

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA ex rel
JOHN DOE, a certain individual subpoenaed
in a matter currently pending
before the Mingo County Grand Jury,**

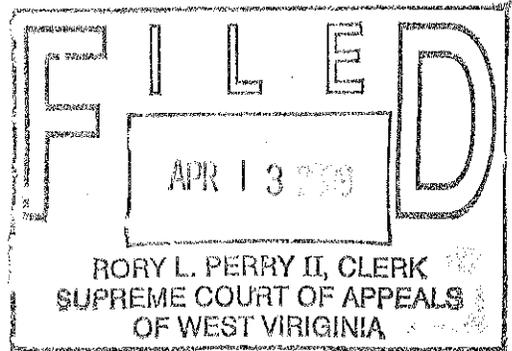
Petitioner,

v.

**Supreme Court No.: 090469
In Re: Grand Jury Subpoena
January 2009 Term**

**THE HONORABLE MICHAEL THORNSBURY,
Circuit Court Judge of the Thirtieth Judicial Circuit,**

Respondent.



**RESPONDENT CIRCUIT COURT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF PROHIBITION**

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**THE HONORABLE MICHAEL THORNSBURY,
Circuit Court Judge of the Thirtieth Judicial Circuit,**

Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO
THE GRANTING OF A WRIT OF PROHIBITION**

I. INTRODUCTION

Petitioner improperly seeks a writ of prohibition barring the enforcement of the Circuit Court's lawful order refusing to honor the invocation of legislative immunity to stay proceedings associated with a Grand Jury subpoena duces tecum. This Court should decline to issue a rule to show cause why the writ should not issue.

Seeking this writ, Petitioner compels this Court to consider the breadth and foundation of West Virginia's legislative immunity statute. This statute unconstitutionally violates the Separation of Powers Clause and the Rule-Making Clause of the West Virginia Constitution. Further, Petitioner's invocation of the protections of this statute was faulty and hence ineffective. Finally, the statute at issue, as invoked in the

proceedings below, directly contradicts substantial and meaningful public policies of this state. Respondent recognizes and respects the importance of citizen service in the Legislature and the need for comity between the separate branches of government to allow lawyer legislators to serve their constituents during legislative sessions. But in this case, considering this statute, the Petitioner is not entitled to the relief he seeks.

II. STATEMENT OF FACTS

On February 20, 2009, the Mingo Circuit Grand Jury met and issued a Grand Jury Subpoena duces tecum for documents of the company employing John Doe, returnable to the Grand Jury at 9:00 a.m. on March 24, 2009. On February 26, 2009, Sergeant L. O'Bryan, West Virginia State Trooper and Detachment Commander, served the Subpoena on the corporate records custodian. The Petitioner allegedly retained counsel on March 19, 2009.

Petitioner's counsel serves in the West Virginia Legislature. The 2009 regular session of the Legislature began on February 11, 2009, and was scheduled to conclude at midnight on April 11, 2009 (Recent news reports indicate that the session may be continued to address budget issues). Counsel for Petitioner accepted the representation of John Doe in regard to the Grand Jury subpoena only five days before the subpoena's return date and squarely in the middle of the legislative session.

Doe's counsel did not move to quash the subpoena or seek an extension of time in which to respond to the subpoena upon accepting the representation. Instead, Doe's Counsel alleges that he invoked his legislative immunity on March 20, 2009, by providing notice of that immunity to the Mingo County Prosecuting Attorney. On March 24, 2009, at 11:15 a.m., two hours after the time at which the subpoena was returnable,

Doe's counsel Letitia Chafin, partner and spouse of Doe's counsel H. Truman Chafin, attempted to invoke legislative immunity in regard to compliance with the grand jury subpoena. Respondent then issued an Order denying the invocation of legislative immunity and holding that the Petitioner was still subject to the subpoena.

Respondent notes that, during the current legislative session, Petitioner's counsel and counsel's law firm have been involved in various other matters pending before the Mingo Circuit Court and in other jurisdictions. On March 3, 2009, Letitia Chafin filed a Notice of Substitution of Counsel in *State of West Virginia v. Paul David Crawford*, Mingo County Indictment No. J09-F-47. Additionally, Petitioner's counsel and his law firm were involved in a multi-day civil jury case, *Sophia and Darrell Savage v. Three Rivers Medical Center*, in Lawrence County, Kentucky, on March 9, 2009 through March 11, 2009. Further, upon information and belief, Ms. Chafin appeared for depositions at Williamson Memorial Hospital in a civil case during the week of March 24, 2009. In contrast to these appearances and as this Court is well aware, Doe's counsel is barred by West Virginia Rule of Criminal Procedure 6(d) from actually appearing before the Grand Jury.

After April 22, the Mingo Circuit Grand Jury is not scheduled to meet again until September.

III. STANDARD OF REVIEW

A writ of prohibition is appropriate "to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is

not corrected in advance.” Syl. Pt. 1, in part, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979). In making its determination, the court is to examine five factors:

(1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996). Public policy concerns are also relevant in determining whether to award a petitioner extraordinary relief in the form of a peremptory writ. Syl. Pt. 3, *State ex rel. Sowards v. County Com'n of Lincoln County*, 196 W.Va. 739, 741, 474 S.E.2d 919, 921 (1996).

Importantly, a court's refusal to engage in an act required by an unconstitutional statute will not support the issuance of a peremptory writ. *LaFollette v. Nelson*, 113 W.Va. 906, 170 S.E. 168, 170 (1933) (holding that writ of mandamus would not issue where act sought to be compelled was based on unconstitutional statute).

IV. ARGUMENT

In the instant matter, the application of the required standard of review leads inexorably to the conclusion that this Court should not issue a rule to show cause. Respondent concedes that Petitioner is unlikely to raise the issue at hand meaningfully upon direct appeal. While the order below, read most narrowly, raises an issue of first impression in West Virginia, the circuit court's ruling and order below is not clearly erroneous. Indeed, the ruling and order cannot be clearly erroneous, for the statute at

issue is patently unconstitutional. Further, the invocation of legislative immunity at issue is facially insufficient and untimely. Finally, the application of the statute in the manner urged by the Petitioner would frustrate important public policy goals of this State.

A. BECAUSE W.VA. CODE § 4-1-17 VIOLATES THE SEPARATION OF POWERS AND RULE-MAKING CLAUSES OF THE WEST VIRGINIA CONSTITUTION, THE CIRCUIT COURT'S REFUSAL TO HONOR PETITIONER'S COUNSEL'S INVOCATION OF IMMUNITY IS NOT ERROR AS A MATTER OF LAW.

Where, as here, the prerogatives of the courts and the legislature collide, two provisions of the West Virginia Constitution are often at issue: the Separation of Powers Clause and the Rule-Making Clause. *See, e.g., Louk v. Cormier*, 218 W.Va. 81, 622 S.E.2d 788 (2005) (reviewing medical malpractice legislative reform provisions in derogation of Rules of Civil Procedure).

The Separation of Powers Clause provides in pertinent part that "[t]he legislature, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others." W.Va. Const., Art. V, § 1. This Clause, "which prohibits any one department of our state government from exercising the powers of the others, is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed." Syl. Pt. 1, *State ex rel. Barker v. Manchin*, 167 W.Va. 155, 279 S.E.2d 622 (1981); Syl. Pt. 1, *State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Development Grant Committee*, 213 W.Va. 255, 258, 580 S.E.2d 869, 872 (2003). Put more succinctly, "the plain language of article 5 calls, not for construction, but only for obedience." *Hodges v. Public Service Com'n*, 159 S.E. 834, 836 (W.Va. 1931).

The Rule-Making Clause provides that the West Virginia Supreme “[C]ourt shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, *process, practice and procedure*, which shall have the force and effect of law.” W. Va. Const. art. 8, § 3 (emphasis added).

The interplay of these two Constitutional clauses effectively means that “a statute governing procedural matters in civil or criminal cases which conflicts with a rule promulgated by the Supreme Court would be a legislative invasion of the court’s rule-making powers.” *Louk v. Cormier*, 218 W.Va. 81, 88, 622 S.E.2d 788, 795 (2005) (internal citations omitted). Decisions of the West Virginia Supreme Court striking down legislative enactments that conflict with the Court’s rules are numerous and commonplace. See, e.g., *Louk v. Cormier*, 218 W.Va. 81, 622 S.E.2d 788 (2005) (invalidating statute that conflicted with W. Va. Rules of Civ. P.); *Games-Neely ex rel. West Virginia State Police v. Real Property*, 211 W.Va. 236, 565 S.E.2d 358 (2002) (invalidating a statute that was in conflict with Rule 60(b)); *West Virginia Div. of Highways v. Butler*, 205 W.Va. 146, 516 S.E.2d 769 (1999) (invalidating a statute that was in conflict with W. Va. R. Evid., Rule 702); *Mayhorn v. Logan Med. Found.*, 193 W.Va. 42, 454 S.E.2d 87 (1994) (invalidating a statute that was in conflict with W. Va. R. Evid., Rule 702); *Williams v. Cummings*, 191 W.Va. 370, 445 S.E.2d 757 (1994) (invalidating a statute that was in conflict with Trial Court Rule XVII); *Teter v. Old Colony Co.*, 190 W.Va. 711, 441 S.E.2d 728 (1994) (invalidating a statute that was in conflict with W. Va. R. Evid., Rule 702); *State v. Davis*, 178 W.Va. 87, 357 S.E.2d 769 (1987) (invalidating a statute that was in conflict with W. Va. R.Crim. P., Rule 7), *overruled on*

other grounds by State ex rel. R.L. v. Bedell, 192 W.Va. 435, 452 S.E.2d 893 (1994); *Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985) (invalidating a statute that was in conflict with W. Va. R.App. P., Rule 23); *State ex rel. Quelch v. Daugherty*, 172 W.Va. 422, 306 S.E.2d 233 (1983) (holding that legislature could not enact law regulating admission to practice and discipline of lawyers); *Stern Bros., Inc. v. McClure*, 160 W.Va. 567, 236 S.E.2d 222 (1977) (invalidating statutes that conflicted with the Court's administrative rules setting out a procedure for the temporary assignment of a circuit judge in the event of a disqualification of a particular circuit judge); *Laxton v. National Grange Mut. Ins. Co.*, 150 W.Va. 598, 148 S.E.2d 725 (1966) (invalidating a statute that conflicted with W. Va. R. Civ. P. Rule 11), *overruled on other grounds by Smith v. Municipal Mut. Ins. Co.*, 169 W.Va. 296, 289 S.E.2d 669 (1982); *Montgomery v. Montgomery*, 147 W.Va. 449, 128 S.E.2d 480 (1962) (invalidating a statute that conflicted with W. Va. R. Civ. P., Rule 80).

To determine whether the Court's rulemaking authority is infringed upon by a statute, the Court must first determine whether the statute is substantive or procedural. *Hinchman v. Gillette*, 217 W.Va. 378, 390, 618 S.E.2d 387, 399 (2005) (Davis, J., concurring). If the law is substantive, it cannot infringe the Court's rulemaking authority. However, if the law is procedural, it may impermissibly interfere with the Court's rulemaking authority. *State v. Arbaugh*, 215 W.Va. 132, 595 S.E.2d 289 (2004) (Davis, J., dissenting). "Substantive law . . . creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated." *Arbaugh*, 215

W.Va. at 139, 595 S.E.2d at 296 (Davis, J., dissenting), (*quoting State v. Templeton*, 148 Wash.2d 193, 213, 59 P.3d 632, 642 (2002)).

The statute at issue provides that

it is the purpose of this section to provide that members of the Legislature and certain designated legislative employees are not required to attend to matters pending before tribunals of the executive and judicial branches of government when the timing of those matters may present conflicts with the discharge of the public duties and responsibilities that are incumbent upon members or employees of the Legislature. During legislative sessions or meetings and for reasonable time periods before and after, the judicial and executive branches should refrain from requiring the personal presence and attention of a legislator or designated employee who is engaged in conducting the business of the Legislature.

W.Va. Code § 4-1-17(a). The statute also indicates that

(d) During any applicable time period, a member or designated employee who does not otherwise consent to a waiver of the stay is not required to do any of the following:

- (1) Appear in any tribunal, whether as an attorney, party, witness or juror;
- (2) Respond in any tribunal to any complaint, petition, pleading, notice or motion that would require a personal appearance or the filing of a responsive pleading;
- (3) File in any tribunal any brief, memorandum or motion;
- (4) Respond to any motion for depositions upon oral examination or written questions;
- (5) Respond to any written interrogatories, request for production or documents or things, request for admissions or any other discovery procedure, whether or not denominated as such;
- (6) Appear or respond to any other act or thing in the nature of those described in subdivision (1), (2), (3), (4), or (5) of this subsection; or
- (7) Make any other appearance before a tribunal or attend to any other matter pending in a tribunal that in the discretion of the member or designated employee would inhibit the member or designated employee in the exercise of the legislative duties and responsibilities owed to the public.

W.Va. Code § 4-1-17. The statute thus focuses most specifically on the mechanical operation of the courts, that is, the *scheduling and progress* of judicial events, not their subject matter, nor does the statute create, define, or regulate a primary right of any

litigant. Accordingly the statute is procedural rather than substantive. As a procedural statute, if the statute conflicts with the rules of the West Virginia Supreme Court, the statute impermissibly invades the Rule-Making Clause and thus violates the Separation of Powers Clause.

The genesis of the matter before the Circuit Court and this Court involves the rules of the Supreme Court, and it is from the operation of these rules that Petitioner sought relief via invocation of W.Va. Code § 4-1-17. Specifically, John Doe's Petition arises from the service upon him of a Grand Jury subpoena duces tecum. Memorandum in Support of Petition, p. 4, ¶ 7. Such subpoenas are the process of the Circuit Court, issued pursuant to West Virginia Rule of Criminal Procedure Rule 17. See *State ex rel. Casey v. Wood*, 156 W.Va. 329, 334, 193 S.E.2d 143, 145 (1972); W.Va. R. Crim.P. 17(c). Indeed, the subpoena only requires Petitioner to appear; counsel is not permitted to appear before grand juries with clients. Rule 17 itself provides a procedure for relief from a subpoena "if compliance would be unreasonable or oppressive": a motion to quash or modify. W. Va. R. Crim. P. 17(c). Instead of utilizing the Rules of this Court to seek relief or accommodation from the subpoena issued under the authority of the Circuit Court, Doe's counsel instead relied upon the pronouncement of the Legislature, effectively avoiding this Court's rule-making authority regarding the process, practice and procedure associated with a subpoena. Accordingly, W.Va. Code § 4-1-17, as invoked by Petitioner's counsel in the proceedings below, is unconstitutional and represents a violation of the Separation of Powers and Rule-Making Clauses of the West Virginia Constitution. Thus, the Circuit Court's refusal to honor Petitioner's counsel's invocation of that statute cannot

constitute error as a matter of law, and this Court should refuse to issue a rule to show cause in this matter.

B. BECAUSE THE NOTICE OF INVOCATION OF IMMUNITY WAS UNTIMELY AND FACIALLY INSUFFICIENT, THE CIRCUIT COURT HAS NOT ERRED AS A MATTER OF LAW.

The statute at issue provides the following procedure¹ for the invocation of legislative immunity:

A member or designated employee who desires to exercise the protections afforded by this section shall not be required to appear in any tribunal to assert the protections. In all cases, it shall be sufficient if the member or designated employee notifies the tribunal in question orally or in writing, stating that he or she is invoking the protections of this section, describing the action, proceeding or act to be stayed, and further identifying the applicable period or periods for which the notice will operate as a stay. An oral communication with the tribunal shall be followed by a written notice or facsimile transmission to the tribunal mailed or transmitted no later than two business days after the oral communication. From the time of the oral communication or the mailing or transmission of the written notice, whichever is earlier, the notice operates as a stay of all proceedings in the pending matter until the applicable time periods have passed and expired.

W. Va. Code, § 4-1-17(e). As a preliminary matter, the Notice of Legislative Immunity tendered to the Circuit Court fails to identify "the applicable period or periods for which the notice will operate as a stay." *Id.*; see also Notice of Legislative Immunity, filed under seal by Petitioner. Instead the Notice simply states that H. Truman Chafin and John Doe are afforded immunity "from any tribunal . . . during the regular session and for thirty (30) days thereafter." Such a statement of the period is meaningless to the tribunal, which is not informed specifically as to when the immunity invoked expires. Because the Notice of Immunity fails to comply with the terms of W. Va. Code, § 4-1-

¹ This provision underscores the fact that this statute is procedural and supplants the Rules promulgated by this Court.

17(e), the Circuit Court cannot have erred as a matter of law in refusing to honor the invocation.

More importantly, however, the Notice of Legislative Immunity was provided to the Circuit Court on March 24, 2009, at 11:15 a.m., *after* the time at which the subpoena was returnable. A proper notice to the tribunal operates as a stay only “[f]rom the time of the oral communication or the mailing or transmission of the written notice . . . until the applicable time periods have passed and expired.” *Id.* Accordingly, the untimely notice could not and did not operate to relieve either Doe or his counsel from the obligation imposed by the Grand Jury subpoena to respond at 9:00 a.m. on March 24, 2009, with the required documents—that obligation had accrued and gone unmet two hours and fifteen minutes prior to the invocation of immunity. Accordingly, to the extent any stay of the proceedings of the Mingo County Grand Jury or the Circuit Court could be imposed, such stay could only be at 11:15 a.m. on March 24, 2009, and would seem applicable primarily to such future proceedings in contempt of court as may be appropriate to sanction John Doe and/or his counsel for failing to abide by the lawful process of the Circuit Court.

Petitioner has indicated in his filings with this Court that initial notice of legislative immunity was provided to the Mingo County Prosecuting Attorney on March 20, 2009. Memorandum in Support of Petition, p. 6. Notification other than to the circuit court was insufficient. The statute at issue defines tribunal as “a judicial or quasijudicial entity of the judicial or executive branch of government, or any legislative, judicial or quasijudicial entity of a political subdivision, created or authorized under the Constitution or laws of this state.” W.Va. Code § 4-1-17(b)(4). In this state, the “circuit court has supervisory

powers over grand jury proceedings to preserve the integrity of the grand jury process and ensure the proper administration of justice." *State ex rel. Hamstead v. Dostert*, 173 W.Va. 133, 142, 313 S.E.2d 409, 418 (1984). The prosecutorial role before the grand jury is strictly circumscribed:

The prosecutor's responsibility is to attend to the criminal business of the State, and when he has information of the violation of any penal law, to present evidence of those offenses to the grand jury. Thus, the jurisdiction of the prosecuting attorney encompasses only the presentation of evidence.

State ex rel. Miller v. Smith, 168 W.Va. 745, 757, 285 S.E.2d 500, 507 (1981). The Prosecuting Attorney is not the "tribunal" which issued the process to which Petitioner is subject, and thus notice to the Prosecuting Attorney was insufficient as a matter of law to invoke any immunity afforded by the statute.

Accordingly, it was not, as a matter of law, error for the Circuit Court to refuse to honor this invocation of legislative immunity, and this court should refuse to issue a rule to show cause in this matter.

C. AS A MATTER OF PUBLIC POLICY, THE REQUESTED WRIT SHOULD NOT ISSUE.

As a matter of public policy, the statute relied upon is too broad to allow the proper functioning of this State's court system if liberally utilized by legislators and presents a tempting opportunity for litigants to frustrate the orderly and speedy functioning of the courts.

1. *The existing rules of the courts of this state express the public policy that judicial matters should proceed in an orderly and speedy manner, with appropriate time limitations; the application of the statute in the manner suggested by Petitioner violates this policy.*

In the proceedings below, the invocation of immunity has effectively halted a Grand Jury investigation into potential criminal activity, potentially for months as to

Petitioner. It is relevant for this Court to consider whether this delay and other potential delays conform with the substantial public policy of this State. For example, the West Virginia Rules of Criminal Procedure "shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay." W.Va. R. Crim. P. 2. To meet this policy goal, this Court has promulgated a number of rules which set important time periods. See, e.g., W.Va. R. Crim. P. 5(c) (setting time for preliminary examination); W.Va. R. Crim. P. 37(b) (time for taking appeal); W.Va. R. Crim. P. 45 (time standards and calculation generally); W.Va. R. Crim. P. 48(b) (dismissal for unnecessary delay of more than one year).

Further, consider the time periods set forth in the Rules of Procedure for Child Abuse and Neglect, which "are designed to accomplish . . . timely and efficient disposition of cases." W.Va. R. P. Child Abuse and Neglect 2(a); see, e.g., W.Va. R. P. Child Abuse and Neglect 3a (time frames for pre-petition investigations); W.Va. R. P. Child Abuse and Neglect 11(a) (two-day response time for discovery request); W.Va. R. P. Child Abuse and Neglect 20 (ten-day notice period for hearing); W.Va. R. P. Child Abuse and Neglect 22 (ten-day requirement for preliminary hearing); W.Va. R. P. Child Abuse and Neglect 25 (requirement that adjudicatory hearing commence within 30 days of custody order); W.Va. R. P. Child Abuse and Neglect 36a(a) (30 day requirement for permanency hearing after dispositional order); W.Va. R. P. Child Abuse and Neglect 51(a) (30 day requirement for MDT meeting).

Or consider the first rule of Civil Procedure promulgated by this Court, which sets forth the goal of the "just, speedy, and inexpensive determination of every action." W.Va. R. Civ. P. 1. To implement this goal, the Rules of Civil Procedure provide many

time frames and limits for litigants. See, e.g., W. Va. R. Civ. P. 4(k) (time limit for service of process); W. Va. R. Civ. P. 6 (computation of time limits and time for filing of motions and replies); W. Va. R. Civ. P. 12 (answer dates); W. Va. R. Civ. P. 15 (amendment of pleadings and responses thereto); W. Va. R. Civ. P. 16 (case management orders providing time limits for litigation events); W. Va. R. Civ. P. 25(a) (substitution of party after death); W. Va. R. Civ. P. 33 (time frames for responses to interrogatories); W. Va. R. Civ. P. 34 (time frames for responses to requests to produce documents); W. Va. R. Civ. P. 36 (time frame for responses to requests for admission); W. Va. R. Civ. P. 45(d) (time frames relating to protection of persons subject to subpoena); W. Va. R. Civ. P. 50(b) (time for renewal of motion for judgment as matter of law after trial); W. Va. R. Civ. P. 59(b) (time for filing motion for new trial); W. Va. R. Civ. P. 65(b) (ten day limit on temporary restraining orders); W. Va. R. Civ. P. 68(a) (time for offer of judgment and response); W. Va. R. Civ. P. 69(a) (time limits for writs execution); W. Va. R. Civ. P. 72 (running of time for appeal).²

This court has promulgated literally scores more time frames than those set forth above. However, under the absolutist view of the legislative immunity statute urged by Petitioner, all of the time limits imposed by this Court's rules and designed to ensure the just, speedy and inexpensive determination of actions may be overruled by a single legislator's invocation of his right to an automatic stay of proceedings. In addition to the rules set forth above, the same problem applies to all the time-based rules of practice and procedure for family court, the time-based rules of procedure for child abuse and neglect proceedings, the time-based rules of practice and procedure for domestic

² As noted above, the statute at issue is in derogation of each and all of these rules and thus is an unconstitutional invasion into the prerogative of this Court.

violence civil proceedings, the time-based rules within the Trial Court Rules, and the time-based rules of appellate procedure, among others. It would be enormously damaging as a matter of public policy to allow legislators to avoid all of these-time based provisions, many of which involve extraordinarily important matters such as criminal investigations and the protection of children and spouses from violence and abuse.

2. *The laws of other states show that the absolute immunity embodied in the statute at issue is unnecessary and not required as a matter of public policy.*

In *State v. Ladd*, 210 W.Va. 413, 429, 557 S.E.2d 820, 836 (2001), this Court discussed W.Va. Code § 4-1-17 and noted it is "a very broadly worded statute." Other jurisdictions have dealt with the issue of legislative immunity and have done so in ways much less broad and much less intrusive into the functioning of their court systems.

McKinney's Judiciary Law § 469 of New York provides that

When a party to a civil action or proceeding shows by his or his attorney's affidavit that his attorney is a member of the legislature of the state of New York, that the legislature is in regular or special session or that not more than ten days have elapsed since the adjournment sine die of such session, that such attorney is the only one employed by the party who is prepared to try the cause, and that due to the performance of his legislative duties he is then unable to try the cause, the court shall grant a stay of the trial without prejudice to its place on the calendar, provided that no such stay shall extend to more than ten days after the adjournment sine die of the session of the legislature.

Thus New York's statute provides that the legislative immunity shall only apply in those limited instances where the attorney is involved in a civil action, is the only attorney employed by the party to try the cause, and the attorney's legislative duties prevent him from trying the case at that time.

Alaska's statute provides that

"Upon a showing that the attorney of record at the time of the defendant's first appearance in the court of record or a principal witness or a party in a criminal proceeding is a member of the legislature and that the legislature is in session or that a legislative interim committee of which the legislator is a member is meeting or is to meet within the next seven days, the defendant is entitled to a reasonable continuance of the date of trial until at least 15 days after the legislative session or interim committee meeting. However, a continuance for this reason shall not exceed 30 days after recess of the legislature or interim committee. A continuance may not be granted for any longer time that it is affirmatively proved to the ends of justice to require.

Alaska Stat. § 24.40.020 (1959). The Alaska statute specifically limits the application of the legislative immunity to a very narrow situation where a trial date is set during a regular legislative session or interim committee meetings.

South Dakota's statute provides that

Whenever any action or proceeding, including a contested small claims action other than for attachment, garnishment, arrest and bail, claim and delivery, injunction, receivership, and deposit in court, to which any member of the Legislature is a party or in which any member of the Legislature is the attorney in charge for either party, comes on for trial or hearing during a session of the Legislature, the attendance of the party or attorney upon the session is cause for the postponement of the trial or hearing until after the conclusion of the session, provided the party or attorney serves notice, on the opposite party, of his intention to apply for the postponement at least fifteen days before the term or time at which the action or proceeding may be brought on for trial or hearing or as soon as notice of hearing is received if less than fifteen days prior to the date set for hearing.

S.D. Codified Laws § 15-11-5 (1989). Once again, the statute in question places reasonable requirements upon the party or attorney seeking to apply the legislative immunity in a particular action pending before the court, whether a hearing or trial in the matter.

Tennessee also provides legislative immunity when

Upon the motion of a member of the general assembly qualified to make such motion under the provisions of this section, or his attorney or representative, any court, constituted under the laws of Tennessee, any administrative board or commission or other agency authorized to conduct hearings shall grant a continuance or postponement of the proceedings, at any stage of the action if it is shown that an attorney, party or material witness is a member of the general assembly and that an attorney, party or material witness is a member of the general assembly and that:

- (1) The general assembly is in annual regular session or special session; or
- (2) The attorney, party or material witness would be required to be absent from any meeting of a legislative committee while the general assembly is not in session if a continuance is not granted.

Tenn. Code Ann. § 20-7-106 (1981). The important language of this statute is subdivision (2), which provides that the legislative immunity does not apply when the attorney, party or material witness would be required to be absent from any meeting of a legislative committee while the general assembly is not in session if a continuance is not granted.

In Missouri, legislative immunity applies when the legislature is in session and the member is "[t]he initial attorney for any party or has filed an entry of appearance as an attorney for any party more than forty-five days prior to the filing of the written notice under this subsection." Mo. Ann. Stat. § 510.120(1)(3) (2005).

Mississippi provides that the legislative immunity shall apply

[i]n any cause now pending or which shall hereafter be pending before any court of this state...in which an application for continuance is properly made, predicated upon the ground that the counsel for the party making said application is a member of the Mississippi legislature and if said application is made at a time when the legislature is in session, either regular or extraordinary, or if said legislature will be in session at the time that said cause would be triable, then the continuance shall be granted in all cases.

Miss. Code Ann. § 11-1-9 (1972). Thus the Mississippi courts require the filing of a motion to continue before legislative immunity can apply.

Perhaps the most restrictive state in regard to the rights of the judiciary in legislative immunity matters, Kansas has determined that

from and after the fifteenth day preceding the day on which any regular or special session of the legislature of this state shall convene, and until the tenth day of adjournment is taken sine die, members of the legislature of this state shall not be required to appear in any court in this state and participate in the trial of action therein pending, or the hearing of any motion, application or other proceeding in which such member is employed as an attorney or interested as a party; and no such member shall be required to attend the taking of any depositions in any action pending in any court in this state in which he is employed during the whole of said period of time, except in cases where the court shall, in its discretion, make an order authorizing the taking of such deposition.

Kan. Stat. Ann. § 46-125 (1927). Even in Kansas, the courts retain some discretion to keep the flow of litigation proceeding through discovery matters.

West Virginia's statute, as urged by the Petitioner, is absolute. Petitioner maintains that in no circumstance will the needs of the judiciary and the rights of the public and other litigants work to overcome an invocation of legislative immunity. The above review of other states' statutes shows a consistent trend toward either (1) requiring the consent of the court to the invocation of immunity by virtue of a motion requirement, (2) limiting the immunity to truly significant events such as trial, (3) requiring an attorney-client relationship that preexists by a significant time the invocation of immunity, (4) limiting immunity to the legislator him- or herself, and/or (5) at least providing that legislative immunity is not absolute. The statutes of our sister states are instructive and show clearly that legislators and their clients can be protected from undue burden without violating the substantial policy goals of allowing litigation to continue in an orderly and appropriate fashion. This policy goal has not been served in the sweeping and overbroad terms of W.Va. Code § 4-1-17.

3. *Case law from other states suggests that the application of the statute in the manner suggested by Petitioner is not required as a matter of public policy.*

Petitioner acknowledges retaining counsel on March 19, 2009, when the current regular legislative term was already in session. The importance of a lack of a preexisting relationship between the legislator and the client is a matter of first impression before this Court. However, several other jurisdictions have previously considered the issue and generally agree that when counsel is retained after the legislative session has commenced, then the immunity protections should not apply.

In *Duncan v. State*, 89 Okla.Crim. 325, 207 P.2d 324 (1949), the Criminal Court of Appeals of Oklahoma considered the application of the Oklahoma immunity statute where the attorney for the defendant was retained after the legislative session convened. There the court held that "if the employment of defendant's counsel is before the House or Senate of the Legislature convenes and the case is called in any proceeding during the session while the defendant's counsel is in attendance thereon, the defendant is entitled to a continuance as matter of right." *Id.*, 207 P.2d at 336. However, "where the accused employs an attorney to represent him in a case, after the legislature has convened it has been held he is not entitled to a continuance as a matter of right." *Id.*, see also *State v. Myers*, 352 Mo. 735, 179 S.W.2d 72 (1944)(where such employment is begun while the legislature is in session it has been held discretionary with the court whether or not to grant a continuance); *McConnell v. State*, 227 Ark. 988, 302 S.W.2d 805 (1957)(Although this statute is mandatory in cases to which it properly applies, it does not require that a continuance be granted when the litigant is represented by other counsel or when the member of the legislature is not the litigant's regular attorney and is employed after the legislative session has begun). As an

Oklahoma court put it, "a defendant should not be permitted to secure a delay of his trial by employing a member of the legislature as his attorney after the legislature is in session, but this application should ... be addressed to the sound discretion of the trial judge, and this discretion, taking into consideration all of the facts of the cause, should not be abused." *Gilroy v. State*, 64 Okla.Crim. 332, 80 P.2d 602, 607 (1938).

West Virginia's jurisprudence is not at odds with this line of reasoning. In *State v. Ladd*, 210 W.Va. 413, 557 S.E.2d 820 (2001), this Court discussed application of the legislative immunity statute in a situation where two witnesses to a criminal trial were not present during the trial due to their counsel's legislative duties. The attorneys in that matter were retained prior to the trial of the matter. This court in reviewing the assignments of error below, noted that "a lawyer who is a legislator or designated employee of the Legislature must share in this duty of reasonable accommodation." *Id.*, 557 S.E.2d at 837. In *State ex rel. Drake v. Hill*, the attorney legislator had a preexisting relationship with the appellant and had been representing him in a divorce proceeding prior to the start of the legislative term. 214 W.Va. 47, 585 S.E.2d 47 (2003). After the legislature began an interim session, the court handed down a decision regarding the appellant's divorce and counsel filed an appeal outside the time limits set forth within the West Virginia Rules of Civil Procedure. *Id.* There, this Court held that the circuit court improperly denied an extension of time outside the appeal period in light of the legislative immunity statute. *Id.*

In the instant matter, counsel for the Petitioner was retained after the legislative session began, making it possible for the Petitioner to frustrate the timing and objectives of an ongoing proceeding merely by retaining a legislator. The public policy of just and

speedy determination of civil and criminal actions and the integrity of the rules governing judicial time and time limits should not be permitted to be foiled by a litigant's mere selection of counsel who happens to be a legislator, knowing that such selection will operate to work a stay of the present ongoing proceeding.

Because the public policy of this state is frustrated by Petitioner's invocation of W.Va. Code § 4-1-17, this Court should decline to issue a rule to show cause in the instant matter.

V. CONCLUSION

The circuit court concurs with the basic idea of affording scheduling relief to litigants whose counsel also serve the public by being legislators. To date, respondent has not routinely found that litigants and their counsel have abused the relief afforded by the statute at issue. In the instant matter, however, Petitioner's selection of counsel has frustrated the orderly and important working of the court system and has done so in such a way which highlights the unconstitutionality of W. Va. Code § 4-1-17.

Petitioner in this case has effectively thus far avoided lawful Grand Jury process. Given the frequency of legislative sessions compared to the infrequency of grand jury sessions, and the broad nature of the legislative immunity statute, Petitioner and counsel could conceivably forever avoid the lawful process of the Grand Jury. If the statute can be utilized in this matter there is a tremendous advantage for any party to a civil or criminal matter to effectively delay these matters indefinitely. This Court noted in *Ladd* that "a lawyer who is a legislator . . . could be exempt from attendance at trials for potentially substantial amounts of time resulting in significant disruption of the justice system as well as great inconvenience to a large number of people." 557 S.E.2d at

836. Only where legislators rigorously adhere to *Ladd's* pronouncement that "a lawyer who is a legislator or designated employee of the Legislature must share in this duty of reasonable accommodation," 557 S.E.2d at 837, can the difficulties inherent in the application of W. Va. Code § 4-1-17 be avoided. In the instant matter, Petitioner and his counsel have not shared in the duty of reasonable accommodation. It was not error for the Circuit Court to refuse to apply the immunity afforded Petitioner's counsel by an unconstitutional statute clearly at odds with the public policy of this state and in clear derogation of this Court's rules.

In light of the circumstances and facts of this matter, the petition for a writ of prohibition is improper, and the Court should decline to issue a rule to show cause in this matter.

Respondent Honorable Michael Thornsby

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel
JOHN DOE, a certain individual subpoenaed
in a matter currently pending
before the Mingo County Grand Jury,

Petitioner,

v.

Supreme Court No.: 090469
In Re: Grand Jury Subpoena
January 2009 Term

THE HONORABLE MICHAEL THORNSBURY,
Circuit Court Judge of the Thirtieth Judicial Circuit,

Respondent.

CERTIFICATE OF SERVICE

I, Benjamin L. Bailey, counsel for Respondent, do hereby certify that service of the foregoing **RESPONDENT CIRCUIT COURT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF PROHIBITION** has been made upon the following by depositing a true and exact copy in the United States mail, postage prepaid, addressed as follows:

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