be unnecessary in this matter, pursuant to Rule 18(a)(4). If, however, this Court were to find oral argument necessary, the Respondent believes argument pursuant to Rule 19 would be appropriate.

ARGUMENT

I. The Circuit Court properly exercised its discretion when denying the Petitioner's Application to Empanel a Special Grand Jury because the Petitioner did not demonstrate need for the extraordinary proceeding.

The Berkeley County Circuit Court concluded correctly that the Petitioner failed to establish sufficient need to exercise the extraordinary measure of empaneling a special grand jury. At no point—neither during the proceedings below, nor in its brief *sub judice*—has the Petitioner articulated how the shooting death of Wayne Jones is a complex and protracted matter that cannot be addressed adequately by the grand jury during its usual tri-annual meetings. *See* W. Va. Code § 52-2-14 (permitting circuit judges to empanel special grand juries to consider offenses that “because of their complexity and involvement may require a grand jury to sit for an extended period of time”). The Petitioner’s failure to offer any argument whatsoever that a special grand jury is necessary, as contemplated under West Virginia Code § 52-2-14, renders this assignment of error futile. Accordingly, the trial court’s Order Denying Petition/Application to Empanel Special Grand Jury should be affirmed.

a. The death of Wayne Jones is not an extraordinarily complex matter that may require a grand jury to sit for an extended period of time.

It is settled law in West Virginia that private citizens, upon application to the circuit court, may present claims of criminal misconduct to the grand jury. *Harman v. Frye*, 188 W. Va. 611, 622, 425 S.E.2d 566, 576 (1992) (affirming Syl. Pt. 1, *State ex rel. Miller*, 168 W. Va. 745, 285 S.E.2d 500 (1981)). However, private persons have no constitutional, statutory, or jurisprudential right to convene a special grand jury. Rather, by the enactment of West Virginia Code § 52-2-14, the Legislature has vested trial courts with the discretion to determine whether to convene a special grand jury because a matter is unusually complicated and time-consuming, and therefore cannot reasonably be considered by a grand jury diligently executing its investigative and deliberative

duties. Thus, unless a criminal case is particularly burdensome for a grand jury to consider, the circuit judge should refrain from convening a special grand jury. As the name itself connotes, *special* grand juries are extraordinary proceedings that should be convened sparingly.

The Petitioner specifically requested that the Berkeley County Circuit Court convene a special grand jury to reconsider the Wayne Jones case. *See* App. 1 (requesting to “Empanel a Special Grand Jury”). However, the Petitioner wholly ignored West Virginia Code § 52-2-14, and never set forth even any argument that Wayne Jones’s death is sufficiently complex and intractable to exceed the capabilities of the grand jury. The Petitioner instead summarily claimed that “this case presents a matter of great local concern and citizen interest and merits a fair, fresh and untainted view.” App. 2. The circuit court therefore correctly concluded that the Petitioner cannot meet its burden under West Virginia Code § 52-2-14.

Furthermore, in its brief before this Court, the Petitioner again omits any articulation of why the Wayne Jones death cannot be considered by the Berkeley County Grand Jury during its usual terms of service despite precisely that occurring in October 2013. The Petitioner simply does not and cannot demonstrate that the trial court violated the strictures of West Virginia Code § 52-2-14. The Order Denying Petition/Application to Empanel Special Grand Jury should consequently be affirmed.

The Respondent believes that this Court should afford this assignment of error no additional consideration. The Respondent will nevertheless address the Petitioner’s additional claims of “erroneous findings and conclusions” thereunder. Pet’r’s Br. 9.

- b. The Petitioner’s additional claims of erroneous findings and conclusions are unsupported or irrelevant to whether the circuit court properly applied West Virginia Code § 52-2-14.**

None of the nine “erroneous findings and conclusions of law” set forth by the Petitioner in cursory fashion under this assignment of error is relevant to the inquiry of whether the Wayne Jones matter is of such “complexity and involvement [that it] may require a grand jury to sit for an extended period of time” under West Virginia Code § 52-2-14. *See* Pet’r’s Br. 9–12. This Court should accordingly affirm the decision of the Berkeley County Circuit Court.

First, the Petitioner asserts that it was erroneous for the circuit court to remark that the October 2013 grand jury “found the shooting [of Wayne Jones] justified under the circumstances.” Pet’r’s Br. 9; App. 194. We will never know precisely what motivated the decision of the Berkeley County Grand Jury to return no true bill in October 2013 on the matter of Wayne Jones, as the deliberative process is not transcribed. However, insofar as the circuit court’s characterization of what caused the grand jury to return no true bill was unfounded, it does not bear upon whether the Wayne Jones death is complex and would require a grand jury to sit for an extended period of time. *See* W. Va. Code § 52-2-14. The Petitioner has never laid any foundation to support a claim that the Berkeley County Grand Jury could not consider the case during its usual tri-annual meetings as it did in October 2013. This Court should therefore reject this claim of error.

Second, the Petitioner asserts that it was erroneous for the circuit court to hold that the request to convene a special grand jury is without legal or factual basis. Pet’r’s Br. 9; App. 194. However, the Petitioner has never offered argument that the Wayne Jones incident constitutes a sufficiently complex and involved case to merit empaneling a special grand jury under West Virginia Code § 52-2-14. The circuit court was accordingly correct to conclude that the Petitioner’s application for a special grand jury was devoid of factual or legal justification. This Court should therefore reject this claim of error.

Third, the Petitioner asserts that it was erroneous for the circuit court to reason that the prior Berkeley County prosecuting attorney fulfilled her constitutional duty by presenting Wayne Jones's death to the October 2013 grand jury. Pet'r's Br. 9. In support, the Petitioner simply submits that the only way to know whether the prior prosecutor discharged her constructional obligations and presented the matter to the grand jury is to obtain transcripts of the proceeding. Pet'r's Br. 9 n.13. Such a position is curious, because the Petitioner conceded below that "this matter was previously presented by a prior prosecuting attorney." App. 2. Regardless, the issue of prior presentation is utterly inapposite to whether a special grand jury should be convened pursuant to West Virginia Code § 52-2-14. The Petitioner makes no showing whatsoever to suggest that the Wayne Jones incident exceeds the abilities of the grand jury. This Court should therefore reject this claim of error.

Fourth, the Petitioner asserts it was erroneous for the trial court to cite verbatim this Court's decision in *Harman v. Frye*² that there is a presumption of faithful execution of duty by prosecutors and law enforcement officers. Pet'r's Br. 9; App. 196. Petitioner perfunctorily notes that "presumptions can be overcome," and that it is an issue in federal litigation whether the officers involved used excessive force. Pet'r's Br. 10 n.14. However, disputes regarding use of force are of no import to deciding if the death of Wayne Jones was sufficiently complex and involved to justify a special grand jury. The Petitioner cannot establish a viable claim that the trial court misapplied West Virginia Code § 52-2-14. This Court should therefore reject this claim of error.

Fifth, the Petitioner asserts it was erroneous for the circuit court to find that each grand juror found no probable cause to indict the officers involved in the Wayne Jones incident. Pet'r's Br. 9; App. 197. As noted above, the details of the deliberations that resulted in the October 2013

² 188 W. Va. 611, 620, 425 S.E.2d 566, 575 (1992).

grand jury returning no true bill will forever be unknown because grand jury deliberations are not transcribed.³ Thus, although the trial court misspoke, the inaccuracy is inconsequential. West Virginia Code § 52-2-14 only allows trial judges to convene special grand juries if they determine that a criminal inquiry is too burdensome to be addressed by the grand jury during usual terms of service. The circuit court's characterization that each grand juror found no probable cause in October 2013 matters none to whether the Wayne Jones matter was such a case. Nor has the Petitioner ever offered any evidence that the Wayne Jones case was of unusual intricacy. This Court should therefore reject this claim of error.

Sixth, the Petitioner asserts it was erroneous for the circuit court to conclude that the Petitioner believes West Virginia law permits unlimited presentations to the grand jury of the same criminal allegations until a true bill is returned. Pet'r's Br. 10. The Petitioner explains that it "isn't requesting multiple presentations," but rather is simply requesting a "second, fair presentation" of the Wayne Jones matter. Pet'r's Br. 10 n.16. However, this Court need not concern itself with which characterization of the Petitioner's position below is correct, because it does not bear upon whether the death of Wayne Jones is complicated and laborious to such an extent that a special grand jury should be convened. The Petitioner has never argued that the Wayne Jones matter is beyond the capacity of a regular grand jury. This Court should therefore reject this claim of error.

Seventh, the Petitioner asserts it was erroneous for the trial court to find that the prior prosecuting attorney did not interfere with the Petitioner's access to the court. Pet'r's. Br. 10. The Petitioner contends that such a conclusion cannot be drawn without the transcript of the prior presentation. Petr's. Br. 10 n.17. The Petitioner concedes, however, that it "is irrelevant" whether

³ Although the precise details of the grand jury's deliberations remain unknown, it is certain that less than 12 of the 16 grand jurors found no probable cause to return a true bill. *See* W. Va. Code § 52-2-8 (demanding that, "at least twelve of the grand jurors must concur in finding or making an indictment or presentment.").

the circuit court was correct on this point. Pet'r's. Br. 10 n.17. Moreover, the issue of prior access to the courts is extraneous, as it ignores the Petitioner's failure to offer any evidence to the circuit court that the Wayne Jones case was too time-consuming and vexing to be addressed adequately during the grand jury's usual tri-annual terms of service, as required under W. Va. § 52-2-14. This Court should therefore reject this claim of error.

Eighth, the Petitioner asserts it was erroneous for the circuit court to recognize its gatekeeper role in grand jury proceedings and that a function of the grand jury is to protect against unfounded prosecutions, yet ultimately conclude that a second presentation of the Wayne Jones incident to the grand jury would undermine that protection. Pet'r's. Br. 10. There is no contradiction in the court's position. The refusal of the Berkeley County Grand Jury to return a true bill in October 2013 was a finding by an independent body comprised of neutral citizens that criminal prosecution in the Wayne Jones matter is unwarranted. Absent any newly-discovered evidence to suggest that the matter should be revisited, it was proper and, indeed, likely incumbent upon the court to exercise its grand jury gatekeeper power to prohibit a frivolous second presentation of the case. Regardless, such questions are of no moment here. The Petitioner made no showing under West Virginia Code § 52-2-14 that the Wayne Jones case is of a complex and involved nature necessitating the empaneling of a special grand jury for its consideration. This Court should therefore reject this claim of error.

Ninth, the Petitioner asserts it was erroneous for the trial court to conclude that another presentation of the Wayne Jones death to another grand jury poses a risk of grand jury abuse. Pet'r's Br. 11; App. 207. As noted above, it would erode the protection against unfounded prosecutions if the trial courts of this State permitted second or subsequent grand jury presentations of criminal allegations absent any newly-discovered evidence to support reconsideration of prior

findings of no true bill. In this case, because no new evidence has been offered, the circuit court rightly exercised its “inherent power to prevent abuse and injustice,” and declined to convene a special grand jury. Pet’r’s Br. 11. Indeed, it likely would have been an abuse of the trial court’s discretion if it had done anything other than deny the request to empanel a special grand jury. This Court need not address such considerations, however, because the Petitioner has never offered any evidence to demonstrate that the Wayne Jones incident is extremely complicated and burdensome as required by West Virginia Code § 52-2-14. This Court should therefore reject this claim of error.⁴

It must be noted that the Petitioner sought below to empanel a *special* grand jury pursuant to West Virginia § 52-2-14. App. 1. Now, on appeal, the Petitioner asserts that it was error for the circuit court to not grant the Petitioner a *second* grand jury presentation under West Virginia Code § 52-2-9. App. 10. Such thimblerrigging is unavailing. That West Virginia Code § 52-2-9 allows for the presentation of “another bill of indictment against the same person for the same offense” does not vest citizens with an affirmative right to make second or subsequent presentations to the grand jury. Moreover, West Virginia Code § 52-2-9 does not eliminate the Petitioner’s burden to show, under West Virginia Code § 52-2-14, that the Wayne Jones matter is complex and involved enough to merit a special grand jury. The Petitioner provided the trial court with no evidence that the Wayne Jones death was a complex and involved matter. This Court should therefore reject this claim of error.

⁴ The Petitioner claims the Respondent conceded that a second grand jury presentation may be made. Pet’r’s Br. 11 (citing App. 12). The Respondent made no such admission. The Respondent simply recognized that “upon application to the circuit court, persons are permitted to present complaints of crimes to the grand jury.” App. 12 (citing W. Va. Const. art. III, § 17; Syl. Pt. 1, *State ex rel. Miller v. Smith*, 168 W. Va. 745, 285 S.E.2d 500 (1981)). That the Respondent made any concessions regarding the right of citizens or, specifically, counsel for the Petitioner, to make second or subsequent grand jury presentations of criminal allegations is simply a fiction.

Thus, the Court should reject this assignment of error because the Petitioner omits any articulation of why the Wayne Jones death cannot be considered by the Berkeley County Grand Jury during its usual terms of service as is required by West Virginia Code § 52-2-14. The Petitioner simply does not and cannot demonstrate that the trial court erred by denying the Application to Empanel a Special Grand Jury. The Petitioner's nine additional "erroneous findings and conclusions of law" set forth in cursory fashion under this assignment of error are equally meritless. None of the trial court's allegedly errant findings and conclusions bears upon whether the Wayne Jones matter is of such "complexity and involvement [that it] may require a grand jury to sit for an extended period of time" under West Virginia Code § 52-2-14. *See* Pet'r's Br. 9–12. This Court should accordingly affirm the decision of the Berkeley County Circuit Court.

II. The circuit court properly exercised its discretion and denied the Petition for Disclosure of Grand Jury Proceedings because the Petitioner cannot make a showing of particularized need for the grand jury transcripts.

West Virginia Code § 52-2-15(c)(2)(A) provides for disclosure of matters occurring before the grand jury when directed "by a court preliminarily to or in connection with a judicial proceeding." *See also* W. Va. R. Crim. P. 6(e)(3)(C)(i). This provision is mirrored by Rule 6(e)(3)(E) of the Federal Rules of Criminal Procedure for the United States District Courts. Consequently, as no controlling West Virginia authority exists addressing the disclosure of grand jury transcripts in connection with a judicial proceeding, this Court may look to federal decisions for guidance. *State v. Sites*, No. 16-0437, 2019 WL 507828, at *11 (W. Va. Feb. 7, 2019) (citing *State v. Hedrick*, 204 W. Va. 547, 554, 514 S.E.2d 397, 404 (1999) ("We frequently look to federal decisions for guidance when we are construing a rule of this Court that is patterned after a federal rule.")).

Upon review of federal jurisprudence interpreting the relevant provisions, it becomes evident that the Petitioner mischaracterizes applicable authority in an attempt to further its argument to gain access to the grand jury transcript. The Petitioner cannot make a strong showing of particularized need, and thus it attempts to vault over that requirement and jump directly to an in-camera review by the trial court and release pursuant to protective provisions. *See United States v. Sells Engineering, Inc.*, 463 U.S. 418, 443 (1983) (holding that disclosure of grand jury transcripts shall occur only upon a “strong showing of particularized need.”).

The United States Supreme Court, in *Douglas Oil Co. v. Petrol Stops Northwest*, has clarified that parties seeking disclosure must establish that (1) the requested material is necessary to avoid possible injustice in another judicial proceeding; (2) the need for disclosure outweighs the need for continued secrecy; and (3) the request covers only material so needed. 441 U.S. 211, 222 (1979). The three prongs in the *Douglas Oil* test are joined by a conjunctive “and,” meaning that each must be proven. *Id.* Indeed, the Fourth Circuit required a movant to satisfy elements one, two, and three before permitting release of grand jury materials. *See Gilbert v. United States*, 203 F.3d 820 (4th Cir. 2000).

The Petitioner interprets *Douglas Oil* to conclude “that the best practice . . . is in camera review of the requested material and, if appropriate, protective provisions concerning disclosure of the material.” Pet’r’s Br. 13. The Petitioner mischaracterizes the holding. In *Douglas Oil*, transcripts from a California federal grand jury were requested for an Arizona civil case, and the Court analyzed the interplay when grand jury transcripts are requested in a matter that is not only civil, but that is also pending in another jurisdiction. 441 U.S. at 229. The Court indicated that:

[T]he better practice would have been for the District Court, *after making a written evaluation of the need for continued grand jury secrecy and a determination that the limited evidence before it*

showed that disclosure might be appropriate, to send the requested materials to the courts where the civil cases were pending.

Id. The Petitioner entirely ignores the preliminary inquiry into the need for secrecy and determination that disclosure might be appropriate because the Petitioner understands that it cannot meet the three prongs of the *Douglas Oil* test.

The Petitioner's Brief, much like its Petition, is heavy on hyperbolic assertions and light on analysis. The Petitioner asserts that this case cannot be compared with *Cruse v. Blackburn*, a Southern District of West Virginia case interpreting *Douglas Oil*, because in *Cruse*, the allegations set forth to request disclosure of transcripts included false affidavits, illegal searches and seizures, fabricated evidence, and perjured grand jury testimony. No. CV 3:17-00485, 2017 WL 3065217 (S.D. W. Va. July 19, 2017). The Wayne Jones matter, however, involves the death⁵ of Wayne Jones, a "likely incompetent or biased" grand jury presentation,⁶ "homicidal" police officers, and a "jay walking encounter." Pet'r's Br. 14. Both cases entail requests for grand jury transcripts for use in civil proceedings. In *Cruse*, the plaintiffs argued that actual wrongdoing occurred before the grand jury. In this case, Petitioner seems to imply the prior prosecutor was incompetent but does not assert purposeful wrongdoing. Rather, Petitioner seems to say that Wayne Jones was shot by police, so his estate should get grand jury transcripts, any authority to the contrary notwithstanding. Much like in *Cruse*, Petitioner's request should be (and was properly) denied.

Petitioner writes for more than two pages and eleven bullet-pointed questions regarding the "new and important revelation" that the "putative target defendants of the first grand jury presentation apparently testified *ex parte*⁷ before the same grand jury which was purportedly and

⁵ Petitioner inexplicably refers to Wayne Jones's death as a "homicide" in quotes. Any death at the hands of another is ruled a homicide by the Office the Chief Medical Examiner.

⁶ Petitioner has set forth no evidence in support of this assertion.

⁷ All grand jury testimony is, by its nature, *ex parte*.

ostensibly investigating these same putative defendants” Pet’r’s Br. 15–17. This argument is again a hyperbolic attempt to distract from the fact that Petitioner is not entitled to grand jury transcripts. The Respondent does not believe that the involved officers testified before the grand jury, but rather that the statement was erroneously included in the circuit court’s final order. Regardless, whether or not the officers testified is entirely irrelevant.

The circuit court correctly analyzed the *Douglas Oil* elements to find that Petitioner is not entitled to review of the grand jury transcripts. First, Petitioner is unable to show that the material sought is needed to avoid a possible injustice in another judicial proceeding. Second, the need for disclosure does not outweigh the need for continued secrecy. Third, Petitioner’s request was not narrowly structured to cover only necessary material.

Petitioner, yet again, sets forth a number of hyperbolic assertions regarding the injustices it seeks to avoid, and indicates that the trial court abused its discretion in failing to address and properly consider those issues. Pet’r’s Br. 18. The purported injustices are as broad and vague as “potential unpunished torts and crimes.” Pet’r’s Br. 18. The trial court did, in fact, review what would be required to overcome the first prong of *Douglas Oil*, and recognized that the Petitioner’s bare assertions and perfunctory allegations that secrecy protects “bad cops” were insufficient to prove that disclosure was warranted. App. 186–87.

The Petitioner asserts that “[s]imply put, the issue of Intervenor’s potential civil and criminal liability remains unresolved.” Pet’r’s Br. 17–18. The Petitioner ignores the facts that this matter was investigated by an independent law enforcement agency, presented to a grand jury, referred to the U.S. Attorney for the Northern District of West Virginia for review, referred to the U.S. Department of Justice, and has been dismissed three times by the U.S. District Court for the Northern District of West Virginia, and once (so far) by the Berkeley County circuit court. It is

also currently on appeal before this Court and the U.S. Court of Appeals for the Fourth Circuit. The Petitioner entirely fails to set forth how production of a grand jury transcripts would have, or will, prevent injustice in any of these numerous investigations and civil actions relating to Wayne Jones's death. Also militating against disclosure is the fact that the discovery process in the Petitioner's parallel civil litigation afforded the Petitioner an opportunity to obtain much of the information now sought. *Douglas Oil* does not countenance the Petitioner's present effort to circumvent the discovery process. Thus, the Petitioner cannot overcome the first prong of the *Douglas Oil* test.

Further, the Petitioner cannot overcome the second prong of the *Douglas Oil* test because the Petitioner fails to set forth adequate justification for overcoming the need for continued secrecy. Chief Judge Maxwell, interpreting *Douglas Oil*, ruled that "[m]erely showing that the testimony contained in the transcript is relevant and useful in a civil action does not appear sufficient to counter the public policy of secrecy of Grand Jury proceedings." *In re Grand Jury*, Sept. 20, 21, 22 & 25, 1967, 82 F.R.D. 70, 73 (N.D. W. Va. 1979). The Petitioner's argument essentially amounts to a feeling that it was not fair that the officers were not indicted. The Petitioner boldly asserts that calling a potential defendant as a witness before the grand jury is a "monumental denial of due process . . . and a scam on the justice system," and alleges collusion between the prosecutor and the officers, asserting that calling the officers as witnesses would permit them to "get away with homicide and, quite possibly, murder." Pet'r's Br. 19. Setting aside the fact that Petitioner's argument is likely moot because the Respondent does not believe that the officers did, in fact, testify, Petitioner yet again relies on hyperbole in the face of a weak argument, and does not set forth any facts or argument that actually address the need for continued secrecy or justify overcoming such a need. The trial court correctly found that the Petitioner "has not provided any

specific need for disclosure, much less one that is greater than the need for continued secrecy” in finding that disclosure of the grand jury transcripts is not warranted. App. 189 (emphasis in original). Thus, the Petitioner cannot satisfy the second prong of the *Douglas Oil* test.

Finally, the trial court properly ruled that the Petitioner failed to satisfy the third *Douglas Oil* element because the Petitioner failed to structure its request to cover only material so needed. App. 189. The Petitioner contests the trial court’s finding that the Petitioner seeks a transcript of the entire grand jury proceeding by saying that the Petitioner requests “only the presentation and statements of the Prosecuting Attorney and all witnesses.” Pet’r’s Br. 20. The Petitioner’s assertion betrays a lack of understanding of the grand jury process. As with petit juries, deliberations are not transcribed. Further, the prosecuting attorney does not make arguments or statements, but rather questions witnesses. Consequently, a request for the presentation and statements of the prosecutor and all witnesses is, by definition, a request for the entire grand jury transcript and is not narrowly structured, failing the third element of the *Douglas Oil* test.

Thus, the Court should reject this assignment of error because the Petitioner cannot satisfy any of the three mandatory elements of the *Douglas Oil* test to demonstrate particularized need for disclosure of the grand jury transcripts. First, the Petitioner cannot show that the requested material is necessary to avoid possible injustice in another judicial proceeding. Rather than offer truly colorable arguments, the Petitioner offers threadbare and perfunctory speculation regarding theoretical injustices that might be avoided by disclosure. Second, the Petitioner cannot show that the need for disclosure outweighs the need for continued secrecy. The Petitioner’s argument amounts to little more than inflammatory rhetoric that in no way shows the trial court erred by heeding the maxim that West Virginia holds inviolate the secrecy of grand jury proceedings. *See* 1 Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure* 648 (2d ed. 1993). Third, the

Petitioner does not establish that the request for disclosure covers only necessary material, because it seeks complete transcript disclosure. Pet'r's Br. 20. This Court should accordingly affirm the decision of the Berkeley County Circuit Court.

III. The Respondent takes no position with respect to whether it was proper for the circuit court to permit intervention.

As the Respondent did below, it takes no position before this Court regarding intervention by Martinsburg Police Department officers. On the matters at issue—the Petitioner's efforts to convene a special grand jury and to disclose transcripts of prior grand jury proceedings—the Respondent stands on its briefs below and before this Court detailing its position. The Respondent maintains its articulated stance that the Petitioner is not entitled to relief irrespective of intervention by other interested parties. Thus, assuming *arguendo* that the circuit court erred in permitting intervention, such error was harmless. This Court should therefore reject this claim of error.

IV. The Respondent takes no position with respect to the circuit court's application of West Virginia Rule of Civil Procedure 6.

The Respondent takes no position before this Court regarding whether the circuit court properly applied West Virginia Rule of Civil Procedure 6 to the Petitioner's opportunity to respond to the motion to intervene. The Respondent maintains its contention that the Petitioner is not entitled to relief irrespective of intervention by other interested parties. Thus, assuming *arguendo* that the circuit court erred by prematurely granting intervention before the Petitioner was given the opportunity to object, such error was harmless. This Court should therefore reject this claim of error.

V. The circuit court's refusal to conduct hearings did not deny the Petitioner its right of access to the courts.

The trial court did not err by refusing to grant the Petitioner hearings on the Application to Empanel a Special Grand Jury and the Petition for Disclose of Grand Jury Proceedings, as the Petitioner was not entitled to hearings. The Petitioner offers no authority to suggest that the trial court ignored a mandate to grant the Petitioner hearings. Further, in outright defiance of objective fact, the Petitioner claims that it was denied access to the courts of this State despite that it filed a petition for one form of relief and then, under the same case number, filed a petition for another form of relief; lodged three rebuttals; submitted one motion for a hearing; and tendered one motion to amend an order. Thus, it is simply false that the Petitioner's "right of access to the court guaranteed by Art. III, §17 of the Constitution of WV was denied" by the trial court. Pet'r's Br. 26. This Court should therefore reject this claim of error.

VI. The existence of "additional information" is irrelevant to the Petitioner's counsel's desire to present to a future grand jury.

Counsel for the Petitioner seems to believe that he should not only obtain an additional presentation to a special grand jury regarding the death of Wayne Jones, but that he should control what evidence is presented to the grand jury. The Petitioner points to no authority for this premise. As the Petitioner discussed, there is pending civil litigation seeking significant sums in damages from the officers. Logically, it follows that the Petitioner (and by extension, counsel for the Petitioner) will benefit pecuniarily from the return of an indictment against the officers. Counsel for the Petitioner asks to control what evidence is presented, and how it is presented, to a grand jury (ex parte, of course) in order to obtain an indictment against the officers, and benefit financially from such indictment.

Both in this case and as a general rule, the Respondent vigorously objects to a party with a financial interest in the outcome of potential criminal litigation attempting to control a grand jury presentation in order to shore up related civil litigation. The prosecutor serves in a quasi-judicial

role. To undertake the course encouraged by the Petitioner would be like having a judge preside over a criminal trial when the judge is the plaintiff in civil litigation against that same defendant. The Petitioner's suggested course is plainly wrong and would result in bad policy. This Court should therefore reject this claim of "error."

VII. The current prosecuting attorney does not have a different view of a special grand jury presentation.

As evidenced by the Respondent's objection to the Petition to Empanel a Special Grand Jury, the current Berkeley County Prosecuting Attorney does not wish to empanel a special grand jury to be controlled by counsel for the Petitioner in order to obtain an indictment against the officers. This matter was investigated by a neutral law enforcement agency, reviewed by the U.S. Attorney's Office, reviewed by the U.S. Department of Justice, and presented to a panel of sixteen grand jurors from Berkeley County. Further, this matter has been litigated in state and federal court. The Respondent relies upon these four prior investigations/presentations and repeated civil suits in declining to present this matter to a grand jury again. This Court should therefore disregard this assignment of "error."

CONCLUSION

As evidenced by the Berkeley County Circuit Court's well-reasoned Order Denying Petition/Application to Empanel a Special Grand Jury and its Order Denying Petition for Disclosure of Grand Jury Proceedings, the trial court did not abuse its discretion, or otherwise err, by denying the same. This Court should therefore affirm the trial court's rulings.

The Berkeley County Circuit Court correctly denied the Petitioner's Application to Empanel a Special Grand Jury for Consideration of a Complaint, because the Petitioner is unable to establish that a special grand jury is warranted under West Virginia Code § 52-2-14. Specifically, the Petitioner has never set forth any evidence that the death of Wayne Jones is a

matter of “such complexity and involvement [that it] may require a grand jury to sit for an extended period of time” for its consideration. W. Va. Code § 52-2-14. This Court should therefore reject this claim of error.

The trial court also correctly denied the Petition for Disclosure of Grand Jury Proceedings, as the Petitioner did demonstrate particularized need for disclosure under the three-pronged element test of *Douglas Oil v. Petrol Stops Northwest*. 441 U.S. 211, 222 (1979). First, the Petitioner’s threadbare and perfunctory speculation regarding theoretical injustices avoided by disclosure do not demonstrate that the requested material is necessary to avoid injustice in another judicial proceeding. Second, the Petitioner cannot show that the need for disclosure outweighs the need for continued secrecy, particularly in consideration of the fact that the Petitioner in its parallel civil suits could have obtained much of the information now sought. Third, the Petitioner does not establish that the request for disclosure covers only necessary material, because it seeks complete transcript disclosure. Pet’r’s Br. 20. This Court should therefore reject this claim of error.

The Respondent takes no position with respect to whether it was appropriate for the circuit court to permit Martinsburg Police Department officers to intervene. The Respondent also takes no position regarding whether the circuit court properly applied West Virginia Rule of Civil Procedure 6 to the Petitioner’s opportunity to respond to the motion to intervene. The Respondent’s silence is due to its contention that the Petitioner is not entitled to relief irrespective of intervention by other interested parties. Thus, assuming *arguendo* that the circuit court erred in permitting intervention, and in so ruling before allowing the Petitioner an opportunity to object, such error was harmless. This Court should therefore reject this claim of error.

The trial court correctly exercised its discretion not to grant the Petitioner hearings below, as the Petitioner was not entitled to hearings. The Petitioner offers no authority to suggest that the

trial court ignored a mandate to grant the Petitioner hearings. Further, the Petitioner's claim that its access to the court was denied is belied by the fact that it filed a petition for one form of relief and then, under the same case number, filed a petition for another form of relief; lodged three rebuttals; submitted one motion for a hearing; and tendered one motion to amend an order.


The circuit court also did not err because the existence of "additional information" is irrelevant to the Petitioner's counsel's desire to present to a future grand jury. Counsel for the Petitioner, who apparently believes he is permitted to dictate how the Wayne Jones case is presented to the grand jury, has a vested financial interest in civil suits regarding Wayne Jones's death. The Petitioner should not be permitted to use a grand jury presentation to shore up that related civil litigation. To undertake the course encouraged by the Petitioner would be like having a judge preside over a criminal trial when the judge is the plaintiff in civil litigation against that same defendant. The Petitioner's suggested course is plainly wrong and would result in bad policy.

Lastly, the trial court did not err because the current prosecuting attorney does not have a different view regarding presentation of the Wayne Jones case to the grand jury. This matter was investigated by a neutral law enforcement agency, reviewed by the U.S. Attorney's Office, reviewed by the U.S. Department of Justice, and presented to a panel of sixteen grand jurors from Berkeley County. Further, this matter has been litigated in state and federal court. The Respondent relies upon these four prior investigations/presentations and repeated civil suits in declining to present this matter to a grand jury again.

The Respondent therefore respectfully requests that this Court affirm the Berkeley County Circuit Court's rulings denying Application to Convene a Special Grand Jury and the Petition for Disclosure of Grand Jury Proceedings submitted below by Petitioner.

Respectfully submitted,

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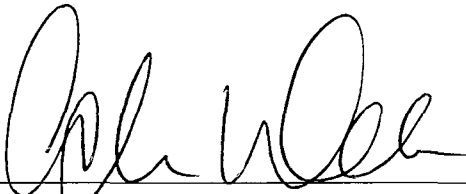
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CERTIFICATE OF SERVICE

I, Catie Wilkes Delligatti, Berkeley County Prosecuting Attorney, hereby certify that I have served a true and accurate copy of the foregoing Respondent's Brief by mailing of the same, United States Mail, postage prepaid, to the following on this 9th day of April 2019:

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