DO NOT REMOVE
FROM FILE

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FILE COPY

NO. 18-0271

EDWARD JESSE DREYFUSE,

Petitioner,

***In re*: Application to Present Complaint to the Grand Jury**

SUPPLEMENTAL RESPONSE BRIEF

PATRICK MORRISEY
ATTORNEY GENERAL

LINDSAY S. SEE (WV Bar #13360)
SOLICITOR GENERAL

Thomas T. Lampman (WV Bar #13353)
Assistant Solicitor General
State Capitol Complex
Building 1, Rm E-26
Charleston, WV 25305
(304) 558-2021
Email: Thomas.T.Lampman@wvago.gov
Counsel for the Respondent State of West Virginia

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Introduction ii

Assignment of Error 2

Argument 2

I. This Court Should Hold That A Circuit Court May Bar An Abusive Or Frivolous Application To The Grand Jury. 3

II. Alternatively, This Court Could Draw From The Examples Of Other State Courts To Define Reasonable Limits On The Grand Jury Appearance Right 6

Conclusion 9

TABLE OF AUTHORITIES

Page(s)

Cases

Blair v. Maynard,
174 W. Va. 247, 324 S.E.2d 391 (1984) 6

Brack v. Wells,
40 A.2d 319 (Md. 1944) 3

Daily Gazette Co. v. Canady,
175 W. Va. 249, 332 S.E.2d 262 (1985) 6

Davis v. Mound View Health Care, Inc.,
220 W. Va. 28, 640 S.E.2d 91 (2006) 6

Denton v. Hernandez,
504 U.S. 25 (1992) 4

Dreyfuse v. Pszczokowski,
2017 WL 478564 (S.D. W. Va. Jan. 6, 2017) 4

Petition of Thomas,
434 A.2d 503 (Me. 1981) 3, 7, 8

Pierce v. Stanley,
2010 WL 1904558 (S.D. W. Va. May 7, 2010) 4

Powers v. Goodwin,
170 W. Va. 151, 158, 291 S.E.2d 466 (1982) 8

Preiser v. MacQueen,
177 W. Va. 273, 352 S.E.2d 22 (1985) 3

Sibley v. Doe,
135 A.3d 883 (Md. Spec. App. 2016) 3, 7, 8

State ex rel. Casey v. Wood,
156 W. Va. 329, 193 S.E.2d 143 (1972) 4

State ex rel. Miller v. Smith,
168 W. Va. 745, 285 S.E.2d 500 (1981) 2, 4

State ex rel. Skinner v. Dostert,
166 W. Va. 743, 278 S.E.2d 624 (1981) 3

State ex rel. State v. Wilson,
239 W. Va. 802, 806 S.E.2d 458 (2017) 5

State v. Barnhart,
211 W. Va. 155, 563 S.E.2d 820 (2002) 5

State v. White,
167 W. Va. 374, 280 S.E.2d 114 (1981) 4

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Lovasco,
431 U.S. 783 (1977) 7, 8
Warner v. Wingfield,
224 W. Va. 277, 685 S.E.2d 250 (2009) 6
Williamson v. Harden,
214 W. Va. 77, 585 S.E.2d 369 (2003) 6

INTRODUCTION

This case concerns the scope of the circuit court's supervisory authority over grand jury proceedings. A convicted felon who did not appeal his conviction, Edward Dreyfuse, asked to appear before the grand jury to seek the indictment of his former prosecutor (now a judge) for purportedly suborning perjury the grand jury hearing leading up to his criminal trial. (Pet's. Suppl. Br. 1). He also sought to indict a police officer who testified that Dreyfuse's victim suffered major skull injuries from Dreyfuse's assault. In addition, he wanted to ask the grand jury to indict the entire state of State of West Virginia. (Pet. Br. 5; Supp. App. 11-12). The circuit court summarily denied his petition to address the grand jury, and he appeals this denial to this Court. (Supp. App. 16).

After Dreyfuse filed his opening brief *pro se* and the State filed its principal response brief in summer 2018, this Court appointed counsel for Dreyfuse and requested supplemental briefing from both parties. (Order). In his supplemental brief, Dreyfuse argues that his right to present an application to the grand jury should not be limited solely because of his status as a prisoner. (Pet's Supp. Br. 2). He also contends that the circuit court has no discretion to bar the grand jury from hearing any accusations he chooses to present.

The State's initial brief demonstrated that although the right to appear before the grand jury is broad, the grand jury remains an arm of the court. As a result, a circuit court judge may exercise some gatekeeping role when supervising and safeguarding the important function the grand jury serves. (State's Br. 9). This duty of the circuit court does not infringe the right to approach a grand jury because that right—like others involving public access to the courts—is subject to limited and reasonable restrictions. (*Id.* at 15). The State also demonstrated that the circuit court correctly denied Dreyfuse's petition because the petition was an abuse of process and frivolous. It urged this Court not to interpret the right to approach the grant jury so expansively that it could become a tool for abuse.

This supplemental brief will not rehash those arguments. The State continues to stand behind the more detailed arguments in its principal brief explaining the circuit courts' discretion to deny petitions like Dreyfuse's. This supplemental brief responds to the new arguments in Dreyfuse's supplemental brief and further outlines the routes this Court could take when resolving the contours of the grand jury right.

ASSIGNMENT OF ERROR

1. Whether circuit courts may dismiss applications to the grand jury that are an abuse of process or legally and factually frivolous.

ARGUMENT

This Court faces a gap in the law. The Court has held that article 3, section 17 of the West Virginia Constitution entitles private citizens to appear before the grand jury. *State ex rel. Miller v. Smith*, 168 W. Va. 745, 752-53, 285 S.E.2d 500, 504-05 (1981). Further, a prosecutor may not attempt to dissuade "the grand jury from hearing evidence" related to the case. *Id.* at 757, 285 S.E.2d at 506. But this Court has not yet addressed whether and under what circumstances the circuit court may act as a gatekeeper to this process—including whether it has discretion to prevent frivolous or abusive applications from reaching the grand jury room. *See id.* Nor has the Court described the proper standard of review for a circuit court's summary denial of such an application.

This case is a good vehicle to clear up this murky area of the law. As the State argued in its principal brief and reaffirms here, this Court should find that circuit courts may refuse applications that would be an abuse of the judicial process or are frivolous. In the alternative, however, this Court could adopt approaches that Maine and Maryland courts follow in similar cases. The Maine approach permits private citizens to present evidence to the grand jury only if the citizen demonstrates that the "petition

on its face alleges sufficient facts to demonstrate a probability . . . that the grand jury will be persuaded to indict," and that the "public interest will be served by allowing the petitioner to present his case to the grand jury." *Petition of Thomas*, 434 A.2d 503, 508 (Me. 1981). The Maryland approach removes the judge from this process. Instead, it holds that petitioners have "the right to ask the foreman for the permission to appear before the Grand Jury," but not to approach "an individual member of that body," and that any petitioner should "exhaust his remedy before the magistrate and state's attorney" before approaching the grand jury. *Sibley v. Doe*, 135 A.3d 883, 888 (Md. Spec. App. 2016); *Brack v. Wells*, 40 A.2d 319, 324 (Md. 1944). The State continues to believe the first standard to be most faithful to this Court's precedent, and the best way to protect the rights of petitioners, the State, and the public. Nevertheless, the State agrees with Dreyfuse that clarity is important in this area of the law, even if the Court chooses an alternate approach.

I. This Court Should Hold That A Circuit Court May Bar An Abusive Or Frivolous Application To The Grand Jury.

As explained at greater length in the State's principal brief, circuit courts have inherent authority as part of their supervisory function over the grand jury to dismiss applications to the grand jury that are either an abuse of process or legally and factually frivolous. (State's Br. 4, 17). An application is an abuse of process if it attempts to use the grand jury process for "an end other than" the vindication of the public interest. *Preiser v. MacQueen*, 177 W. Va. 273, 279 n.8, 352 S.E.2d 22, 28 n.8 (1985) (quoting William Prosser, Handbook of the Law of Torts § 121 (1971)); *see State ex rel. Skinner v. Dostert*, 166 W. Va. 743, 752, 278 S.E.2d 624, 631 (1981). If a petitioner's application to the grand jury is aimed at something other than the public interest, a circuit court may "exercise its particular responsibility to [ensure] the fairness of grand jury proceedings" and dismiss the application. *Miller*, 168 W. Va. at 756, 285 S.E.2d at 506. An application is legally and factually frivolous if the proposed indictment is based

on an "indisputably meritless legal theory" or bereft of any factual support. *Pierce v. Stanley*, 2010 WL 1904558, at *1 (S.D. W. Va. May 7, 2010) (citing *Denton v. Hernandez*, 504 U.S. 25, 32 (1992)).

The circuit court properly rejected Dreyfuse's application under these principles. The circuit court could properly have deemed the application to be an abuse of process because on its face it reflects an intent not to vindicate the public interest but to relitigate the validity of Dreyfuse's first-degree murder conviction. *Compare* Supp. App. 33-44, 47-48, 70, 72, *with Dreyfuse v. Pszczokowski*, 2017 WL 478564, at *2, 4-5 (S.D. W. Va. Jan. 6, 2017), *adopted*, 2017 WL 758950 (S.D. W. Va. Feb. 27, 2017). And Dreyfuse's claim is legally and factually frivolous because nothing in his application supports a theory that the prosecutor willfully suborned perjured testimony. (Supp. App. 348); (Pet. Br. at 24-26).

Dreyfuse does not contend in his supplemental brief that his application should be denied under the State's proposed standard of review. Nor does he engage with the cases establishing that circuit courts have the right and duty to exercise "power over their own process to prevent abuse, oppression, and injustice." *State ex rel. Casey v. Wood*, 156 W. Va. 329, 333, 193 S.E.2d 143, 145 (1972) (citation omitted); *see also* (Pet. Br. at 12, 14). Dreyfuse argues instead that his "incarceration status is immaterial" to his grand jury application, and that the circuit courts have no discretion or gatekeeping role—no matter how limited—because only a "grand jury has the power to determine the existence of probable cause to indict." (Pet's Supp. Br. 4-5). His arrows miss the mark.

First, the State does not argue that Dreyfuse should be barred from presenting a complaint solely because he is incarcerated. Status as a prisoner may be *probative* when the circuit court considers an application, much as an informant's reliability in a case may be "inferred from the circumstances" of the case. *State v. White*, 167 W. Va. 374, 378, 280 S.E.2d 114, 118 (1981). Dreyfuse's status as a prisoner would almost certainly be irrelevant to a grand jury complaint against one of his fellow prisoners, for example, but the circuit court is not required to ignore that status when presented with leave to bring a

complaint against the man who put him in jail. More importantly, nothing in the abuse-of-process or frivolous claim approach raises an automatic bar against prisoners appearing before the grand jury. Any individual presenting an inappropriate or baseless petition would be barred from appearing before the grand jury under this standard. Likewise, the circuit court would be required to give the same consideration and presumption in favor of access to a prisoner as to a non-incarcerated petitioner.

Second, Dreyfuse's argument that only a "grand jury has the power to determine the existence of probable cause to indict," is, at best, half-correct. (Pet. Supp. Br. 5). A circuit court usually may not dismiss an indictment once a grand jury has returned it. *State ex rel. State v. Wilson*, 239 W. Va. 802, 807, 806 S.E.2d 458, 463 (2017). But a circuit court's inability to dismiss an indictment after the fact does not imply that a circuit court is powerless to protect the integrity of the grand jury process *before* indictment. For example, this Court faulted a circuit court for allowing an investigating "officer to remain in the grand jury room during the presentment of the indictment." *State v. Barnhart*, 211 W. Va. 155, 160, 563 S.E.2d 820, 825 (2002). This Court found that the circuit court should have guarded the grand jury from legally improper influences. *Id.* The question is thus not whether the circuit court may act to protect the functioning of the grand jury before an indictment; the issue is whether it may do so in circumstances like these.

Further, the Court should adopt the State's proposed standard because it protects both the autonomy of the grand jury and potential petitioners. The grand jury retains its traditional autonomy in deciding the sufficiency of the evidence for an indictment under this approach; the circuit court's limited gatekeeping role simply ensures its time is not wasted by clearly frivolous or bad-faith complaints. Moreover, the State's proposed test is not very demanding—after all, a tort for abusive process can only succeed when there is "proof of a willful and intentional abuse or misuse of the process for the accomplishment of some wrongful object—an intentional and willful perversion of it to the unlawful

injury of another." *Williamson v. Harden*, 214 W. Va. 77, 80, 585 S.E.2d 369, 372 (2003) (quotation omitted). It will be the rare petition a circuit court will properly exclude under this standard.[1]

Moreover, affirming the inherent authority of the courts to dismiss frivolous petitions is fully consistent with other methods courts use to avoid abuse of judicial resources. This Court has acknowledged, for example, that while "there is an undeniable interest in the maintenance of unrestricted access to the judicial system, unfounded claims or defenses asserted for vexatious, wanton, or oppressive purposes place an unconscionable burden upon precious judicial resources already stretched to their limits in an increasingly litigious society." *Daily Gazette Co. v. Canady*, 175 W. Va. 249, 252, 332 S.E.2d 262, 265 (1985). Accordingly, this Court has upheld sanctions against attorneys for filing frivolous lawsuits, *Warner v. Wingfield*, 224 W. Va. 277, 283, 685 S.E.2d 250, 256 (2009), affirmed the right of courts to restrict the state constitutional right of *pro se* representation, *Blair v. Maynard*, 174 W. Va. 247, 253, 324 S.E.2d 391, 396 (1984), and upheld a statute requiring petitioners to file presuit notice of medical malpractice claims, *Davis v. Mound View Health Care, Inc.*, 220 W. Va. 28, 32, 640 S.E.2d 91, 95 (2006). These decisions recognize that there is no inherent conflict between giving full effect to the right of open access to the courts on the one hand, and circuit courts having discretion to limit vexatious, frivolous, or otherwise abusive suits on the other. The State's proposed standard in the specific context of the grand jury is a natural extension of these long-standing doctrines.

II. Alternatively, This Court Could Draw From The Examples Of Other State Courts To Define Reasonable Limits On The Grand Jury Appearance Right.

The liability of Dreyfuse's proposed approach—which is an absence of *any* limit on the right to appear before the grand jury—is that it could expose potential defendants to the fancies of any aggrieved

[1] The State took the position that this Court may affirm the circuit court's order. (State's Br. 26). However, the State does not oppose a remand to the circuit court should this Court conclude that the circuit did not provide sufficient analysis to determine whether it followed the appropriate analysis.

person and dragoon the resources of the State into investigating frivolous offenses. The approach discussed above balances the right to appear against the government's important interests in the integrity of the judicial process and preservation of judicial resources. If this Court disagrees that concepts of abuse of process or frivolous litigation are the appropriate guideposts for circuit courts exercising their supervisory function in cases like these, it should be clear what limits *do* exist. Although grounded in separate constitutional and statutory regimes, other States that allow private citizens to petition the grand jury impose *some* procedural safeguards to avoid the potential for abuse. *Thomas*, 434 A.2d at 508; *Sibley*, 135 A.3d at 889. Prudence dictates care before refusing to do the same in West Virginia, and this Court could alternately look to the approaches of these other States.

A. This Court could consider a more stringent standard than that proposed by the State. In Maine, lower courts have "discretion" to allow a "citizen having personal knowledge of an indictable offense the opportunity to persuade" a grand jury to indict. *Thomas*, 434 A.2d at 504. The Maine high court, however, carefully cabined that discretion on the theory that issuing an indictment is not just a matter of whether a crime was committed, but whether justice requires an indictment. The Maine Supreme Court therefore held that its lower courts could permit an application to the grand jury if the application petition satisfied two criteria: "First, the [court] must be satisfied that the petition on its face alleges sufficient facts to demonstrate a probability, or at least a substantial possibility, that the grand jury will be persuaded to indict"; and second, the court must also "be satisfied that the public interest will be served by allowing the petitioner to present his case to the grand jury." *Id.* at 508.

This Court could adopt the same standard of review for West Virginia. As the Maine Supreme Court recognized, the "decision to file criminal charges, with the awesome consequences in entails, requires consideration of a wide range of factors in addition to the strength of the . . . case, in order to determine whether prosecution would be in the public interest." *Thomas*, 434 A.2d at 508 (citing *United*

States v. Lovasco, 431 U.S. 783, 794 (1977)). Such factors include the "possible motives of a complainant" in filing a complaint. *Id.* If anything, these concerns are especially weighty in West Virginia because under our system "there are fewer impediments to frivolous criminal prosecutions than there are perhaps elsewhere." *Powers v. Goodwin*,170 W. Va. 151, 158, 291 S.E.2d 466, 473 (1982). While the West Virginia Constitution may grant citizens the right to apply to the grand jury, there is little sense (and much to be lost) in knocking down all barriers between defendants and overly zealous grand juries.

B. This Court could also consider a less stringent standard that removes the judge's oversight role while still allowing some limits on who may appear before the grand jury. Maryland provides a useful model for how this standard might work. There, a citizen wishing to approach the grand jury should "exhaust his remedy before the magistrate and the state's attorney" before he may apply to present himself before the grand jury. *Sibley*, 135 A.3d at 889. Then, and only then, the citizen has the right "to ask the *foreman* for the permission to appear before the Grand Jury" through a written request. *Id.* (emphasis added). The petitioner "does not have the right to appear in person before the foreman" nor does he have the right to present himself to other members of the grand jury directly. *Id.* The petitioner is out of luck if the foreman decides to deny his application to appear. *Id.*

There are weaknesses to this approach, of course, including the fact that it would create tension with the circuit court's inherent and long-recognized authority to supervise the functioning of the court generally, and the grand jury specifically. An overly permissive standard may also forget the lessons from history that the grand jury has been a tool for equity *and* a tool of oppression. The Court would best further the grand jury's equitable aims—and protect the grand jury process from a deluge of frivolous and vexatious private complaints—by allowing circuit courts to continue in the role of gatekeeper, not the grand jury itself.

CONCLUSION

For the reasons stated above this Court should affirm the decision below.

Dated: December 9, 2019

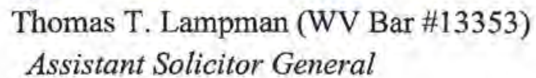
Respectfully submitted,

STATE OF WEST VIRGINIA

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

LINDSAY S. SEE
SOLICITOR GENERAL



Thomas T. Lampman (WV Bar #13353)
Assistant Solicitor General
State Capitol Complex
Building 1, Rm E-26
Charleston, WV 25305
(304) 558-2021
Email: Thomas.T.Lampman@wvago.gov