IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

Docket No. 22-0111

NORM LAUNI, II,
Plaintiff, Below, Petitioner

Vs.)

19-C-15
(Mineral County)

THE HAMPSHIRE COUNTY PROSECUTING ATTORNEY'S OFFICE, and COUNTY OF HAMPSHIRE, WEST VIRGINIA, et al.
Defendants Below, Respondents.

PETITIONER'S BRIEF

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IV. STATEMENT OF THE CASE

This case concerns the prosecution of a decorated police officer in Mineral County West Virginia, Petitioner Sergeant Norman Launi, on charges that everyone involved knew to be false in an attempt to drive said Petitioner from employment.

From the date of his election in 2013 until his appointment to his current position in Morgan County, West Virginia in September of 2017, Respondent Dan James was the Prosecutor in Hampshire County, West Virginia. *See Complaint*, Appendix Record ("Appendix Record pg. 4) ¶ 3. During this time, Petitioner was a Detective with the Hampshire County Sheriff's Department, and worked regularly with Respondent James. The animus with which Respondent James treated Petitioner began in November of 2013, when a gathering of the Hampshire County law enforcement community was held on a property leased by members of the Hampshire County law enforcement, including the Respondent James, who was present at the gathering. *Id.* at ¶ 4. After consuming some alcohol, several members of the Hampshire County Law Enforcement Community, as a practical joke, placed a bear carcass - a subject of some amused discussion that evening - in the back of Respondent James' pickup truck prior to

his departure. *Id.* at ¶ 4. Upon discovering the carcass, Respondent James became angry with the members of the HCSD and with Petitioner most of all. *Id.* at ¶ 7.

Tensions between the two were exacerbated after the passing of Captain John Eckerson of the HCSD, Petitioner's partner. *Id.* at ¶ 11. Captain Eckerson's death is believed to have occurred as the result of contact with an illicit substance during a field test. *Id.* at ¶11. Shortly after Captain Eckerson's passing, an examination of his phone was performed by the West Virginia State Police. *Id.* at ¶ 13. Respondent James obtained and reviewed this data. *Id.* at ¶ 13. Upon review of the data, Respondent James saw mocking and derisive texts between Captain Eckerson and numerous members of the HCSD. *Id.* at ¶ 14. On August 18, 2017, Respondent James made statements to members of the HCSD accusing the Petitioner of playing a role in the death of Captain John Eckerson. *Id.* at ¶ 15. These statements were made in spite of the fact that Respondent James knew the Petitioner to have been out of town on scheduled leave at the time of Captain Eckerson's demise. *Id.* at ¶ 15.

In September of 2016, Respondent James contacted Assistant U.S. Attorney Paul Camiletti, the Federal Bureau of Investigations, and the Drug Enforcement Administration, requesting they investigate the circumstances surrounding Captain Eckerson's death. *Id.* at ¶ 16. Despite Respondent James' requests, all agencies declined the invitation to investigate. *Id.* at ¶ 17. At around the same time - between August 17, and September 30, 2016 - Respondent James contacted the West Virginia State Police ("WVSP") and requested assistance investigating the events surrounding Captain Eckerson's death. *Id.* at ¶ 18. The WVSP assigned Respondent Cpl. Scott Nazelrod to the case. *Id.* at ¶ 19.

In October of 2016, numerous packages believed to be carrying narcotics, bound for the WVSP Crime Lab for analysis, went missing from the postal center located in Charleston, West

Virginia. *Id.* at ¶ 20. It was believed the missing packages were stolen in transit. *Id.* at ¶ 20. After an investigation conducted by the USPS, it was discovered that an employee of the USPS or another postal carrier was responsible. *Id.* at ¶ 21. Despite USPS's finding, Respondent James continued to accuse the Petitioner and other members of the HCSD of the thefts. *Id.* at ¶ 22.

On or about January 25, 2017, Respondent James advised Corporal Nazelrod that he was aware of possible recordings of alleged domestic violence between the Petitioner and his former paramour, Penny Hartman. *Id.* at ¶ 28. Upon learning that the Petitioner had pressed charges against Ms. Hartman for phone harassment, Respondent James, either personally or through a subordinates, opportunistically filed a petition to revoke Ms. Harman's bond on a prior charge for driving under the influence, which she had acquired in late December of 2016. *Id.* ¶ 32. It was through this bond revocation that Respondent James leveraged Penny Hartman's freedom in order to force her to pursue charges against the Petitioner for domestic violence. *Id.* at ¶ 33.

In addition to placing pressure on Penny Hartman, Respondent James also continued to make public statements against the Petitioner to other members of the Hampshire County Law Enforcement Community regarding the alleged statements provided by Ms. Hartman. *Id.* at ¶ 34. Demonstrating further animus and distrust of the HCSD, in February of 2017, Respondent James then stated that he would refuse to prosecute any drug cases brought by the HCSD until a drug testing protocol was in place for officers involved in drug interdiction. *Id.* at ¶ 36. This assertion was made by Respondent James with the knowledge that such a protocol was already in existence. *Id.* at ¶ 36. Also on or about February 4, 2017, Respondent James directed Corporal Nazelrod to interview Penny Hartman, despite the fact that he was on special assignment to Hampshire County to investigate the death of Captain Eckerson and Ms. Hartman's allegations had nothing at all to do with Cpt. Eckerson. *Id.* at ¶ 35.

Upon Ms. Hartman's release, on or about February 8, 2017 and pursuant to a plea agreement, Respondent Nazelrod instructed Ms. Hartman to file for a domestic violence protective order. *Id.* at ¶¶ 37, 40. The most recent allegation of domestic violence contained in the petition occurred more than five (5) months prior to the entry of the petition. *Id.* at ¶ 41. As her primary reason for requesting the protective order, Ms. Hartman stated that the investigation of the domestic violence allegation made her fear for her safety. *Id.* at ¶ 42. Fearing that Ms. Hartman's petition would be denied, Respondent Nazelrod contacted Magistrate John Rohbaugh at home and personally requested that the protective order issue. *Id.* at ¶ 44. As a result of the entry of the protective order, the Petitioner's firearms were relinquished and he was unable to work as a law enforcement officer. *Id.* at ¶ 45.

On or about February 9, 2017, Petitioner's attorney, Jonathan Brill, who he had retained to represent him in the proceedings surrounding the protective order, called Respondent James and attempted to speak with him about the recordings he possessed. *Id.* at ¶ 47. During the brief conversation with Respondent James, it was apparent that he was not going to provide Mr. Brill with a copy of the recordings. *Id.* at ¶ 47. Before ending the conversation Respondent James, again falsely accused Petitioner of criminal involvement in the death of Captain Eckerson. *Ibid.*

On February 10, 2017, Petitioner met with Respondent Nazelrod, in the Moorefield State Police Barracks for the purposes of giving a statement regarding allegations made by Penny Hartman. *Id.* at ¶ 48. The interview was divided into two (2) separate and distinct parts, part 1 of which lasted one (1) hour. *Id.* at ¶48. In part 1, Respondent Nazelrod indicated that he was originally sent to Hampshire County to investigate the circumstances surrounding Captain Eckerson's death and had been instructed by Respondent James to investigate Penny Hartman's allegations. *Id.* at ¶ 48.

As the interview progressed, Respondent Nazelrod began questioning the Petitioner about allegations made by Ms. Hartman of Domestic Abuse. *Id.* ¶ 48(b). Respondent Nazelrod first inquired of the circumstances alleged by Ms. Hartman to have occurred in May of 2016, wherein Ms. Hartman sustained bruises and broken ribs. *Id.* at ¶ 48(c). Petitioner explained that they had come from a physical confrontation with her daughter, Robin, and that he was in no way responsible. *Id.* at ¶ 48(c)(i). He then cited three (3) separate instances of physical altercations between Robin and Ms. Hartman. *Id* at ¶ 48(c)(ii). Petitioner even provided an alibi, stating that he was not in town when the altercation occurred. *Id* at ¶ 48(c)(iii).

Respondent Nazelrod, then inquired as the allegation arising in July 2016. *Id.* at ¶48 (d). Again, the Petitioner categorically denied striking Ms. Hartman or inflicting any physical violence upon her. *Id* at i. Petitioner then demonstrated that Ms. Hartman was verifiably lying because there were no pictures sent, as she had claimed, from her phone to the Sherriff of Hampshire County, and Cpl. Nazelrod admitted his knowledge of such. *Id.* at ¶ 48(e)(ii).

Respondent Nazelrod also asked t he Petitioner about the events surrounding Ms. Hartmans allegations to have taken place in September of 2016. *Id.* at ¶48(e). Again, the Petitioner provided numerous witnesses that could verify that the Petitioner had not harmed Ms. Hartman, witnesses that Respondent Nazelrod never interviewed. *Id.* at ¶ 48(e)(ii).

In addition to his denials and alibis, the Petitioner offered Cpl. Nazelrod numerous other examples of conduct on the part of Ms. Hartman that would lead a reasonable investigator to view her allegations with skepticism. *Id.* at ¶ 48(g). He even showed Cpl. Nazelrod several instances where Ms. Hartman had texted him, threatening the Petitioner with false allegations if he did not resume a romantic relationship with her. *Id.* at ¶ 48(k).

Part 2 of the interview lasting approximately thirty (30) minutes. *Id.* at ¶ 49. Nazelrod began by, again, confirming that the Respondent James initiated the investigation into the Petitioner. *Id.* at ¶ 49(a). He then renewed his line of questioning by asking Petitioner about his allegations of telephone harassment against Ms. Hartman. *Id* at ¶ 49 (b). In response, the Petitioner provided Respondent Nazelrod with numerous text messages from Ms. Hartman requesting that he, again, resume his relationship with her. *Id.* at (c). Petitioner also again provided numerous examples of Ms. Hartman engaging in harassing behavior and threatening him with false allegations. *Id.* at ¶ 49(c),(d),(e),(h).

After hearing these examples of Ms. Hartman's outrageous conduct, Respondent Nazelrod began, again, addressing the nature of his, and Respondent James' involvement in the investigation. *Id.* at ¶ 49(k)i. In doing so, Respondent Nazelrod indicated that Respondent James had spoken with him regarding certain recordings he had been made aware of by Ms. Hartman allegedly showing instances of domestic violence. *Id.* at ii.

In late March of 2017, Respondent James, began actively interviewing witnesses in the investigation of the Petitioner. *Id.* at ¶ 51. At least one of these witnesses was subpoenaed for the Petitioner's criminal trial by the State. *Id.* at ¶ 53.

As the investigation continued, Respondent James' animus toward the Petitioner increased. On or about March 2, 2017, Respondent James discovered that his picture was located on the same bulletin board as targets of ongoing criminal investigations. *Id.* at ¶ 54. Though this was done as a humorous take on Respondent James' treatment of local law enforcement, Respondent James lost his temper and spouted obscenities. *Id.* at ¶ 55.

On April 6, 2017, the Petitioner contacted Respondent Nazelrod and inquired as to the status of the Hartman investigation. *Id.* at ¶ 56. In response, Respondent Nazelrod stated that he

would be filing a complaint and that Ms. Hartman wanted to press charges. *Id.* at ¶ 56. Respondent Nazelrod, in direct contravention of his previous statements at the Moorefield Barracks regarding the Petitioner's own grounds for pressing harassment charges, refused to take any complaints from the Petitioner related to incidents of telephone harassment. *Id.* at ¶ 56.

In Respondent Nazelrod's complaint, the Petitioner was charged with three separate instance of Domestic Battery and one count of domestic assault. *Id.* at ¶ 58. In his narrative Respondent Nazelrod alleges that he was on assignment to investigate "non professional conduct of specific members of the Hamphire County Sherriff's Department." *Id.* at ¶ 59(a). With no corroborating evidence and no discussion of any of the witnesses mentioned by the Petitioner, Respondent Nazelrod requested a warrant for the Petitioner. *Id.* at ¶ 59(e)(i-v). Respondent Nazelrod made no mention of the Petitioner's statement or any of the information obtained during that interview. *Ibid.* It was further revealed that much of the evidence claimed to exist in the videos provided by Ms. Hartman was not present. *Id.* at ¶ 59(f). The Narrative in support of the complaint described the alleged incidents without making mention of the witnesses referenced by the Petitioner in his interview with Respondent Nazelrod. *Id.* at ¶ 60.

It is reasonably believed that Respondent James drafted the Narrative in support of Respondent Nazelrod's complaint. *Id.* at ¶ 61. This is due to the fact that it does not follow the standard structure of complaint writing and it appears to have been drafted by an individual with legal training. *Id.*

After being arraigned on the charges set forth in Respondent Nazelrod's complaint, the Petitioner was again stripped of his weapons and unable to work. *Id.* at ¶ 62. After the Petitioner's arraignment, Respondent James, during a conversation with Amber Talley, a director

of a local non-profit, stated humorously that he would never have to work with "that son of a bitch again." *Id.* at ¶ 63.

As the case proceeded to trial, Penny Hartman made numerous calls contacting the Petitioner's trial counsel as well as Special Prosecutor Ours requesting the charges be dismissed. *Id.* at ¶ 72. Before trial, subpoenas were served on Ms. Hartman as well as other witnesses. *Id.* at ¶ 75. Ms. Hartman was served by Respondent Nazelrod and Corporal Spence of the West Virginia State Police, though neither of them were stationed in Mineral County. *Id.* at ¶ 76. After the Petitioner's trial, Ms. Hartman communicated to the Petitioner that they had come to her home to intimidate her into testifying against the Petitioner. *Id.* at ¶ 77.

In June of 2017, Respondent Ours requested that Penny Hartman be deposed – a highly unusual act in criminal cases in the State of West Virginia. ¶78. The stated purpose of this deposition was to document that Ms. Hartman did not want to pursue criminal charges so that, should she testify as such, they could dismiss the case. *Id.* at ¶79. At the deposition, taken on June 12, 2017, Ms. Hartman indicated that the information relayed by Respondent Nazelrod in his complaint was not as she reported it and that she wanted the charges dismissed. *Id.* at ¶ 83(g). After the Deposition, Respondent Ours went back on his previous statement to defense counsel that he would dismiss the case, and instead proceeded to trial. *Id.* at ¶ 84.

On or about June 12, 2017, Respondent James met with Jim King, a reporter with the Hampshire County Review, a local newspaper. *Id.* at ¶ 86. Two days later, a story about the Petitioner's pending case was printed with a picture of the Petitioner on the front page. *Id.* at ¶ 87. Said article contained information that only someone in possession of the State's discovery in the Petitioner's criminal case could have known. *Id.* at ¶ 88. The Complaint asserts that

Respondent James relayed this case-specific information with the intent to harass and besmirch the reputation of the Petitioner. ¶89.

At a September 2017 pre-trial hearing held before the presiding Magistrate Gilbronson, it was again brought up that Penny Hartman, the alleged victim and key witness for the State, wanted the case dropped. *Id.* at ¶ 90. The Magistrate indicated that if the State did not object and Ms. Hartman wanted the case dismissed, he would dismiss it. *Id.* Respondent Ours, speaking on behalf of the State, objected and the case was set for trial on October 24 and 27, of 2017.

Also, in September of 2017, Respondent James continued to demonstrate hostility towards the Petitioner when he confronted Amber Talley regarding the recordings that she had previously made of him. *Id.* at ¶ 93. This confrontation took place at an MDIT meeting in front of other members of the community. *Ibid.* Petitioner avers that Respondent James only had knowledge of this recording because he had access to the Respondent's reciprocal discovery and was actively participating in the Petitioner's prosecution. *Id.* at ¶ 94.

During final preparations for trial with his Defense Counsel, the Petitioner reviewed the transcript and the recording that had been provided in discovery by the State. *Id.* at ¶ 101. Upon review of the information provided, it was clear that only a portion of the recording had been provided. *Id.* More specifically, the portion where Respondent Nazelrod indicates Respondent James' involvement were missing. *Id.* However, albeit unknown to Respondent Nazelrod, the Petitioner had made his own recording of the February 10th conversation and preserved the missing thirty-six (36) minutes, thereby catching Respondents in an attempt to falsify evidence. *Id.* at ¶¶ 102 -103.

On the first day of trial, Petitioner, through his counsel, informed the Court that Respondent Ours had failed to comply with discovery by suppressing exculpatory evidence - the

missing thirty-six (36) minutes of the February 10, 2017, statement. *Id.* at ¶ 104. In response to this, Respondent Ours inexplicably moved to hold the Petitioner in contempt for not turning over the un-tampered with footage which, but for the tampering, should have already been in the State's Possession. *Id.* at ¶ 105. After ruling that the parties would proceed to trial, the presiding Magistrate reprimanded Respondent Nazelrod. *Id.* at ¶ 106. It is the Petitioner's reasonable belief, based on the facts available that Respondent James directed Respondent Nazelrod to suppress said evidence. *Id.* at ¶ 107.

During the State's case in chief, all of the witnesses called, with the exception of Respondent Nazelrod, stated that Penny Hartman was not credible. *Id.* at ¶ 111. During cross examination, Ms. Hartman openly denied that the Petitioner had ever engaged in domestic violence against her. *Id.* at ¶ 113. After the taking of all testimony and closing arguments the Petitioner was acquitted in approximately twenty (20) minutes. *Id.* at ¶ 114.

On or about October 29, 2018, Petitioner filed a Complaint in the Circuit Court of Morgan County – subsequently transferred to Mineral County - naming each of the Respondents as Defendants and alleging causes of action for Malicious Prosecution, Abuse of Process, Civil and Civil Conspiracy against the Respondents . *Id.* at ¶¶ 116-149. Plaintiff's also brought an Intentional Infliction of Emotional Distress claim against Defendant James. *Id.* at ¶¶ 130-135. In response, all named Defendants, including the Respondents, filed motions to dismiss all claims. Thereafter, Mineral County Circuit Court Judge James Courier, issuing three separate opinions for each of the Respondents, dismissed all causes of action against all parties except Petitioner's claim for Intentional Infliction of Emotional Distress against Respondent James. Petitioner then moved for certification under Rule 54(b) to appeal the dismissed causes of action prior to

adjudication of the remaining IIED claim against Respondent James, which was granted on January 14, 2022 (AR pg. 280). This appeal follows.

V. SUMMARY OF ARGUMENT

The Circuit Court erred in dismissing Petitioner's claims of malicious prosecution against Respondents James, Ours, and Nazelrod. Specifically, the Court erred in finding that absolute immunity applied to James and Ours because the actions complained of by Petitioner were investigative or administrative, not advocatory in nature. The Court further erred in finding that there was probable cause to arrest and prosecute based on the findings of the Mineral County Magistrate because such findings were based on fraudulent, falsified, or corrupted evidence.

The Circuit Court further erred in dismissing Petitioner's abuse of process claims against Defendant Nazelrod because the allegations in the Complaint against Respondent Nazelrod plainly amount to an assertion that Respondent Nazelrod misused and misapplied lawful process to accomplish a purpose not intended by that process.

Finally, the Circuit Court erred in dismissing Petitioner's claims of Civil Conspiracy because the basis for the dismissal of these claims was the dismissal of the predicate malicious prosecution and abuse of process claims, which should not have dismissed. It was further error to dismiss this claim because malicious conspiracy and abuse of process were not the only unlawful actions complained of by Petitioner against the named Respondents.

VI. ARGUMENT

1. STANDARD OF REVIEW

Because the appealed matters were dismissed at the 12(b)(6) stage – before the taking of evidence and with assuming Petitioners allegations to be true - and pertain exclusively to

questions of law, all rulings are subject to de novo review. See Questions of **law** are **subject** to a **de novo review**." Syl. Pt. 2, Walker v. West Virginia Ethics Comm'n, 201 W.Va. 108, 492 S.E.2d 167 (1997).

To grant a motion to dismiss pursuant to Rule 12(b)6 WVRCP, the movant must meet a high burden. In order to succeed on such a motion, the movant must clearly demonstrate that the plaintiff has failed to state allegations in the complaint arising to a claim. *See Sedlock v. Moyle,* 668 S.E.2d 176 at Syl. Pt. 2. (W.Va. 2008). As such the Court should not grant a motion to dismiss pursuant to 12(b)6 unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief (citation omitted)." Syl. Pt. 3, *Chapman v. Kane Transfer Co., Inc.*, 236 S.E.2d 207 (W.Va. 1977).

In evaluating the merits of a motion to dismiss, the court must also view all allegations in the complaint as true and view them in the light most favorable to the plaintiff. *See John W. Lodge Distributing Co., Inc. v. Texaco Inc.*, 245 S.E.2d 157 at 158-159 (W.Va. 1978) *also Forshey v Jackson,* 671 S.E.2d 748, 754. That being said the policy of this rule as adopted by the West Virginia Supreme Court of Appeals is to "to decide cases upon their merits, and if the complaint states a claim upon which relief can be granted under any legal theory a motion under Rule 12(b)(6) must be denied." *John W. Lodge Distrib. Co.*, at 159 (Quoting *United States Fidelity & Guaranty Co. v. Eades*, 144 S.E.2d 703 (W.Va. 1965). It is not for the court to simply dismiss a claim because it has doubts as to whether the plaintiff is likely to prevail in court. *Id.*

I. THE CIRCUIT COURT ERRED BY DISMISSING PETITIONER'S CLAIMS FOR MALICIOUS PROSECUTION AGAINST RESPONDENTS JAMES, NAZELROD, AND OURS.

As to Petitioner's claims for malicious prosecution, each of the named Respondents argued that absolute prosecutorial and/or qualified immunity applied to their actions in the case. See Defendants James, Nazelrod, and Ours separately filed Motions to Dismiss (AR pg. 44, page 54, page 68), pp. 7,4, and 4 respectively. The Court found that absolute immunity barred Petitioner's claims against Ours and James. *See Order on Motion to Dismiss of Defendant Dan James* (AR pg. 252), at ¶¶ 4-8; *Order on Motion to Dismiss of Defendant John Ours* (AR pg. 263). ¶¶ 10-12.

The West Virginia Supreme Court has spoken directly on the issue of when absolute immunity attaches to a prosecutor's actions:

> *Prosecutors enjoy absolute immunity from civil liability for prosecutorial functions such as, initiating and pursuing a criminal prosecution, presenting a case at trial, and other conduct that is intricately associated with the judicial process.... It has been said that absolute prosecutorial immunity cannot be defeated by showing that the prosecutor acted wrongfully or even maliciously, or because the criminal defendant ultimately prevailed on appeal or in a habeas corpus proceeding. The absolute immunity afforded to prosecutors attaches to the functions they perform, and not merely to the office. Therefore, it has been recognized that a prosecutor is entitled only to qualified immunity when performing actions in an investigatory or administrative capacity.*

Corra v. Conley, No. 13-0430, 2013 WL 6153013, at *3 (W. Va. Nov. 22, 2013) (*quoting Mooney v. Frazier*, 693 S.E.2d 333, 345 n. 12 (2010*), (quoting Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., Litigation Handbook on West Virginia Rules of Civil Procedure, § 8(c), at 213 (3d ed.2008)(emphasis added).* While it is recognized that prosecutors "acting in an investigatory or administrative" capacity are not afforded absolute immunity, there is a relative lack of jurisprudence at the state level addressing what constitutes "investigative" actions. *Id.*

Federal Courts have been more detailed in describing actions that may be of an investigatory or administrative nature giving rise to only qualified immunity using the

"functional approach." *See Van de Kamp v. Goldstein*, 555 U.S. 335 (2009). The United States Supreme Court has spoken numerous times regarding what actions, by their function, might be considered investigative in nature. In *Burns v. Reed*, 500 U.S. 478, 494 (1991), the U.S. Supreme Court noted that "[a]bsolute immunity is designed to free the judicial process from the harassment and intimidation associated with litigation...That concern therefore justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct." The U.S. Supreme Court elaborated further in *Buckley v. Fizimmons*, writing that:

> *There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other."*

509 U.S. 259, 273–74, (1993) (quoting *Hampton v. Chicago,* 484 F.2d 602, 608 (CA7 1973)). In other cases since *Buckley,* the Supreme Court has gone further in illustrating examples of what might constitute actions not intimately associated with the prosecutor's role as an advocate and hence entitled to qualified immunity:

> *In the years since Imbler, we have held that absolute immunity applies when a prosecutor prepares to initiate a judicial proceeding, Burns, supra, at 492, 111 S.Ct. 1934, or appears in court to present evidence in support of a search warrant application, Kalina, supra, at 126, 118 S.Ct. 502. We have held that absolute immunity does not apply when a prosecutor gives advice to police during a criminal investigation, see Burns, supra, at 496, 111 S.Ct. 1934, when the prosecutor makes statements to the press, Buckley v. Fitzsimmons, 509 U.S. 259, 277, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993), or when a prosecutor acts as a complaining witness in support of a warrant application, Kalina, supra, at 132, 118 S.Ct. 502 (SCALIA, J., concurring).*

Van de Kamp v. Goldstein, 555 U.S. 335, 343 (2009) (emphasis added).

Courts within the Fourth Circuit have taken a similar view to the Supreme Court in other cases. One such example can be found in *Rhodes v. Smithers.* In *Smithers*, the Court was asked to rule on a motion for summary judgement, not a motion to dismiss for failure to state a claim

pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In granting the motion for summary Judgment, the Court conceded that the prosecutor, as a party to the case, was entitled to only qualified immunity for his actions prior to obtaining probable cause. The Court took a similar approach to analyzing actions as to whether they were investigative in nature:

> *"investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity." Buckley, 509 U.S. at 273, 113 S.Ct. at 2615 (citing Burns v. Reed, 500 U.S. 478, 491, 111 S.Ct. 1934, 1941–42, 114 L.Ed.2d 547 (1991)). Rather, the prosecutor's role as an advocate, and the attachment of absolute immunity, does not commence until the prosecutor has probable cause for an arrest. Buckley, 509 U.S. at 273–75, 113 S.Ct. at 2616. Consequently, when prosecutors advise police on how to conduct an investigation, when prosecutors undertake themselves to perform investigatory work prior to a determination that there is probable cause for an arrest, and when prosecutors fabricate false evidence during an investigation preliminary to a probable cause determination, they are not afforded the protection of absolute immunity.[4] Id. at 269–77, 113 S.Ct. at 2614–17. The prosecutor's protection of absolute immunity ceases at the conclusion of his advocacy role in presenting the state's case during trial and post-trial proceedings. Allen v. Lowder, 875 F.2d 82, 85–86 (4th Cir.1989); accord Houston v. Partee, 978 F.2d 362 (7th Cir.1992), cert. denied, 507 U.S. 1005, 113 S.Ct. 1647, 123 L.Ed.2d 269 (1993).*

Rhodes v. Smithers, 939 F. Supp. 1256, 1266 (S.D.W. Va. 1995), aff'd, 91 F.3d 132 (4th Cir. 1996) (emphasis added).

A. The Actions Complained of against Respondents James and Ours do not entitle them to Absolute Immunity.

Taking all allegations in the Complaint as true and viewing them in the light most favorable to the Plaintiff, Defendant James did not undertake any "conduct that is intricately associated with the judicial process." *See Conley, supra,* at 3. This is most obviously because Defendant James, being the prosecutor of Hampshire, and not Mineral, County, had no authority to engage in prosecutorial conduct associated with the Mineral County Judicial process. Instead, Defendant James took various behind the scenes steps – none of them in keeping with his legitimate prosecutorial role with the Hampshire County, to procure a criminal prosecution, for malicious reasons, of a police officer in another jurisdiction that he did not like in order to remove said officer from employment with Hampshire County. *See Complaint* (AR pg. 4) at ¶¶ 49 and 61. In

doing so, Respondent James acted in a clearly investigatory and administrative capacity. He interviewed witnesses associated with the case and directed law enforcement in the course of their investigation. *Id.* at ¶¶ 28, 51, 53. He spoke with the press regarding said criminal prosecution. *Id.* at ¶¶ 86-89. Plaintiff further complains that Respondent James falsified evidence prior to a probable cause determination in the form of the edited recording and in the form of the ghost written complaint which intentionally omitted the clear and obvious exculpatory information provided. *Id.* at ¶ 61. These actions cannot be said to be prosecutorial in nature, even if they were being done as part of an investigation for which Defendant James had prosecutorial jurisdiction. Quite the contrary, they instead plainly fall into the category of "investigatory work prior to a determination of probable cause," as prohibited in *Smithers*, supra. Moreover, once you also consider the fact that Defendant James had no legitimate role in this Mineral County investigation and prosecution to begin with, it is beyond clear that he is not entitled to the protective cloak of absolute immunity.

Despite all this, the Circuit Court, in granting Respondent's motion to dismiss Petitioner's malicious prosecution claims against Defendant James, found that absolute prosecutorial immunity applied to Defendant James actions. *See Order on Motion to Dismiss of Defendant Dan James* (AR pg. 252), at ¶¶ 4-8. Specifically, the Court found that "directing law enforcement officer to conduct an investigation of possible criminal activity in order to pursue a prosecution, if warranted by the evidence gathered, clearly falls under these prosecutorial functions." *Id.* at ¶ 7. The Circuit Court cites to no authority for this supposition. In fact, the authority that was cited by the Circuit Court at paragraph 6 for the enumeration of activities warranting absolute immunity, *Broadnax v. Pugh*, does not include directing law enforcement

officers to conduct investigations.[1] Quite the opposite, this appears to be a textbook example of an investigatory action which would strip from Respondent James the protections of qualified immunity because it would have come before Respondents even claim that probable cause to arrest existed (not that it ever actually existed, as discussed below), and would further amount to, at best, prosecutorial advise on how and what to investigate, which is exactly the sort of behavior declared to be investigatory in *Goldstein* and *Smithers*, *supra*.

Similarly, the Circuit Court also erroneously stated as to Defendant James that, "even if it could be proven that Defendant James continued to participate in the Plaintiff's prosecution after the case had been filed in Mineral County, the decision of whether an item of evidence is disclosable under *Brady v. Maryland*... is a prosecutorial function which is afforded absolute immunity." *Id.* at ¶ 8. This same argument was also employed by the Court in conferring on Respondent Ours absolute immunity regarding his alleged role in the tampered with evidence. *See Order on Motion to Dismiss of Defendant John Ours* (AR pg. 263). ¶¶ 10-12. This reasoning is faulty for multiple reasons. First, Petitioner is not making fifth amendment claims based on *Brady* in this suit. Second, the allegations against James and Ours are not simply that *Brady* information was not disclosed, it was that the evidence was tampered with and falsified. *See Complaint* (AR pg. 4), ¶¶ 118,119, 137. This was plainly the holding in *Smithers*, *supra*, 939 F. Supp. at1266. Moreover, just this year, the fifth circuit also held that a prosecutor was not entitled to absolute immunity for acts associated with tampering with the testimony of a witness. *See Weary v. Foster*, No. 20-30406 (5th Cir. May 3, 2022). Petitioner believes this case is

[1] The enumerated actions referenced in Pugh entitling a prosecutor to absolute immunity were: (1) initiating a judicial proceeding, (2) presenting evidence in support of a search warrant, (3) conducting a criminal trial, bond hearing, grand jury proceeding or pre-trial hearing, (4) engaging in 'an out-of-court effort to control the presentation of a witness's testimony, and (5) making a professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before the grand jury after a decision to seek an indictment has been made. No. 5:15-03736, 2017 U.S. Dist. LEXIS 191655, 9-13 (S.D. W.Va. Oct 24, 2017)

particularly instructive and persuasive for the facts at bar. There, Michael Weary, following the overturning of his murder conviction, brought suit on state and federal grounds against the prosecutor and detective on his case on the basis that they "fabricated evidence against him… by coercing a vulnerable juvenile to adopt, and eventually testify to, a false story concocted entirely by the Detective and the District Attorney." *Id.* at Slip Op. 2. The prosecution claimed absolute prosecutorial immunity, but the Court rejected it, citing to *Buckley, supra*, (which also involved a fabrication of evidence claim) and stating that:

> *We can map the allegations in Weary's complaint onto this dichotomy by following the Supreme Court's decision in Buckley v. Fitzsimmons. That case also involved a conspiracy to fabricate evidence through false witness testimony. 509 U.S. at 262 . There, the prosecutor searched for a witness who would testify that a bootprint found at the crime scene matched that of the petitioner's boot. Id. After going through several experts at state-administered institutions who concluded the two bootprints did not match, the prosecutor located a witness "well known for her willingness to fabricate unreliable expert testimony." Id. at 262 . The issue, as framed by the lower courts, was "whether the effort to obtain definitive boot evidence linking petitioner to the crime was in the nature of acquisition of evidence or in the nature of evaluation of evidence for the purpose of initiating the criminal process." Id. at 264-65 (cleaned up). The Supreme Court held that this conduct was investigatory, and therefore absolute immunity was not available. Id. at 276 .*

Id. at *5-6

Perhaps most interesting and relevant to the case at bar, the Weary court noted that the fact that probable cause had already been found against Weary prior to the falsification of evidence was of no import to the liability of the prosecutor and detective, noting:

> *There is one noteworthy difference between Wearry's case and Buckley. Namely, the prosecutors in Buckley lacked probable cause to indict Buckley at the time they fabricated the evidence, while here Wearry had already been charged. But the existence of probable cause is not a bright-line rule, as Buckley itself recognized that "a prosecutor may engage in 'police investigative work'" even after probable cause has been found. Buckley, 509 U.S. at 274 n.5 (1993). As this court stated recently, "[t]he Supreme Court has never held that the timing of a prosecutor's actions controls whether the prosecutor has absolute immunity. Instead, the Court focuses on the function the prosecutor was performing." Singleton, 956 F.3d at 783 . And the function performed by a prosecutor in fabricating evidence is evidence creation, which is not part of the advocate's role, but a corruption of the investigator's function of "searching for clues and*

> *corroboration." Buckley, 509 U.S. at 273 . The fact that Wearry's trial was only three months away when the defendants first pulled Ashton out of school to transform him into a prosecution witness does not change the fundamental nature of their actions.*

Id. at *6-7.

Finally, as to Respondent James, the Circuit Courts ruling ignores perhaps the most fundamental basis for Petitioner's argument that he is not entitled to absolute prosecutorial immunity, to wit, Respondent James, as Hampshire County Prosecutor, never had any basis to prosecute Petitioner at all because Petitioner was not a Hampshire County resident and the events giving rise to the claimed offense did not occur in Hampshire County. Although Respondent Ours alleged involvement in fabricating evidence also removes from him the protection of absolute immunity for that action, at least he had actual prosecutorial authority over the matter. How one can be entitled to prosecutorial immunity in a case where one has no prosecutorial authority is beyond the comprehension of Petitioner and his counsel.

B. There was no probable cause to arrest Petitioner, and the probable cause finding made was based on evidence which was fraudulent and falsified.

The Circuit Court, as to Defendants James and Nazelrod, found that Petitioner's claims for malicious prosecution must fail because there was probable cause. *See Order on Motion to Dismiss of Defendant James* (AR pg. 252), ¶¶ 12-14; *Order on Motion to Dismiss of Defendant Nazelrod* (AR pg. 270), ¶¶ 7-11. Specifically, the Court relied on the fact that the presiding magistrate made a probable cause finding by signing off on the criminal complaint and by denying a motion for acquittal and the close of the State's case. *Ibid.*

As a preliminary matter, The Complaint plainly alleges that Defendant Nazelrod and Defendant James worked together to procure a prosecution devoid of probable cause, and that Nazelrod affixed his signature to a complaint which omitted material facts. Id. at ¶ 61. More specifically, The Complaint provides excruciating details as to all the reasons probable cause did

not exist to charge, or continue pursing, Petitioner's prosecution. *See Id.* at ¶¶ 48, 49, 59, 83. At this stage in the litigation, it is inappropriate to consider facts beyond those contained within the Complaint.

However, to the extent the Court wishes to infer these findings from the Course of events outlined in the Complaint, the Court should also infer that, based on the Complaint, it is clear and obvious that there was no probable cause to arrest or prosecute petitioner for the crimes charged. See Complaint generally. As the federal caselaw has acknowledged, "the existence of probable cause is not a bright-line rule," *Weary, supra*, at * 7 (referencing *Buckley, supra*).

Even more importantly, although there is a long standing general public policy in favor of assuming that prosecutions for crime are founded on probable cause (*See* Syl. Pt. 4, *Mcnair v. Erwin*, 84 W.Va. 250, 99 S.E. 454 (1919)) prima facie evidence for the existence of probable cause only attaches when such finding is made by a grand jury who issues an indictment. Syl. Pt. 5, *Jarvis v. West Virginia State Police*, 227 W.Va. 472, 711 S.E.2d 542 (W.Va. 2010). There was no grand jury findings at all made in the instant case. Moreover, even in situations in which probable cause prima facie exists, those findings are rebutted where a plaintiff shows "that the indictment was procured by fraud, perjury, or falsified evidence." *Ibid.* The *Jarvis* Court then invoked a number of federal cases which made the same finding, and insodoing demonstrated the broad nature of the types of misconduct which can rebut this presumption. Said the Court:

> *In Moore v. Hartman, the Court of Appeals for the District of Columbia discussed what presumption a grand jury indictment is afforded in a retaliatory prosecution claim as follows:*
>
> *[S]everal of our sister circuits have held that a grand jury indictment is prima facie evidence of probable cause which may be rebutted. See, e.g., White v. Frank, 855 F.2d 956, 961–62 (2d Cir.1988) ("[T]hough an indictment by a grand jury is generally considered prima facie evidence of probable cause in a subsequent civil action for malicious prosecution, this presumption may be rebutted by proof that the defendant misrepresented, withheld, or falsified evidence."); see also Gonzalez Rucci v. INS, 405*

F.3d 45, 49 (1st Cir.2005) (generally an indictment establishes probable cause, but there is an exception if law enforcement officers knowingly presented false testimony to the grand jury); Rothstein v. Carriere, 373 F.3d 275, 282–83 (2d Cir.2004) (grand jury indictment creates presumption of probable cause; may be rebutted if plaintiff "establish[es] that the indictment was produced by fraud, perjury, the suppression of evidence or other police misconduct undertaken in bad faith"); Riley v. City of Montgomery, Alabama, 104 F.3d 1247, 1254 (11th Cir.1997) ("[A]n indictment is prima facie evidence of probable cause which can be overcome by showing that it was induced by misconduct."); Rose v. Bartle, 871 F.2d 331, 353 (3d Cir.1989) (grand jury indictment "constitutes prima facie evidence of probable cause to prosecute, but ... may be rebutted by evidence that the presentment was procured by fraud, perjury or other corrupt means"); Hand v. Gary, 838 F.2d 1420, 1426 (5th Cir.1988) ("obtaining an indictment is not enough to insulate state actors from an action for malicious prosecution under § 1983" when "finding of probable cause remained tainted by the malicious actions of the government officials"); Harris v. Roderick, 126 F.3d 1189, 1198 (9th Cir.1997) (same; explicitly adopts reasoning of Hand). Cf. Awabdy v. City of Adelanto, 368 F.3d 1062, 1067 (9th Cir.2004) (in a later civil action for malicious prosecution, a judicial finding of probable cause in a criminal proceeding is prima facie evidence of probable cause which may be rebutted by a "showing that the criminal prosecution was induced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith"); Hinchman v. Moore, 312 F.3d 198 (6th Cir.2002) (a judicial finding of probable cause in a criminal proceeding does not bar a future malicious prosecution claim where plaintiff alleges the police officer supplied false information to establish probable cause); DeLoach v. Bevers, 922 F.2d 618, 620–21 (10th Cir.1990) (despite judicial determination of probable cause, police officer "cannot hide behind the decisions of others involved in [plaintiff's] arrest and prosecution if she deliberately conceals and mischaracterizes exculpatory evidence").

Id. at 550.

Petitioner's complaint alleges that the probable cause findings made in this case were very clearly made with evidence which was either directly fabricated or fraudulent by omission insomuch as key pieces of information which were exculpatory were left out of Nazelrod's Affidavit in support of his Criminal Complaint. The Complaint alleges that Penny Hartman, during her deposition, informed the prosecutor that the information relayed in Respondent Nazelrod's complaint was not what was in her statement to him (*Id.* at ¶ 83(f), 83(g)). The Complaint also alleges that Cpl. Nazelord was fully aware that there was an alternate explanation for the May 2016 altercation, witnesses who could testify to that fact, and pictures proving the same which Nazelrod never followed up on (Id. at ¶ 48(c)(i),(ii), and (iv). The Complaint also alleges that Petitioner informed Nazelrod of his alibi and witnesses for said alibi regarding the

May 2016 incident, which Nazelrod never followed up on and purposefully omitted from his Complaint. See Id. at 48(c)(iii). The Complaint also alleges that, regarding the alleged July 2016 incident, that Petitioner had claimed, and Respondent Nazelrod had acknowledged being aware, that Penny Hartman had lied about sending pictures of the alleged assault to Hampshire County Sheriff John Alkire (*Id.* at ¶ 48(d)). The Complaint also alleges that Respondent Nazelrod falsely claimed that he could hear a metallic clicking noise of a gun in the background of a video provided by Hartman (*Id.* at 59(e)(iii)), and that this claim was later proven false in trial when the video was played and did not contain any metallic clicking noise as alleged by Nazelrod (*Id.* at 59(f)). Together, these and other similar claims made throughout Petitioner's complaint very clearly suggest that probable cause findings made in this case where based on the falsification of evidence, the deliberate concealment and mischaracterization of exculpatory evidence, or fraud, perjury, fabricated evidence, or other corrupt means undertaken in bad faith, just as the federal Circuits have proscribed and just as the *Jarvis* Court incorporated by reference.

For this reason, it was wholly improper for the Circuit Court, taking the allegations in the Complaint as true, to find that Petitioner's Malicious Prosecution claims failed because probable cause existed to prosecute.

II. THE CIRCUIT COURT ERRED BY DISMISSING PETITIONER'S CLAIMS OF ABUSE OF PROCESS AGAINST DEFENDANT NAZELROD.

In order to succeed on a claim for abuse of process, a plaintiff must allege "the willful or malicious misuse or misapplication of lawfully issued process to accomplish some purpose not intended or warranted by that process." *Wayne Cty. Bank v. Hodges*, 338 S.E.2d 202, 205 (W.Va. 1985).

The Circuit Court, in dismissing Petitioner's Abuse of Process claim against Respondent Nazelrod, found that "in the present case, defendant Nazelrod conducted an investigation which

led him to compile and file a criminal complaint against the Plaintiff in which probable cause was found by a magistrate; he informed Ms. Harman of her right to file for a DVPO, which is standard protocol for law enforcement in domestic violence cases, and contacted the magistrate to let him know that the Ms. Hartman wanted to file a petition for a DVPO, also standard practice, but otherwise had nothing to do with the issuance of the DVPO; and he served Ms. Hartman with a subpoena, also a standard practice of law enforcement." *Order on Motion to Dismiss of Defendant Nazelrod* (AR pg. 270), ¶ 14. The Court then further states that "The Court also finds no merit in the argument that the troopers exceeded their jurisdiction and abused process by serving Ms. Hartman in mineral County, even though the troopers were assigned to a State Police detachment outside Mineral County. First, these officers are state troopers and have jurisdiction in every county of the state. Second, even though the prosecution was occurring in mineral county, Defendant Nazelrod was still the investigating officer for the case… so, even if Defendant Nazelrod had bad intentions, he did nothing more than use standard process to its natural conclusion." *Id.* at ¶¶ 15-16. These findings amount to a straw manning of Petitioner's claims on this point. In actual fact, Petitioner's claims of abuse of process against Nazelrod are as follows:

Plaintiff's Complaint states that "by seeking a DVPO on behalf of Penny Hartman… and by other acts as set forth in the allegations of fact above, Defendant Nazelrod engaged in a willful and knowing misapplication of lawfully issued process for a purpose not intended or warranted by that process." *Complaint* (AR pg. 4), ¶ 168. Those "other acts as set forth above," include the acts set forth in the factual allegations relating to the malicious prosecution, which have been discussed at length above. By procuring a malicious prosecution against Petitioner, and falsifying evidence in support thereof, for the improper purpose of driving Petitioner out of

law enforcement, Defendant engaged in an abuse of process. The Circuit Court failed to reckon with this argument entirely, despite it being clearly articulated in Petitioner's Response Brief on Nazelrod's 12(b)(6) motion. *See Plaintiff's Response in Opposition to Defendant Nazelrod's Motion to Dismiss* (AR pg. 122), at p. 17-18.

As to the abuse of process claim regarding the DVPO issuance, the Complaint alleges that Respondent Nazelrod stepped outside the confines of his investigation to instruct Penny Hartman to seek a DVPO against Defendant, regardless of the age of the allegations. *Id.* at ¶ 40. When it became likely that she may not wish to obtain a protective order, Respondent personally contacted the presiding Magistrate and requested he issue the protective order on her behalf, which the magistrate had previously stated he would not do. *Id.* ¶ 44. Respondent engaged in these actions with the full knowledge that Petitioner was being harassed telephonically by Penny Hartman. *Id.* at ¶ 49(a)-(i). Defendant did this for the purpose of harassing Plaintiff and hindering his ability to work as a law enforcement officer. *Id.* ¶164.

These allegations plainly amount to an assertion that Respondent Nazelrod misused and misapplied lawful process to accomplish a purpose not intended by that process as required under *Hodges*. To spell it out even more explicitly, the lawful process here was an investigation into a domestic violence allegation and the obtainment of a DVPO, and the misallocation and misuse of the same is there bad faith utilization for the purpose of driving Plaintiff from employment. This is more than mere "bad intentions" which the West Virginia Supreme Court noted in *Preiser v. MacQueen*, 177 W.Va. 273, 279 n.8 (W.Va. 1985),[2] do not rise to abuse of process. This is a misapplication of process designed not to seek justice but to intentionally pervert it so as to accomplish an objective totally contrary to the laws intention – the harassment

[2] Plaintiff notes here that, although the Circuit Court cited this case and this language as if it were precedent, this statement came only as dicta from a footnote, and cannot properly be said to be binding precedential authority.

of Petitioner and his dissociation from law enforcement. The Circuit Court's findings do not properly reckon with this argument at all.

III. THE CIRCUIT COURT ERRED IN DISMISSING PETITIONER'S CLAIMS OF CIVIL CONSPIRACY AGAINST RESPONDENT'S JAMES, OURS, AND NAZELROD.

Under West Virginia law, "'a civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means.'" Dixon v. Am. Indus. Leasing Co., 253 S.E.2d 150, 152 (W. Va. 1979) (quoting 15A Corpus Juris Secundum Conspiracy § 1(1)). Stated another way, "[t]here can be no conspiracy to do that which is lawful in a lawful manner." Syl. Pt. 2, *Porter v. Mack*, 40 S.E. 459, 460 (W. Va. 1901)

In the case of each named Respondent, the Circuit Court found, as to Petitioner's claims of Civil Conspiracy, that because it is dismissing claims of malicious prosecution and abuse of process, it is also dismissing claims of civil conspiracy to accomplish these ends. *See Order on Motion to Dismiss of Defendant Nazelrod* (AR pg. 270), ¶ 17; *Order on Motion to Dismiss of Defendant James* (AR pg. 252), ¶ 25; *Order on Motion to Dismiss of Defendant Ours* (AR pg. 263), ¶ 19. Obviously, as Petitioner is challenging the Circuit Court's malicious prosecution finds as to all Respondents, and the Abuse of Process claim as to Nazelrod, to the extent this Court agrees with Petitioner's arguments, the Circuit Court's finding on this point should also be reversed.

However, this is not the end of the inquiry, as there are other allegations of civil conspiracy which are not dependent on a finding by this Court as to the sufficiency of Petitioner's malicious prosecution and abuse of process claims. Petitioner's Complaint is replete with allegations of

unlawful conduct, particularly with regard to Petitioner's allegations of tampering with and destruction of evidence. See e.g. *Complaint* (AR pg. 4), ¶¶ 102-104, 118, 119, 137, 208. Such acts are plainly unlawful. *See State v. Osakalumi*, 461 S.E.2d 504, 194 W.Va. 758 (W.Va. 1995). For that reason alone, if for no other, Petitioner's Civil Conspiracy claims should remain, and the Circuit Court's order should be reversed on this point.

VIII. CONCLUSION

For all the reasons stated above, the Circuit Court's dismissal of the above described causes of action should be reversed, and this matter should be remanded back to the circuit court for further proceedings.

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CERTIFICATE OF SERVICE

I, Christian J. Riddell, Esq., attorney for the Petitioner, Norm Launi, do swear that a copy of the foregoing Petitioner's Brief in this matter was served upon all counsel by USPS, postage prepaid this 16th day of May, 2022.

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