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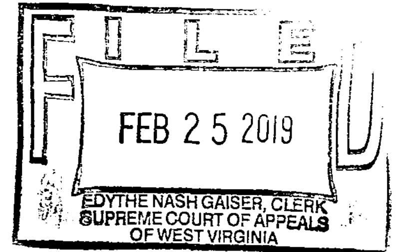
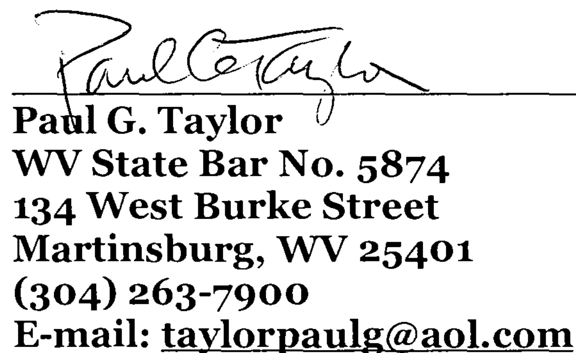


ESTATE OF WAYNE A. JONES
PETITIONER,

Vs. Case No. 18-1045

BERKELEY COUNTY PROSECUTING ATTORNEY, et al.
RESPONDENTS

PETITIONER'S BRIEF



Paul G. Taylor
WV State Bar No. 5874
134 West Burke Street
Martinsburg, WV 25401
(304) 263-7900
E-mail: taylorpaulg@aol.com

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Assignments of Error

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

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

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

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

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

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

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

Statement of the Case

A. Factual Summary

This case arises from the March 13, 2013 homicide of Wayne A. Jones at the hands of five (5) Martinsburg Police Officers. Jones was shot approximately twenty-two (22) times, including approximately eleven (11) times in the back and buttocks (App. Pg. 1). Jones was initially stopped by police for jaywalking. What should have been a simple, brief encounter was escalated by the police officers into a foot chase, struggle and fatal shooting. Police officers claim Jones had a knife. However, no knife is seen on multiple videos of the shooting, nor has a knife been physically produced in this case or a related federal case. The same videos demonstrate that at the time of his homicide, Jones was laying prone on the ground, unmoving and posing no threat.[1]

The facts underlying this matter were previously presented to a regular grand jury by a prior prosecutor.[2] No true bill was returned. Through the case sub judice, Petitioner sought to both obtain a transcript of portions of the previous grand jury presentation, and empanel a special grand jury to re-examine the circumstances of the homicide. Petitioner's requests were denied by the Circuit Court of Berkeley County without the Circuit Court having as much information as possible prior to ruling, i.e., without relevant transcripts of the first

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[1] None of the videos were made part of the circuit court record below, but they are a matter of public record, and were referenced several times in the proceedings below. The videos are a part of the record in parallel litigation pending before the U.S. Court of Appeals for the Fourth Circuit, Case No. 18-2142. The most useful videos are a disturbing record of what amounts to a public execution by "law enforcement" officers acting as judges, jurors and executioners by firing squad. The videos speak volumes about the injustice represented by this case. They say more than the hundreds of words that follow in this brief. The videos are the subject of a contemporaneously filed Motion to Supplement the Appendix.

[2] The issue of a prior presentation to a Berkeley County Grand Jury concerning the conduct of the police officers involved in this homicide is also the subject of a separate case pending before this court. See this Court's Docket No. 18-0927.

grand jury presentation,[3] and without an evidentiary hearing.[4]

There is related litigation pending in the U.S. Court of Appeals for the Fourth Circuit, Case No. 18-2142; the federal case having been appealed twice from the U.S. District Court for the Northern District of West Virginia, remanded twice, and now on appeal for the third time. The federal case contains various civil rights claims, negligence and a wrongful death claim. App. Pg. 143.[5]

There has never been a public trial nor a public accounting, in state or federal court, of the facts underlying this homicide. As this case is on appeal in both state and federal courts, there has never been a final decision on the merits.

B. Procedural History

The petition seeking a special grand jury was filed on August 9, 2018. App. Pg. 1.

On September 5, 2018, the Berkeley County Prosecuting Attorney filed a response in opposition to the subject petition. App. Pg. 12-20. The opposition points out that because there are no formal West Virginia guidelines applicable to Petitioner's requests, the requests are within the discretion of the circuit court. App. Pg. 12-13. The opposition essentially argues that because the petition doesn't meet certain non-existent standards of consideration, it should be denied "... as presented." App. Pg. 12. The prosecutor's opposition conceded Petitioner was entitled to seek the requested relief. App. Pg. 13.

In a move that appears to give rise to issues of first impression, on September 6, 2018 the

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[3] The issue of the grand jury transcripts is discussed in greater detail below.

[4] The issue of requests for a hearing is discussed in greater detail below.

[5] A related case is also pending before this Court. See docket No. 18-0927.

police officers responsible for the Jones homicide moved to intervene in this matter.[6] App. Pg. 22-32.. The Intervenors' incorrect claim that Petitioners "...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..." (App. Pg. 54) is directly contradicted by WV Code §52-2-9.[7] Intervenors go on to argue that they are entitled to intervene both as a matter of right under Rule 24(a), WV R.Civ.P., and as a matter of discretion under Rule 24(b), WV R.Civ.P.

On September 13, 2018, the trial court issued a Trial Court Rule (TCR) Rule 22 Scheduling Order on the Motion to Intervene. Pursuant to the order, Petitioner, as non-moving party, had ten (10) days to respond to the Motion to Intervene. App. Pg. 59. However, before the ten (10) days expired, the Court prematurely granted the Motion to Intervene by order dated September 18, 2018. App. Pg. 62. This denied Petitioner an opportunity to provide a substantive response to the Motion to Intervene.

On September 20, 2018, Petitioner filed its Rebuttal in Opposition to State's Response to Petition/Application to Empanel Special Grand Jury. The rebuttal pointed out the State's concession that Petitioner was entitled to seek the requested relief under appropriate circumstances. App.Pg. 71. Petitioner's requests for a hearing on the matter were denied. App. Pg. 72, 75, 144, 147.

The State responded to the Petition for Disclosure of Grand Jury Proceedings on

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[6] The issue of first impression appears to be whether the potential criminal defendants who are the subject of a proposed grand jury presentation should be permitted to intervene in the civil action intended to empanel the same investigating grand jury.

[7] WV Code §52-2-9 reads in pertinent part: "Second hearing. 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."

See also State ex rel. C.T. Miller v. Smith, 285 SE 2d 500 (WV 1981).

September 21, 2018. App. Pgs. 78-87. The State's Response highlights the fact that there is very little West Virginia guidance on this issue. Most importantly, the response illustrates that without in camera review of the transcript at issue, the trial court was unable to make a fully informed ruling. Simply put, the underlying facts of this case have not been sufficiently developed for meaningful appellate review.

Intervenors' September 24, 2018 Response to Petition for Disclosure of Grand Jury Proceedings highlights the fact that the lack of guidelines concerning the disclosure of grand jury proceedings appears to be is an issue of first impression in West Virginia. App. Pg. 106-112. Petitioner's September 28, 2018 Rebuttal to State's Response to Petition for Disclosure of Grand Jury Proceedings points out the fact that the only way the trial court can make a fully informed ruling on the issue of transcript production is to review the subject transcript in camera prior to ruling. App. Pg. 142-144. The trial court refused this reasonable and responsible suggestion.

Petitioner's September 25, 2018 Rebuttal to Intervenors' Response to Petition for Disclosure of Grand Jury Proceedings incorporated Petitioner's Rebuttal to the State's response on the issue. Significantly, Petitioner again requested a hearing on the matter. App. Pg. 147. The trial court refused to hold a hearing. This also resulted in a less than fully informed ruling by the trial court.

Petitioner's September 28, 2018 Motion and Memorandum Pursuant to Rule 59(e), WV R. Civ. P., to Alter or Amend the Court's Order Entered September 18, 2018 Granting Motion to Intervene points out that: 1) the trial court ignored the strictures of Rule 6, WV R.Civ.P.; and 2) there are glaring inconsistencies in Intervenors' arguments in support of intervention in the case. App. Pg. 150-151.

Intervenors' October 11, 2018 Response to Petitioner's Motion to Alter or Amend Order Granting Motion to Intervene failed to address the Rule 6 argument and was essentially a regurgitation of their original Motion to Intervene. App. Pg. 158-167.

The State's October 12, 2018 Response to Petitioner's Motion to Alter or Amend Order Granting Motion to Intervene took no position on the issue of intervention. App. Pg. 170.

Petitioner's October 15, 2018 Rebuttal to Intervenors' Response to Petitioner's Motion to Alter or Amend Order Granting Motion to Intervene reiterates the point that the trial court (and, indeed the appellate court) can't make a fully informed ruling on the issues presented in this case without benefit of a partial transcript of the first grand jury presentation. App. Pg. 174.

On October 22, 2018, the trial court entered its Order Denying Petitioner's Motion to Vacate Order Granting Motion to Intervene, Order Denying Petition for Disclosure of Grand Jury Proceedings, and Order Denying Petition/Application to Empanel a Special Grand Jury.

This appeal followed.

Summary of Argument

This case presents issues of first impression and issues with little prior development of guidance and standards from this appellate court. Such guidance could have assisted the trial court in rendering correct and fully informed rulings. As a result, this appellate court is presented with a less than fully developed record for purposes of review. The key piece of missing evidence is a partial transcript of the first grand jury presentation.

Petitioner contends the trial court abused its discretion in refusing the Petition/Application for the empaneling of a grand jury. The trial court further abused its discretion and committed error in incorrectly applying instructive, but not binding,

guidelines concerning the production of grand jury transcripts.

Petitioner contends further that the trial court committed error in granting a motion to intervene and misapplied Rule 6, WV R.Civ.P., in motions practice.

This case represents an apparent reluctance on the part of the trial court to follow the path of truth, wherever that path leads.

Suppressio veri expressio falsi
(A suppression of truth is equivalent to an expression of falsehood)

Statement Regarding Oral Argument and Decision

This case should be placed on the Court's argument calendar pursuant to Rule 18(a), WV R. App. Pro., because it concerns issues of first impression and the decisional process will be aided by oral argument.

This case is suitable for oral argument under Rule 20, WV R. App. Pro., because it involves the following: 1) issues of first impression; 2) insufficient evidence to support the ruling below; 3) issues of fundamental public importance, 4) an unsustainable exercise of discretion where the law governing that discretion is not settled; and 5) constitutional questions regarding a Court ruling.

Petitioner suggests to this Court that this case should be decided on the merits by the issuance of an opinion under Rule 20(g), WV R.Civ.P., for the following reasons: 1) emphasize the application of settled law; 2) correct an abuse of discretion resulting in rulings not supported by evidence; 3) address issues of first impression; 4) address issues of fundamental public importance, i.e., police administration and function; and (5) provide future guidance to trial courts and litigants faced with similar issues in the future.

Argument

1. IT WAS REVERSIBLE AND PREJUDICIAL ERROR AND AN ABUSE OF DISCRETION FOR THE CIRCUIT COURT TO DENY THE UNDERLYING PETITION TO EMPANEL A SPECIAL GRAND JURY.

A. Standard of Review

An abuse of discretion arises from an erroneous assessment of the evidence or the law. Davis ex rel Davis v. Wallace, 565 SE 2d 386 (WV 2002); Rollyson v. Jordan, 518 SE 2d 372 (WV 1999); Bartles v. Hinkle, 472 SE 2D 827 (WV 1996).

Interpretation / application of a statute is reviewed de novo. Rollyson v. Jordan, 518 SE 2d 372 (WV 1999), citing Syl. Pt. 1, Chrystal R.M. v. Charlie A. L., 459 SE 2D 415 (WV 1995).

B. Argument

Art. III §17 of the Constitution of WV guarantees citizens access to the court with a minimum of impediments.[8]

WV Code §52-2-1 permits the trial court to empanel a special grand jury.[9]

WV Code §52-2-14 permits the trial court to empanel a special grand jury.[10]

State ex rel. C.T. Miller v. Smith, 285 SE 2d 500 (WV 1981) and its progeny permit a second grand jury presentation.

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[8] Art. III, §17: Courts Open to All - Justice Administered Speedily. 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.

[9] WV Code §52-2-1 reads in pertinent part: Any circuit court may, at a special, regular or adjourned term thereof, whenever it shall be proper to do so, order a grand jury to be drawn and to attend such term.

[10] WV Code §52-2-14 reads in pertinent part: Whenever it appears to the judge of any court of record having criminal jurisdiction that there may be possible offenses against the criminal laws of this State which because of their complexity and involvement may require a grand jury to sit for an extended period of time, he may, pursuant to the provisions of this section, order a grand jury to be drawn and to attend any special, regular or adjourned term of such court.

Despite overwhelming authority permitting the relief sought by Petitioner, the trial court summarily dismissed Petitioner's request for relief.

The trial court's October 23, 2018 Order Denying Petition / Application to Empanel a Special Grand Jury is replete with erroneous findings and conclusions, or conclusions not supported by the facts and law, to-wit:

1. "In October, 2013, the Berkeley County Prosecuting Attorney, presented the circumstances of the March 13, 2013 shooting incident to a Berkeley County Grand Jury... They (the grand jury) found the shooting justified under the circumstances." App. Pg. 194. [11]

2. The request for a second grand jury "... has no legal or factual basis..." App. Pg. 195. [12]

3. The Berkeley County Prosecuting Attorney fulfilled her constitutional duty as the State's representative — and the Petitioner's representative — by presenting the March 13, 2013 shooting incident to a grand jury in October, 2013." App. Pg. 196.[13]

4. "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

[11] Without the transcript of the grand jury proceedings, neither the trial court, nor this appellate court, know what was presented nor whether the shooting was "justified". The issue of partial transcripts of the proceedings is discussed below.

[12] This finding is directly contradicted by WV Code §52-2-9. In addition to the shocking facts of the "homicide", and the finding of the US Court of Appeals for the Fourth Circuit of genuine issues of material fact as to whether excessive force was used (App. Pg. 93), there may be additional factual bases revealed by a partial transcript of the first grand jury presentation, which transcript has never been produced.

See also C.T. Miller, supra.

[13] There is no way to determine the accuracy of this finding without a partial transcript of the proceeding.

and skillfully." (Citation omitted)[14] App. Pg. 196.

5. "...Each (grand juror) found no probable cause to charge any Intervenor with any crime related to the March 13, 2013 shooting incident."[15] (Emphasis added) App. Pg. 197.

6. "Petitioners would have this Court conclude that Miller, supra, 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."[16] App. Pg. 197.

7. The Berkeley County Prosecuting Attorney "...did nothing to interfere with Petitioner's access to the court....[17] App. Pg. 200. (Emphasis added)

8. The trial court contradicts itself when it recognizes a) its inherent power to act as a "gatekeeper" as to whether to permit a second grand jury presentation as authorized by WV Code §52-2-9; b) and that one of the functions of a grand jury is to protect citizens against unfounded criminal accusations, then concludes that a second grand jury presentation would undermine the protection against unfounded criminal accusations. App. Pg. 205, 206.

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[14] Presumptions can be overcome. The US Court of Appeals found genuine issues of material fact exist as to whether excessive force was used. i.e., whether the law enforcement officers in this case acted "fairly and skillfully." App. Pg. 93. Further, this finding is contradicted by WV Code §52-2-9.

[15] WV Code §52-2-9 does not require such a conclusion before a second grand jury presentation. Without the transcript of the grand jury proceeding, it is impossible for any court to conclude each grand juror found no probable cause.

[16] This finding demonstrates an abuse of discretion insofar as it is an erroneous assessment of Petitioner's position, the facts of this case, C.T. Miller, supra, and WV Code §52-2-9. Petitioner isn't requesting multiple presentations. Petitioner is requesting a second, fair presentation as contemplated by WV Code §52-2-9.

[17] It is impossible for any court to make this finding and conclusion without a transcript of the proceeding. Furthermore, this finding is irrelevant. WV Code §52-2-9 does not require a prior prosecutor's interference in a prior grand jury presentation in order for a second grand jury presentation to be made.

Certainly Intervenors are interfering with Petitioner's access to the court as discussed below.

The reality is that the protection against unfounded criminal accusations is still present in a second grand jury presentation. As in the first grand jury presentation, it's possible a second grand jury could not issue a true bill.

Furthermore, IF a true bill is returned by a second grand jury and the perpetrators of the Jones homicide are criminally charged, then those Defendants would have the additional protections of due process and a trial before a petit jury. Those Defendants would enjoy the protection of proof beyond a reasonable doubt. Those Defendants would enjoy all the rights and privileges they denied Wayne Jones.

9. The trial court's finding of the "...potential for significant grand jury abuse in ... a second presentation to a second grand jury..." (App Pg. 207) flies in the face and contradicts the trial court's previous recognition of its "gatekeeper" roll.

As the trial court recognized, it has the inherent power to prevent abuse and injustice. The trial court recognizes the grand jury as "an arm or agency of the court... and such court has control and supervision over the grand jury" App. Pg. 205.

With or without the aid of standards and guidance from this appellate court as to empaneling a second grand jury, the trial court can easily craft a "road map" for a second grand jury presentation which balances and meets the competing considerations presented here.[18]

At this point, it should be apparent to the reader that the trial court is unwilling to follow the path of truth, regardless of where that path leads. There is ample statutory and case law authority supporting a second grand jury presentation. The first grand jury proceedings

[18] The reader should recall that Respondent Berkeley County Prosecuting Attorney conceded Petitioner's statutory right to pursue a second grand jury presentation. App. Pg. 12.

were transcribed for a reason: to permit review of those proceedings by the court if necessary or requested. The trial court not only refuses to review those proceedings, the trial court won't even order preparation of the transcripts for appellate review. The trial court, as "gate keeper," refuses to even consider crafting an approach to a second grand jury presentation. The trial court's reluctance to proceed is exacerbated by a lack of guidance or standards from the appellate court, and perhaps as important, the transcript of the prior proceeding.

The Supreme Court of Appeals must review de novo the application of WV Code §52-2-9 to the facts presented. Upon such appellate review, the court will find the trial court abused its discretion by erroneously assessing the evidence presented and the law as it relates to a second grand jury presentation.

2. IT WAS REVERSIBLE AND PREJUDICIAL ERROR, AND AN ABUSE OF DISCRETION, FOR THE CIRCUIT COURT TO DENY THE PETITION FOR DISCLOSURE OF GRAND JURY PROCEEDINGS.

A. Standard of Review

An abuse of discretion arises from an erroneous assessment of the evidence or the law. Davis ex rel Davis v. Wallace, 565 SE 2d 386 (WV 2002); Rollyson v. Jordan, 518 SE 2d 372 (WV 1999); Bartles v. Hinkle, 472 SE 2D 827 (WV 1996).

Interpretation / application of a statute is reviewed de novo. Rollyson v. Jordan, 518 SE 2d 372 (WV 1999), citing Syl. Pt. 1, Chrystal R.M. v. Charlie A. L., 459 SE 2D 415 (WV 1995).

B. Argument

The trial court relied heavily on the unpublished opinion of Cruse v. Blackburn, infra, in denying Petitioner's request for transcripts of portions of the first grand jury proceedings. However, Cruse is progeny of Douglas Oil Co. of California v. Petrol Stops Northwest, 441

US 211, 99 S. Ct. 1667, 60 C. Ed. 2d 156 (1979). Douglas Oil addressed the same issue presented in the case sub judice: release of grand jury transcript for use in a civil proceeding. In a studied opinion, the Douglas Oil court concluded that the best practice in such an issue is in camera review of the requested material and, if appropriate, protective provisions concerning disclosure of the material. This is the course Petitioner urges upon this court.

On September 4, 2018, the Petition for Disclosure of Grand Jury Proceedings was filed. App. Pg. 7-9. WV Code §52-2-15, and Rule 6(e)(3)(c)(I), WV R. Crim. Pro., were cited in support of the petition. Because the trial court previously noted in related proceedings[19] that it found Cruse v. Blackburn, Case No. CV 3:17-00485, 2017 WV 3065217 at 1 (SD WV 7/19/17) as instructive (but not binding) on the issue, Petitioner addressed the Cruse factors in its petition. App. Pg. 8. The trial court previously noted that the issue of the production of grand jury transcripts in a civil proceeding in West Virginia was an issue of first impression.

The petition highlighted a key factor, if not THE key factor, in the trial court's consideration of the issue was that the trial court is unable (as is any appellate court reviewing the issue) to make a fully informed ruling without at least reviewing relevant portions of the transcript in camera.

The State's response to disclosure of the grand jury transcripts cited the "instructive" (but not binding) guidelines of Cruse, supra. The State went on to attempt to compare the facts of Cruse with the facts in the Jones case sub judice. App. Pg. 79. There simply is no such comparison. Jones is NOT "...nearly indistinguishable... from Cruse." Cruse alleged fake

[19] See docket No. 18-0927, currently pending before the Supreme Court of Appeals of West Virginia.

affidavits used to effect illegal searches and seizures, fabricated evidence used to arrest Plaintiff, and perjured grand jury testimony. Jones, on the other hand, involves: 1) the "homicide"[20] of a human being by five (5) police officers using excessive force and firing twenty-two (22) times into the body of a prone, unmoving person posing zero threat at the time of his homicide; 2) a likely incompetent or biased grand jury presentation by a prosecutor who promptly lost her re-election bid; 3) homicidal police officers who boast about being cleared after the prior grand jury presentation, about which "secret" grand jury presentation no one presently involved in the case should have any personal first hand knowledge; and 4) all of this arising from a simple "jay walking" encounter which was incompetently allowed to escalate into a brutal and shocking homicide. There is virtually no comparison between the facts of the Cruse and Jones cases.

The Intervenors essentially echoed the arguments of the State in opposing Petitioner's request for the transcripts.[21]

The Court's October 22, 2018 Order Denying Petition for Disclosure of Grand Jury Proceedings appears at App. Pgs. 185-190.

The Order, prepared by Intervenor's counsel and apparently entered by the trial court without close review, contains a startling statement: "...this Court will not sanction the disclosure of prior grand jury testimony of the defendant officers and permit it to be scrutinized when the District Case [sic] has found that their actions occasioning said

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[20] See cause of death in death certificate of Wayne Jones already a part of the record in this case. App. Pg. 3.

[21] The response by the Intervenors which echoed the State's response highlights the fact that the claim that intervention was necessary because the rights of intervenors were not adequately protected by the State is bogus. This is discussed in greater detail below.

testimony is not subject to civil liability." (Emphasis added) App. Pg. 190.

The fact that the putative target defendants of the first grand jury presentation apparently testified ex parte before the same grand jury which was purportedly and ostensibly investigating these same putative defendants is a new and important revelation which raises a number of new and serious questions, to-wit:

1) Why did intervenors not mention in their Response to Petition for Disclosure of Grand Jury Proceedings (App. Pg. 106-112) the fact that they gave ex parte testimony before the grand jury that was purportedly investigating them?

2) Why is the fact that Intervenors gave ex parte testimony before the grand jury mentioned for the first time in the Order prepared by Intervenors counsel and signed by the trial court?

3) Were the Intervenors and prior prosecuting attorney of Berkeley County engaging in collusion or some "white wash" or subterfuge intended to protect intervenors and obstruct Petitioner's quest for justice? Did the prior prosecuting attorney "stack the deck" in favor of intervenors?

4) Was it Intervenors' intention to both escape indictment and immunize themselves from future criminal prosecution?[22]

5) At a future civil or criminal trial, were Intervenors to give testimony of their actions

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[22] "Statements or testimony of any person made under oath as a witness before a grand jury or any other investigation authorized by law wherein the witness told the "truth" and admitted the commission of a crime cannot be admitted in evidence in a prosecution of a witness for such crime." (Emphasis added). Syl. Pt. 3, State v. Crowder, 123 SE 2d 42 (WV 1961).

See also WV Code §57-2-3: "In a criminal prosecution other than for perjury or false swearing, evidence shall not be given against the accused of any statement made by him as a witness upon legal examination."

in the light of day, rather than in secret and not subject to cross examination, would the results of such a trial be a finding of guilt or liability?

6) How could the first grand jury know the full "truth" of what took place during the homicide of Wayne Jones when the testimony given to the grand jury was one-sided, ex parte, and not subject to cross examination? Did the grand jurors realize they were dealing with a "stacked deck" during their deliberation?

7) If the Intervenors admitted to the commission of a crime before the first grand jury to somehow secure both immunity and a not true bill, shouldn't the trial court, the Supreme Court of Appeals of WV, the US District Court for the Northern District of West Virginia, and the US Court of Appeals for the Fourth Circuit either been previously made aware of this new revelation, or be made aware now, while various appeals are pending before the appellate courts?

8) Have Intervenors breached the requirement of grand jury secrecy by now revealing for the first time that they were witnesses before the same Grand Jury that investigated them? If so, have they now committed additional crimes?[23]

9) If the revelation of grand jury secrets is a crime, this is another reason to empanel a second grand jury. It is not difficult to imagine that a new, fresh grand jury given the truth of these circumstances would return indictments.

10) Have the Intervenors and the prior prosecuting attorney of Berkeley County conspired or colluded to obstruct justice, subvert the spirit of the grand jury process, or

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[23] WV Code §52-2-15(b) reads in pertinent part: "a person who knowingly violates subsection (a) of this section is guilty of a misdemeanor and, upon conviction, shall be fined not more than $1,000.00 or confined in jail not more than thirty days, or both fined and confined."

further frustrate Petitioner's civil rights by giving a biased, lop-sided, partisan grand jury presentation?

11) Had the trial court both been made aware of this late-stage development and had the benefit of in camera review of the subject transcript, this case would probably not now be on appeal. The only true, fair, open, and transparent way to resolve these issues is to 1) remand this case for in camera review of a transcript of witness testimony and the prosecuting attorney's comments before the grand jury and (2) empanel a second grand jury for an honest presentation of the facts of this case with procedural guidelines from the appellate court.

The same paragraph of the subject order (App. Pg. 190) contains another curious finding, to-wit: "this Court will not sanction the disclosure of the prior grand jury testimony of the defendant officers and permit to be scrutinized when the District Case [sic] has found their actions occasioning said testimony is not subject to civil liability." (Emphasis added).

This conclusion is problematic for several reasons. First, the subterfuge before the first grand jury elaborated upon above. Second, Petitioners are not asking, at least at this point, to "scrutinize" the testimony. Petitioners are requesting in camera review by the trial court of such testimony. Third, the US Court of Appeals for the Fourth Circuit has ruled genuine issues of material fact surround the question of whether the Intervenors used excessive force and are, possibly civilly liable. App. Pg. 93. This directly contradicts the trial court's finding. Fourth, the District Court's most recent dismissal is on appeal for the THIRD time. There has not been a resolution on the merits, ever, in any case arising from the underlying facts. Fifth, the issue of the grand jury transcript is currently before this appellate court in docket no. 18-0927. Simply put, the issue of Intervenor's potential civil and criminal liability

remains unresolved. The trial court abused its discretion insofar as it appears the trial court misunderstood both the procedural posture of this case, and the Fourth Circuit's second opinion. Rollyson and Bartles, supra.

The order erroneously addressed the instructive, but not binding Cruse factor as follows:

First, petitioner must demonstrate that the requested material is necessary to avoid injustice in another proceeding.[24]

As previously mentioned, this case has never been resolved on the merits. There are three (3) pending appeals, including the case sub judice.

The injustices sought to be avoided in these pending cases by production of grand jury witness testimony and the presenting prosecutor's argument are several:

a) denial of the day in court due the Jones family; b) denial of a full, fair, true and neutral grand jury investigation of the underlying facts; c) court rulings made in a vacuum without all available evidence; d) suppression of full disclosure; d) the blunting of public confidence in the judicial process by a lack of transparency and full disclosure; e) the development by this appellate court of standards and guidance on the issues of empaneling a second grand jury and disclosure of prior grand jury testimony in civil proceedings; f) the inability to answer the questions of a potential second jury about proceedings before the first grand jury; and g) potential unpunished torts and crimes. The failure of the trial court to address and properly consider these issues amounts to an abuse of discretion. Id.

Second, Cruse requires that Petitioner must demonstrate the need for disclosure is

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[24] There are currently two (2) pending appeals related to the case sub judice: 1) Supreme Court of Appeals Docket No. 19-0927; and 2) U.S. Ct. Of App. for the Fourth Circuit Case No. 18-2142 (on appeal from the US District Court for the Northern District of WV for the THIRD time. There has never been a final adjudication on the merits in any case arising from the operative facts.

greater than the need for continued secrecy. Intervenors have opened the door on this point in substantial ways: First, they use the prior grand jury result of not true bill as a shield to blunt Petitioner's efforts to advance Petitioner's cause. Second, Intervenors have now revealed for the first time in an order filed with the court without Petitioner nor the trial court ever having had notice and an opportunity to explore the disclosure that they, Intervenors, were themselves witnesses before the grand jury that did not indict Intervenors. This is a monumental denial of due process to Petitioner and a scam on the justice system. The apparent collusion demonstrated by Intervenors and the prior prosecuting attorney of Berkeley County has severely blunted the ability of Petitioner to have its day in court and apparently allowed potential criminals and tortfeasors to literally get away with homicide and, quite possibly, murder. All at taxpayer expense! If there were ever a need to avoid injustice and require disclosure, it is represented by the facts of this case. The trial court abused its discretion by misapplying the third Cruse factor and not considering the facts of this case.[25] Id.

The third Cruse factor requires the transcript request to be structured to cover only needed material. The trial court erroneously concluded that "the Petitioner's request is not structured in any manner whatsoever because the Petitioner seeks a transcript of the entire grand jury proceeding." (Emphasis added) App. Pg. 189. While it is true that this is the request contained in the petition, Petitioner modified this request based on the third Cruse factor. App. Pg. 144. Again, the trial court has been led down the path of error by

[25] It must be acknowledged that in large part the Intervenors have led the trial court down the path of error by revealing for the first time in an order presented to and signed by the court that they, Intervenors, testified before the first grand jury. This appellate court should give the trial court a second chance to review this disingenuous behavior after remand.

Intervenors through an inaccurate order.

Petitioner directs the reader to App. Pg. 144 where Petitioner makes clear that the request includes only the presentation and statements of the Prosecuting Attorney and all witnesses.

Petitioner requested a hearing on this issue, App. Pg. 144, which was denied by the trial court. Had a hearing been held, many of these issues could have been addressed without the necessity of an appeal.

3. IT WAS REVERSIBLE AND PREJUDICIAL ERROR, AND AN ABUSE OF DISCRETION, FOR THE TRIAL COURT TO GRANT THE MOTION TO INTERVENE.

A. Standard of Review

The standard of appellate review of a trial court's decision in a Rule 24 motion is abuse of discretion. Public Emp. Ins. Bd. V. Blue Cross, 375 SE 2d 809 (WV 1988) (Per Curium).

B. Argument

This particular issue appears to present an issue of first impression: Under Rule 24(a)(2) WV R. Civ. P., where an aggrieved citizen seeks to present a complaint to a second grand jury, is the desire of a potential criminal defendant to avoid a second grand jury presentment concerning that potential criminal defendant a sufficient "... specialized or private interest justifying intervention" in a civil proceeding which seeks to empanel a second grand jury?

In considering this issue, the reader should keep the following rhetorical questions in mind: Is it good public policy to permit potential criminal defendants (Intervenors) to intervene in an attempt to seek a second grand jury review of the potentially criminal acts of those potential defendants? If so, where does that intervention end, or should it be limited? What if a potential criminal defendant currently represented by a public defender

becomes aware of a forthcoming grand jury presentment against the defendant – should that defendant be allowed to intervene or seek prohibition at public expense?

The potential for mischief from putative criminal defendants such as Intervenors under the facts presented by this case is extraordinary.

Fortunately, guidance in resolving this issue is provided by Syl Pt. 5 of State v. M.J. Miller, 356 SE 2d 910 (WV 1985) which disapproved of such grand jury involvement by a putative criminal defendant. This case was never even mentioned by the trial court in its ruling to grant intervention in Petitioner's effort to approach a second grand jury.

This particular issue is complicated by the trial court's failure to follow its own TCR 22 Scheduling Order. By Order entered September 13, 2018, the trial court gave Petitioner, as non-moving party, ten (10) days from entry of the scheduling order to file a response to the motion to intervene. App. Pg. 59.

> Under Rule 6(a), WV R. Civ. P., In computing any period of time prescribed or allowed... by order of court,... the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. When the period of time prescribed or allowed is fewer than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

Using Rule 6(a) as a guide, Petitioner's response to the Motion to Intervene was due no later than September 27, 2018. However, only three (3) business days after entry of the September 13, 2018 Scheduling Order, on September 18, 2018, the trial court prematurely entered its Order Granting Motion to Intervene. App. Pg. 62. The trial court's action effectively frustrated Petitioner's ability to provide a meaningful response to the motion to

intervene and constitutes clear error.[26]

Turning to the trial court's September 18, 2018 order granting Motion to Intervene (App. Pg. 62-69), the court correctly cites the Rule 24(a), R.Civ.P. standard for intervention of right.[27] The applicant (Intervenor) must have an interest in the action and must be so situated that the disposition of the action may impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by exiting parties.

> To justify intervention of right under West Virginia Rule of Civil Procedure 24(a)(2), the interest claimed by the proposed intervenor must be direct and substantial. A direct interest is one of such immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment to be rendered between the original parties. A substantial interest is one that is capable of definition, protectable under some law, and specific to the intervenor. In determining the adequacy of the interest in a motion to intervene of right, court should also give due regard to the efficient conduct of the litigation. Syllabus Point 4, State ex rel. Ball v. Cummings, 208 W. Va. 393, 540 S.E. 2d 917 (1999).

The trial court goes on to erroneously conclude that Intervenors somehow have a right to be involved in a second grand jury review of the underlying circumstances. App. Pg. 67.[28] . Without citation of any supporting law, the trial court concludes intervenors have "the right to be free from criminal prosecution...." App. Pg. 64.

The trial court continues with several other erroneous conclusions without any legal or

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[26] This error by the trial court is discussed in greater detail below.

[27] Rule 24 (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action:... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impeded the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

[28] This erroneous conclusion is directly contradicted by Syl Pt. 5 of State of M.J.Miller, §365 SE 2d 910 (WV 1985): "courts have generally held that a putative Defendant and his counsel have no constitutional right to be present at any participate in grand jury proceedings." (Emphasis added). Any other conclusion could interfere with the grand jury process.

factual basis:

A. "Each Intervenor is so situated that the disposition of the action may as a practical matter impair or impede the [Intervenors] ability to protect that (unidentified) interest." (Emphasis added) App. Pg. 64.

B. "Each Intervenor should be permitted to demonstrate for this Court why Petitioner's second grand jury presentation is unwarranted and unsupported in the law before he is potentially subjected to an indictment." App. Pg. 65. (It should be noted Petitioners' several requests for hearings were denied.)

C. The Intervenors' rights aren't adequately protected by existing parties, including the Berkeley County Prosecuting Attorney.[29] App. Pg. 65.

D. The trial court's conclusion, citing Ball, supra, that Intervenors demonstrated "inadequate representation" by the Berkeley County Prosecuting Attorney as a government agency by citing the purported specialized or private interests in not being subjected to criminal charges, the potential need for appeal, and the ability to defend themselves against civil liability is made without any legal citation or support. Protecting potential culpable criminal defendants from prosecution and civil liability should be against public policy.

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[29] This conclusion by the trial court in the order prepared by Intervenors is contradicted by Intervenors' own acknowledgment that they "... concur with and join the State's argument and conclusion that the renewed Petition should be denied....." App. Pg. 107.

Perhaps the trial court's conclusion of inadequate protection of Intervenors' unidentified and unrecognized interests is further contradicted by the fact that it appears the former Berkeley County Prosecuting Attorney represented Intervenors' interests by having Intervenors' themselves testify, ex parte, not subject to cross examination, and with the help of an expert witness, before the grand jury that did not return a true bill.

It should be obvious from the known circumstances of the prior grand jury presentation that the interests of both the Prosecuting Attorney and Intervenors were aligned. If the former Prosecutor really wanted Intervenors indicted, she controlled all of the levers to make that happen. Instead she "stacked the deck" in favor of the return of a not true bill.

Whether the reasons cited constitute "specialized or private interests" demonstrating the "inadequate representation" necessary for intervention is an issue of first impression. Petitioner suggests to this court that avoiding criminal prosecution and civil liability amounts to obstruction of justice and Petitioner's interest in the open court provision of Art. III, §17 of the Constitution of WV.

Petitioner points out further that the trial court never addressed the issue of delay caused by Intervention vis a vis the right of Petitioner to advance its cause without undue delay or prejudice.

Should the appellate court conclude that State of WV v. Matthew Junior Miller, 336 SE 2d 910 (WV 1985)[30] , does not preclude Intervenors' claim of an alleged right to be involved in the empaneling of a grand jury, it should be noted that the trial court misapplied the standard for permissive intervention under Rule 24(b), WV R. Civ. P. [31]

By its own language, Rule 24(b) is permissive and rests in the court's discretion. Upon review of the order granting intervention, it is apparent the trial court has both abused its discretion and committed error in permitting intervention. App. Pg. Under Miller, supra, it is clear Intervenors have no right to be involved in the grand jury process, period. As pointed out in Miller, "... a putative defendant and his counsel have no constitutional right

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[30] "Courts have generally held that a putative defendant and his counsel have no constitutional right to be present at and participate in grand jury proceedings." Syl. Pt. 5, State v. MJ Miller, 336 SE 2d 910 (WV 1985).

[31] Rule 24(b) (B) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action:... (2) when an applicant's claim or defense and the main action have a question of law or fact in common. [...] In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

to be present at and participate in grand jury proceedings." Miller at 919.[32] It should be remembered, as pointed out by Intervenors, (App. Pg. 47) that "... the historic mission of the grand jury [is] 'to clear the innocent no less than to bring to trial those who may be guilty' ... any holding that would saddle a grand jury with mini-trials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and

expeditious administration of the criminal law." Miller at 919, citing United States v. Dionisio, 410 U.S. 1, 16-17, 93 S.Ct. 764, 773, 35 L.Ed.2d 61, 81 (1973).

In light of the guidance provided by Miller, supra, it is clear that the trial court's granting of the Motion to Intervene has generated the evil sought to be avoided by Miller: delay, obstruction of justice and prejudice to the rights of Petitioner. As Intervenors have pointed out: Petitioners have been waiting nearly six (6) years for their day in court. The entirety of this delay has been caused by Intervenors' frustration of Rule 1, WV R. Civ. P., "...the just, speedy, and inexpensive determination of every action."

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

A. Standard of review

Application of Rule 6 is reviewed under an abuse of discretion standard. State ex rel. Ward v. Hill, 489 SE 2d 24 (WV 1997).

B. Argument

Where a trial court reduces time requirements to the extent that the party entitled to notice is deprived of opportunity to prepare, such action constitutes a denial of due process

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[32] Petitioner's efforts to empanel a second grand jury, as permitted by statute and with the concession of the State (except for the details of such empaneling), are proceedings concerning a grand jury.

and is in excess of jurisdiction. Cremans v. Goad, 210 SE 2d 169 (WV 1974); Ward, supra; Truman v. Auxier, 647 SE 2d 794 (WV 2007) (Per curium).

As previously mentioned, upon the filing of the Motion to Intervene on September 13, 2018, the trial court issued a TCR 22 Scheduling Order granting Petitioner, as non-moving party, ten (10) days respond to the Motion to Intervene. App. Pg. 59. Under Rule 6, WV R. Civ. P., Petitioner had ten (10) business days, or until September 27, 2018, to respond to the motion.[33] Instead, on September 18, 2018, a scant three (3) business days after entry of the scheduling order, the trial court granted the Motion to Intervene. Petitioner was deprived of an opportunity to substantively respond in writing to the motion to intervene. As a result of the trial court's premature ruling, the trial court entered the Order Granting Intervention prepared by Intervenors. As pointed out above, the order contains numerous errors and is unsupported by the law and the facts of this case. This was pointed out in Petitioner's Rule 59(e) Motion to Alter the September 18, 2018 Granting Motion to Intervene. App. Pg. 150-152. Most importantly, the trial court denied itself the benefit of guidance from Miller, supra, which suggests the Motion to Intervene should have been denied to avoid the evil represented by Intervenors' attempts to obstruct justice by generating delay and expense.

5. Petitioner's constitutional right of access to the court guaranteed by Art. III, §17 of the Constitution of WV was denied by the circuit court's refusal of Petitioner's requests for hearings.

A. Standard of review.

Questions of law are subject to de novo review. Marthena v. Haines, 633 SE 2d 771 (WV

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[33] Rule 6(a), WV R Civ.P., reads in pertinent part, "In computing any period of time prescribed or allowed... by order of court, — the day of the act, event or default from which the designated period of time begins to run shall not be included .... when the period of time prescribed or allowed is fewer than eleven (11) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation."

2006).

B. Argument

Art. III §17 of the Constitution of WV reads as follows:

> § 17. Courts Open to All - Justice Administered Speedily
> 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.

On at least four (4) occasions, Petitioner requested hearings before the trial court: 1) in its Rebuttal in Opposition to State's Response to Petition/Application to Empanel Special Grand Jury (App. Pg. 72); 2) in its formal Motion for Hearing on Petition/Application to Empanel Special Grand Jury. App. Pg. 75 ; 3) in its Rebuttal to State's Response to Petition for Disclosure of Grand Jury Proceedings. App. Pg. 144; and 4) in its Rebuttal to Intervenors' Response to Petition for Disclosure of Grand Jury Proceedings. App. Pg. 147.

The actions of the trial court in refusing Petitioner's requests for a hearing have resulted in denial of Petitioner's access to two (2) court bodies: 1) the Grand Jury (as discussed above); and 2) the trial court itself.

The trial court has ruled in a vacuum without all available information. The availability of additional information that would assist both the trial and appellate courts would have been highlighted at a hearing. Evidence could have been produced. A record could have been made. Tough questions asked and answered. A protective order concerning the requested grand jury transcripts could have been crafted. The details of a second grand jury presentation developed.

Without intervention from the appellate court, which intervention could provide guidelines upon remand, Petitioners have been denied meaningful access to the court in

violation of Art. III, §17 of the Constitution of West Virginia.

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

There are several pieces of information that should be considered by a second grand jury. In no particular order, the items are:

1) The video of the moments before homicide was perpetrated on Jones. As mentioned, the video depicts Jones prone on the ground, unmoving, with no visible weapon nor posing a threat, then being subjected to excessive force by twenty-two (22) gunshots, half of which were in the back or buttocks. The video is the subject of a pending motion to supplement the appendix.

2) Testimony of witnesses to be proposed by Petitioners.

3) The circumstances of the first grand jury, as elaborated upon above, which appear to show a "stacked deck" in favor of the return of a no true bill of indictment.

4) additional evidence likely to be revealed by review of the requested portion of the transcript of the first grand jury proceeding.

5) whether the former prosecuting attorney that conducted the first grand jury presentation had a conflict of interest insofar as she had an ongoing professional relationship requiring cooperation with the putative defendants she purportedly sought to indict. And further, whether the better practice would have been for the presenting former prosecuting attorney to recuse herself from this matter to avoid the appearance of impropriety.

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

It appears the presenting former prosecuting attorney had a conflict of interest in handling the first grand jury presentation. Rule 1.7(a), WV R Professional Conduct, reads as follows:

> "....a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if. . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . .a third person or by a personal interest of the lawyer."

Where the public interest is involved, an attorney may not represent conflicting interests, even with the consent of all concerned. State ex rel. Morgan Stanley & Co v. Mac Queen, 416 SE2d 55(WV1992)

As representative of the State's interest in criminal prosecutions reliant on the putative defendants before the first grand jury, the former presenting prosecuting attorney had a conflict of interest. She had ongoing criminal cases with each putative defendant. She needed each putative defendant to successfully prosecute those other pending criminal matters. To saddle those putative defendants with criminal changes would cripple 1) the ongoing criminal maters, 2) the Martinsburg Police Department, and 3) public perception of law enforcement. Simply put, neither the former prosecuting attorney nor the Martinsburg Police Department can afford the grand jury returning indictments against "their" officers.

The former prosecuting attorney held all the levers controlling the results of the first grand jury presentation. She acted in a manner designed to direct the outcome of the first grand jury in a non-adversarial environment. She clearly had a conflict of interest. She was unwilling to follow the path of truth, wherever that path led. The better practice would have been to recuse herself and let a special prosecutor handle the matter to avoid the appearance

of impropriety. Or, in the alternative, request an ethics opinion as to the propriety of presenting a case to the grand jury concerning what essentially amounts to professional colleagues.

Conclusion

Petitioner prays this Honorable Court reverse the Order of the Circuit Court which denied the Petition/Application to Empanel a Special Grand Jury, denied Petitioner's Request for Grand Jury, and granted the Motion to Intervene. Petitioner prays the Court remand this case for further proceedings.

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

Paul Taylor
2/22/19

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

ESTATE OF WAYNE A. JONES
PETITIONER,

Vs. **Case No. 18-1045**

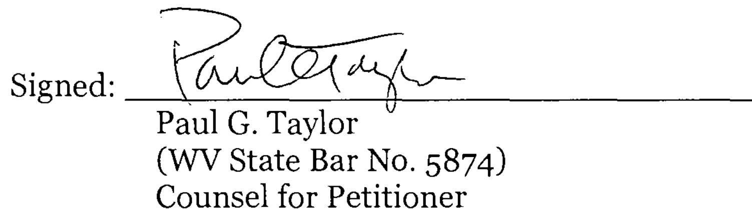
BERKELEY COUNTY PROSECUTING ATTORNEY, et al.
RESPONDENT.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 2019 a true and accurate copy of the foregoing PETITIONER'S BRIEF was deposited in the United States first class mail, postage pre-paid envelope addressed as follows:

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

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

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