

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.

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

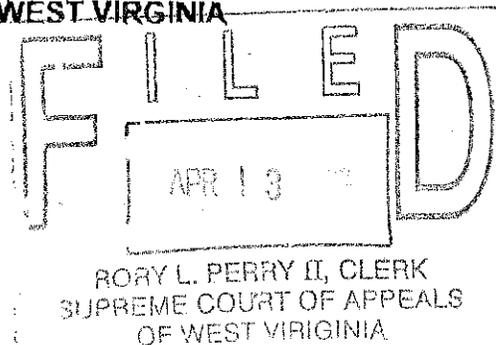
Respondent.

**STATE OF WEST VIRGINIA'S RESPONSE
TO PETITION FOR WRIT OF PROHIBITION**

The State of West Virginia, by Mingo County Prosecuting Attorney, C. Michael Sparks, respectfully avers as follows:

I. PROCEEDINGS BELOW/STATEMENT OF FACTS

On or about February 26, 2009, a grand jury subpoena duces tecum for the production of certain documents was served upon the Petitioner. On March 23, 2009, the undersigned received correspondence from the Petitioner's counsel [Senator H. Truman Chafin] purporting to invoke "legislative immunity" pursuant to West Virginia Code § 4-1-17. The Petitioner's counsel did not notify the tribunal [Mingo County Circuit Court] of his intention to invoke his legislative exemption privilege until more than two hours after the grand jury convened at 9:00 a.m. on March 24, 2009. Mingo County Circuit Court Judge Michael Thornsby promptly denied the relief requested by the Petitioner's counsel as being untimely filed and inapplicable under the circumstances.



No. 090469

II. STANDARD OF REVIEW

When determining whether a writ of prohibition should be issued, the court must consider five (5) factors in its legal analysis:

(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.

Syllabus Point 4, State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S. E.2d 12 (1996).

Public policy has prompted a practical approach in assessing the appropriateness of drastic remedies requested in writ form. See Syllabus Point 2 and 3, State ex rel.

Sowards v. County Com'n of Lincoln County, 196 W. Va. 739, 474 S.E.2d 919 (1996).

III. ARGUMENT

A. THE PETITIONER'S COUNSEL DID NOT ATTEMPT TO REASONABLY ACCOMMODATE THE CIRCUIT COURT.

A lawyer who is a legislator must reasonably accommodate the trial court and waive their legislative exemption privilege when possible. See State v. Ladd, 210 W. Va. 413, 557 S.E.2d 820 (2001). The undersigned advised the Petitioner's counsel that strict compliance would not be necessary if the Petitioner simply acted in good faith by minimally complying with the grand jury subpoena duces tecum. Nevertheless, the Petitioner's counsel adamantly refused to submit a single document requested in the

grand jury subpoena duces tecum until thirty (30) days after adjournment of the regular session or any extraordinary session that followed. The Petitioner's counsel abused the legislative exemption privilege by repudiating any efforts by the undersigned to achieve a mutual and reasonable accommodation.

**B. THE PETITIONER'S COUNSEL IS REQUESTING AN
ERRONEOUS AND OVERLY BROAD APPLICATION
OF THE LEGISLATIVE EXEMPTION PRIVILEGE.**

The Petitioner's counsel is requesting an erroneous and overly broad application of the legislative exemption privilege. No appearance or attendance to a matter by the Petitioner's counsel was required to minimally comply with the grand jury subpoena duces tecum. In fact, Rule 6(d) of the West Virginia Rules of Criminal Procedure prohibited the presence of the Petitioner's counsel while the grand jury was in session. Therefore, the circuit court's refusal under the circumstances to recognize the legislative exemption privilege was not clearly erroneous as a matter of law.

An overly broad application of legislative exemption privilege would violate West Virginia public policy by creating multiple pitfalls for criminal prosecutions, including, but not limited to:

- unreasonable delays in grand jury investigations;
- loss, destruction and/or spoliation of evidence;
- violation of the Defendant's right to a speedy trial;
- mandatory release of incarcerated violent offenders for failure to indict pursuant to West Virginia Code § 62-2-12.

Moreover, inevitable expansion of the legislative exemption privilege will render it impossible to comply with the ambitious time standards promulgated in the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings and prove to be a

substantial impediment to the timely disposition of juvenile and emergency protective order/domestic violence protective order proceedings. Left unconstrained, the legislative exemption privilege is a looming obstruction in cases where a timely disposition is required by law or otherwise synonymous with justice.

**C. SELECTIVE AND CAPRICIOUS ASSERTION OF THE
LEGISLATIVE EXEMPTION PRIVILEGE VIOLATES PUBLIC
POLICY**

The Petitioner's counsel appears to have selectively and capriciously asserted the legislative exemption privilege. According to the 2009 Legislative Calendar, the regular session is scheduled to adjourn at midnight on April 11, 2009. Historically, the West Virginia Legislature is busiest during the last week of the regular session, yet on April 8, 2008, no scheduling conflict prevented The H. Truman Chafin Law Firm PLLC from filing a major civil action in Kanawha County Circuit Court naming among others, Judge Michael Thornsby, as a party defendant. Earlier in the legislative session, the Petitioner's counsel participated in a jury trial of a medical malpractice case that lasted three days in Lawrence County, Kentucky. Selective and capricious assertion of the legislative exemption privilege is an abuse of the deference afforded by the statute and inconsistent with the public interest in the fair administration of justice.

IV. CONCLUSION

The Petitioner's counsel is not entitled under the circumstances to the untimely asserted legislative exemption privilege. The Petitioner's counsel failed to make even the slightest good faith gesture to reasonably accommodate the circuit court. Moreover, the erroneous and overly broad assertion of the legislative exemption privilege by the Petitioner's counsel violates West Virginia public policy. Finally, the Petitioner's counsel

abused the deference afforded in West Virginia Code § 4-1-17 by selectively and capriciously asserting the legislative exemption privilege during the legislative session. Accordingly, the West Virginia Supreme Court of Appeals should deny the relief requested.

STATE OF WEST VIRGINIA
By Counsel



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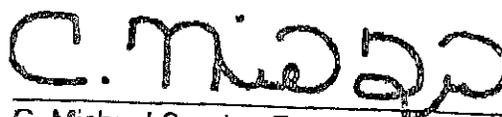
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing
"State of West Virginia's Response to Petition for Writ of Prohibition" was served
via facsimile or United States Mail upon the following party:

H. Truman Chafin, Esq.
Letitia Neese Chafin, Esq.
THE H. TRUMAN CHAFIN LAW FIRM PLLC
P.O. Box 1799
Williamson, WV 25661

Dated the 13th day of April, 2009.



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