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In the Circuit Court of Berkeley County, West Virginia

Wayne A. Jones,	)	
Plaintiff,	)	
	)	
vs.)	)	Case No. CC-02-2018-P-318
	)	
State of West Virginia,	)	
Defendant	)	
	)	

ORDER DENYING PETITION/APPLICATION OF THE ESTATE OF WAYNE A. JONES TO EMPANEL A SPECIAL GRAND JURY FOR CONSIDERATION OF A COMPLAINT

Petitioners, Robert L. Jones and Bruce A. Jones, as Administrators of the Estate of Wayne A. Jones, by counsel, filed their Petition/Application of the Estate of Wayne A. Jones to Empanel a Special Grand Jury for Consideration of a Complaint on August 9, 2018.

The Court entered a Trial Court Rule 22 Scheduling Order directing a response to the Petition from the Prosecuting Attorney for Berkeley County, West Virginia on August 22, 2018.

The State of West Virginia, by Berkeley County Prosecuting Attorney Catie Wilkes Delligatti, filed its Response to Petition/Application to Empanel Special Grand Jury on September 4, 2018.

Intervenors, Erik Herb, Daniel North, William Staubs, Paul Lehman, and Eric Neely – the five Martinsburg police officers involved in the March 13,

2013 shooting incident partially described in the Petition and the five individual Defendants in Petitioners' separate civil rights and wrongful death law suit filed in the United States District Court for the Northern District of West Virginia - Martinsburg Division (Civil Action No. 3:13-CV-68) – moved the Court to intervene in this action and oppose the Petition on September 6, 2018.

The Court entered an Order Granting Motion to Intervene allowing consideration of the Intervenors' Brief in Opposition to Petition/Application of the Estate of Wayne A. Jones to Empanel a Special Grand Jury for Consideration of Complaint on September 18, 2018.

Upon mature consideration of the Petition, the State's Response, and the Intervenors' Response, the Court hereby DENIES the Petition and makes the following findings in support of this decision:

1. 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 Intervenor with any crime related to the shooting incident. They found the shooting justified under the circumstances. *See* Petition, ¶ 7. Petitioners now ask this Court to empanel a *second* grand jury to consider the March 13, 2013 shooting incident *a second time* in hopes of undermining the first grand jury's "no probable cause" finding. The

Court finds no legal or factual basis for this request.

2. Petitioners cite no legal authority which permits them 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 Intervenor with any crime related to the March 13, 2013 shooting incident. Petitioners cite three sources of legal authority to support their Petition: 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 permits Petitioners to undermine the work of the October 2013 grand jury by making a second presentation of the March 13, 2013 shooting incident to a second grand jury in hopes of obtaining a different result.

3. 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 of the West Virginia Constitution does not guarantee

any person multiple attempts or a specific result. It only guarantees each person access to the courts of this State.

4. 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, 168 W.Va. 745, 752, 285 S.E.2d 500, 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"). The Berkeley County Prosecuting Attorney fulfilled her constitutional duty as the State's representative – *and the Petitioners' representative* – by presenting the March 13, 2013 shooting incident to a grand jury in October 2013.

5. "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 do not allege any reason for the Court to question this presumption or conclude the Prosecuting Attorney's October 2013 presentation to the grand jury was so flawed, skewed, or unfair that they were denied meaningful access to the courts of this State.

6. Each member of the October 2013 grand jury took the

following oath:

> 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. Petitioners do not allege any reason for the Court to conclude any member of the October 2013 grand jury violated his/her oath when, after hearing the Prosecuting Attorney's presentation and the Court's instructions of law, each found no probable cause to charge any Intervenor with any crime related to the March 13, 2013 shooting incident.

7. The Court notes that Petitioners previously filed a Petition for Disclosure of Grand Jury Proceedings related to the March 13, 2013 shooting incident in Berkeley Co. Civil Action No. 16-C-490. In consideration of that Petition, during a hearing on October 12, 2017, the Petitioners requested, and the Court granted, permission for their counsel to contact an expert witness who testified before the 2013 grand jury regarding the March 13, 2013 shooting incident. Despite this permission to develop the record, the Petition contains nothing to question the presumption of integrity or support a conclusion that the Petitioners were somehow denied meaningful access to the courts of this State.

8. The Prosecuting Attorney provided Petitioners access to the

courts of this State for purposes of determining whether charges could go forward against Intervenors. This is all the West Virginia Constitution guarantees. It does not guarantee Petitioners an indictment or multiple presentations to multiple grand juries until they obtain the result they desire. Therefore, the "open courts" provision of the West Virginia Constitution does not justify Petitioners' request for a *second* presentation of the March 13, 2013 shooting incident to a *second* grand jury.

9. Petitioners rely upon State ex rel. Miller v. Smith, 168 W. Va. 745, 285 S.E.2d 500 (1981), as support for their Petition. 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. The annotations to Article III, Section 17 of the West Virginia Constitution identify three cases under the heading "grand jury access, open courts": 1) State ex rel. Miller v. Smith, 168 W. Va. 745, 285 S.E.2d 500 (1981); 2) Harman v. Frye, 188 W. Va. 611, 425 S.E.2d 566 (1992); and 3) State ex rel. R.L. v. Bedell, 192 W. Va. 435, 452 S.E.2d 893 (1994). None of these cases supports the proposition that Petitioners have a constitutional entitlement to make multiple presentations to a grand jury until they obtain the result they desire, particularly after a prosecuting attorney has already made a presentation to a grand jury for them.

10. Syllabus Point 1 of State ex rel. Miller v. Smith, 168 W. Va. 745, 285 S.E.2d 500 (1981) 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 Court conclude that 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 position 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 policemen in Clay County, West Virginia. Petitioner prosecuted two criminal warrants against the policemen, 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 Clay County 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 Berkeley County Prosecuting Attorney made a presentation to the grand jury and 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 grand jury determination of probable cause and, thus, denied any access to the courts of this State. In 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' argument that the "open courts" provision of the West Virginia Constitution entitles them to make multiple presentations to a grand jury until they obtain the result they desire.

11. Harman v. Frye, 188 W. Va. 611, 425 S.E.2d 566 (1992), is one of the cases which affirms Syllabus Point 1 of State ex rel. Miller v. Smith, 168 W.

Va. 745, 285 S.E.2d 500 (1981). 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 West Virginia Supreme Court 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's 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 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, the Berkeley County Prosecuting Attorney did not refuse to initiate criminal proceedings with regard to the March 13, 2013 shooting incident. She presented the circumstances of 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.

12. 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, 168 W. Va. 745, 285 S.E.2d 500 (1981). 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 West Virginia Supreme Court 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 W.Va. Code § 62-9-1. The Supreme Court held that 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 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 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 Berkeley County Prosecuting Attorney presented the March 13, 2013 shooting

incident to a grand jury for the 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.

13. Petitioners also rely upon West Virginia Code § 52-2-1, § 52-2-9, and § 52-2-14 as support for their Petition. These statutes do not guarantee people a right to make multiple presentations to a grand jury until they obtain the result they desire. Only one of these statutes actually has any bearing on Petitioners' request for a second grand jury presentation. West Virginia Code § 52-2-1 establishes a circuit court's power to convene or excuse a grand jury. West Virginia Code § 52-2-14 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 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" ("no probable cause") determination has been returned. Petitioners present this statute as mandatory in their Petition. However, a second presentation is not mandatory under this statute and, under the circumstances, should not be permitted by this Court.

14. "[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). This "gatekeeper" requirement demonstrates that the Court is not required to allow Petitioners a *second* presentation to a *second* grand jury simply because they do not like the decision of the October 2013 grand jury.

15. 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, 168 W.Va. 745, 751, 285 S.E.2d 500, 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 met this first responsibility. It determined there is no probable cause to charge any Intervenor with any crime related to the March 13, 2013 shooting incident. The duly sworn Berkeley County citizens who heard the Prosecuting Attorney's presentation and reached this conclusion should not be undermined simply because Petitioners desire another result. If this Court were to grant Petitioners a *second* presentation to a *second* grand jury, it would essentially undermine the second responsibility of grand juries by removing the protection against unfounded criminal accusations already afforded Intervenors by the October 2013 grand jury.

16. "[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, 194 W. Va. 28, 34, 459 S.E.2d 139, 145 (1995) *citing* State ex rel. Casey v. Wood, 156 W.Va. 329, 333, 193 S.E.2d 143, 145 (1972). 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, as here, 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.

17. The Court finds potential for significant grand jury abuse in Petitioners' request for a *second* presentation to a *second* grand jury and corresponding attempt to undermine the October 2013 grand jury's decision.

First, Petitioners delayed nearly five years before making their request (October 2013 to August 2018). This delay is sufficient abuse of the grand jury process to deny their request.

Second, Petitioners' five-year delay is suspect because Intervenors 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 to the Petitioners in their separate civil case. Thus, Petitioners now improperly seek to benefit from their own delay.

Third, Petitioners' five-year delay is also suspect because they waited until approximately two months before their October 23, 2018 civil trial to threaten Intervenors with a second grand jury presentation and potential criminal charges. This threat would effectively prevent Intervenors from testifying during their civil trial and defending both themselves and the City of Martinsburg against Petitioners' civil claim. Intervenors would be required to invoke their Fifth Amendment privilege against self-incrimination while the specter of a second grand jury presentation was hanging over their heads. Thus, Petitioners again

improperly seek to benefit from their own delay.

Fourth, Petitioners propose a *second* presentation to a *second* grand jury "untainted by contact with a prosecuting attorney and law enforcement witnesses" which will provide a "fresh, fair, and unbiased review of the circumstances." *See* Petition, pg. 2, ¶ 8. This proposal is contrary to established law. The prosecuting attorney is the constitutional officer charged with prosecuting criminal offenses against the State and its citizens. State ex rel. Miller v. Smith, 168 W.Va. 745, 752, 285 S.E.2d 500, 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 second grand jury and cannot dictate that law enforcement officers cannot testify.

Finally, Petitioners appear to suggest their counsel should be permitted to serve as a grand jury witness, a grand jury advocate, or a stand-in for the Prosecuting Attorney as part of their proposed *second* presentation to a *second* grand jury. Such participation by Petitioner's counsel, *who has a clear pecuniary*

interest in the outcome of the grand jury presentation and Petitioner's separate 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 immediately. Petitioners' counsel could not make a presentation to a grand jury which would be improper, and probably illegal, for a prosecuting attorney. Furthermore, it would be inappropriate, and an abuse of the grand jury process, for Petitioners to make a biased, misleading presentation to a second grand jury.

18. 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 money 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. 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).

19. More than five years after the March 13, 2013 shooting incident, and just seven weeks before their October 23, 2018 civil trial was set to begin, Petitioners proposed an abuse of this Court's power to empanel a grand jury.

They have no legal right to ask the Circuit Court or the Prosecuting Attorney to present the March 13, 2013 shooting incident to a second grand jury 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 two police officers' alleged malicious wounding to a grand jury – the Prosecuting Attorney has already presented the March 13, 2013 shooting incident to a duly sworn grand jury and, after considering the incident, that duly sworn grand jury has already determined there is no probable cause to charge any Intervenor with a crime related to the March 13, 2013 shooting incident. Thus, the courts of this State have already been open to Petitioners. Petitioners did not obtain the result they desired (i.e. an indictment of any Intervenor); however, this does not justify a second presentation to a second grand jury to satisfy of the "open courts" provision of the West Virginia Constitution. Such an abuse of the court system, and such disregard for the work of the first grand jury, should not be permitted.

It is accordingly **ORDERED** that the Petition/Application of the Estate of Wayne A. Jones to Empanel a Special Grand Jury for Consideration of a Complaint shall be, and hereby is, **DENIED** for each of the reasons discussed above. This case shall be, and hereby is, **DISMISSED WITH PREJUDICE**, removed from the Court's active docket, and placed among the causes ended.

Petitioners' objections to all adverse rulings are hereby noted and preserved.

The Court's Clerk shall transmit an attested copy of this Order to all counsel of record.

/s/ Laura Faircloth
Circuit Court Judge
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.