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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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

STATE OF WEST VIRGINIA EX REL. JORDAN SHAVER,
Petitioner,

v. PETITION No. 35518

HONORABLE HERSHEL MULLINS, MAGISTRATE FOR MONONGALIA COUNTY
Respondent.

STATE'S RESPONSE TO REQUEST FOR WRIT OF MANDAMUS

The Petitioner has filed a writ of mandamus against the Honorable Magistrate Hershel Mullins to compel the victim to testify at a preliminary hearing. The State files this response in opposition to the Defendant's Writ supported by the following grounds:

FACTUAL BASIS:

The Defendant's Writ of Mandamus grossly omits material and crucial facts that are imperative for any consideration by this court. It appears by such omissions, and the Defendant's argument, that the State's case is based on "an uncorroborated accusation of sexual assault" (page 5). The Defendant wishes to give the Court the misleading impressions that the State's case is based solely on the victim's statement which necessitates her testimony at the preliminary hearing. Because of this gross misrepresentation, the State will first response by outlining an accurate account of events. The State will further show that the Defendant was fully aware of the corroboration of the victim's statement at the time of the filing of this request for a Writ of Mandamus, as well as at the time of the preliminary hearing. Specifically, the Defendant made several admissions to law enforcement and confessions to his friends that he had sexually

assaulted the victim, which information was contained in the original charging instrument: the criminal complaint.

On January 23, 2010, around 3:42 a.m. the Morgantown Police Department received a report of a sexual assault. The victim, who is a student at WVU, went out that evening with several of her friends, and utilized the late night student transportation system, commonly known as the "drunk" bus. The Defendant, who is NOT a student at WVU, got on the drunk bus at a subsequently location and sat next to the victim. The Defendant had come to Morgantown with a friend simply to party that weekend. He was staying at the dorms with an acquaintance who is a student at WVU. The Defendant took his WVU friend, Nicholas Cozine's, student ID to be able to access the bus for free, as well as gain entry into the dorm when he returned from his night of partying. The "drunk" bus has acquired a reputation for being a raucous and unruly environment. The bus driver that drove the bus on that night has since quit his employment because of the uncontrollable drunken behavior on the bus. Actions such as males pulling out their penises and rubbing them on other passengers, as well as other obnoxious, disorderly and recalcitrant behavior is present. Other witnesses on the bus gave statements observing that the victim was wearing a short black skirt or dress, and was intoxicated. She was leaning over to her male friend on the other side of her and laying across his lap. A male witness on the bus stated that the Defendant and the male on the other side of the victim were laughing and making fun of the victim over top of her. The male witness also indicated that the victim's underwear was exposed placing the victim's exposed private area directly next to the Defendant. The victim stated that the Defendant kept trying to put his hand up her skirt, and she told him to stop. The Defendant ignored her and then

forced his fingers inside her vagina. The victim stated that she repeatedly told the Defendant to stop, and the Defendant continued to force his fingers inside her. She became upset and began to cry. People asked the victim what was wrong but she indicated that she was too upset and scared to speak until she got off the bus. Statements of witnesses indicated that the victim was crying when she got off the bus and went to her dorm room. Friends were trying to consol her and ask what happened. The Resident Advisor heard the victim crying and went to check on her. She found her crying on the floor. She asked what was wrong. The victim was hesitant to tell what had happened because she was afraid she would be in trouble for drinking underage if she told the police. The Resident Advisor assured her she would not be in any trouble. The victim then disclosed that she was fingered on the bus a few minutes earlier. She described the perpetrator, the Defendant, and where she believed he had entered the dorm building.

When the bus stopped at the Towers dormitory, the Defendant exited the bus and so did the victim. The Defendant was approximately two people ahead of the victim as they entered the dormitory and swiped their student IDs, according to the victim. The victim subsequently reported the sexual assault to her Resident Advisor, then to WVU police Sgt. Burks and Officer Dull who were summoned by the Resident Advisor. Finally, the victim made a statement to Morgantown City Police Detective Larry Hasley who was asked by WVU police to assist in the investigation. In all the victim's statements, the victim consistently described the defendant's physical characteristics white male with short brown hair; and what he was wearing, a white button up shirt with blue pin stripes and blue jeans. Detective Hasley was able to immediately access recorded surveillance video of the building and the elevators. Detective Halsey was able

to observe the defendant on video surveillance showing when he swiped the student ID card registered to Nicholas Cozine, just prior to the victim entering the dormitory. This information was consistent with the victim's account of events. Additionally, Detective Hasley observed surveillance video from the lobby and elevator of the dormitory. Detective Hasley was able to spot the Defendant who matched the physical description and clothing description given by the victim, in the lobby and on the elevator. Also, every other person who entered the dorm and utilized the elevator was able to be identified by other residents, except the Defendant. Other residents who knew Nicholas Cozine, the owner of the student ID swiped by the Defendant, indicated that the person using that card was not Nicholas Cozine.

Detective Halsey was able to locate the dorm room of Nicholas Cozine to question him regarding the use of his ID. Mr. Cozine was asked by Detective Halsey where he was earlier that evening and Nicholas Cozine indicated that he was in his room that evening. He further stated that he had loaned his ID to a friend who was visiting for the weekend, Jordan Shaver, the Defendant. More specifically, Nicholas indicated that the Defendant took Nicholas' ID when he left the dorm room to party that night. Nicholas Cozine consented to Jordan Shaver taking the student ID, and stated to Detective Hasley that he did not think much about it at the time. Nicholas Cozine was very cooperative with police and allowed them to enter into his dorm room. Upon entering the room, Detective Hasley noticed the shirt matching the description of the one worn by the perpetrator and viewed on surveillance video as the shirt worn by the Defendant, was laying on the floor. Detective Hasley asked who the shirt belonged to and Nicholas Cozine indicted it was Jordan Shavers who had come back that night, and

was still asleep in a bed in the room. Detective Hasley explained that they were asking questions regarding a sexual assault that had taken place that night. Jordan Shaver overheard Detective Hasley speaking with Nicholas Cozine and asked where the incident had taken place. Detective Hasley informed them that it took place on the night bus from downtown to Towers dormitory. Jordan Shaver then stated "I'm straight then, I didn't ride the bus back. I got a ride back". Nicholas Cozine told Detective Hasley separately from Jordan Shaver that when Jordan Shaver came back into the room that night he announced that he had just "fingered a girl on the drunk bus" and that "she was frowning". Nicholas Cozine gave a written and recorded statement to Detective Hasley regarding the Defendant's statements when he returned to the dormitory.

Detective Hasley obtained a search warrant for the dress shirt, and swabs and fingernail clippings from the Defendant, Jordan Shaver. After the collection of the materials, Detective Hasley asked Jordan Shaver if he would come to the police station for an interview. Jordan Shaver agreed and followed Detective Hasley in his own car to the police station.

At the police station, Detective Halsey read the Defendant is **Miranda** rights and the Defendant signed the form indicating that the rights were read and that he understood them. He agreed to speak with Detective Hasley without an attorney being present. The Defendant proceeded to state that he met up with a guy and two girls who gave him a ride back to Towers in a dark colored SUV, and that he sat in the back of the vehicle. He stated that he did use Nicholas Cozine's ID to get into Towers. Detective Hasley then showed the Defendant the statement from Nicholas Cozine. The Defendant then asked for an attorney. Detective Halsey terminated the interview and proceeded to arrest the

Defendant for sexual assault. While in processing, the Defendant spontaneously told Detective Hasley that he was scared and that he wanted to tell him something. Detective Hasley indicated that it was not in the Defendant's best interest to speak, and the time had passed for any statement until he spoke to his lawyer. The Defendant stated to Detective Hasley that "she was acting like she wanted it" and asked Detective Hasley to tell the victim "tell her I'm sorry." The Defendant asked Detective Hasley again to "tell her I'm sorry" while being placed in the Monongalia County sally port.

Detective Halsey identified numerous students who had ridden the bus the night of the incident from their student ID swipes to get on the bus. Numerous witnesses were able to describe the victim as being on the bus, and the Defendant sitting next to her. Witnesses indicated that they recalled the victim being intoxicated and leaning on a male next to her. Witnesses also recall seeing the Defendant sitting on the other side of the victim making fun of the victim and gesturing over top of her to the male on her other side. Most witnesses did not know the victim or the Defendant, and all indicated that the bus was very crowded and numerous people were required to stand to ride the bus. No one was able to see the actual digital penetration by the Defendant, but the witnesses were able to confirm the circumstances surrounding the sexual assault. Specifically, that witnesses saw the victim become upset and begin to cry on the bus, and continued to cry upon entering into the dorm.

Soon after the Defendant was released on bond, Nicholas Cozine called Detective Hasley to inform him that Jordan Shaver had called him and asked him to retract and change his statement and to lie to the police for him. Additionally, during the interviewing process of witnesses another friend who was present in Nicholas Cozine's

dormitory room when Jordan Shaver returned after the sexual assault, indicated that Jordan Shaver told him he had fingered a girl on the drunk bus and was bragging about his actions.

THE VICTIM WAS NOT REQUIRED TO TESTIFY DUE TO THE STATE SHOWING AN UNREASONABLE BURDEN ON THE WITNESS

Criminal Procedure for Magistrate Courts Rule 5.1 outlining preliminary hearings and the admissibility of hearsay at said hearing states that "hearsay evidence may be received, if there is a substantial basis for believing:

1. That the source of hearsay is credible;
2. That there is a factual basis for the information furnished; and
3. That it would impose an unreasonable burden on one of the parties or on a witness to require that the primary source of the evidence be produced at the hearing.

This rule is discussed and explained in **Peyatt v Kopp** 189 W. Va. 114, S.E. 2d 535. The first prong of the hearsay analysis is credibility of the source. In making a determination that the source of the hearsay was credible, the magistrate had the benefit of the State's proffer and the criminal complaint which alleged the victim gave a statement that she was sexually assaulted, a description given by the victim of her perpetrator, and his proximity to hers upon entering Towers dorm. The proposed source and witness of the hearsay testimony was Detective Hasley who interviewed the victim, was able to view surveillance video confirming the victim's account of events, and recovered the white and blue striped button up shirt described by the victim. Furthermore, the criminal complaint sworn to by Detective Hasley contained information regarding the confession made by the Defendant to his friend at the dormitory, which further supported the victim's account of events. All of these factors presented more than

sufficient grounds to validate the credibility of the source of hearsay, namely, Detective Hasley, to support admissibility of the victim's statement at the preliminary hearing.

The second prong of the hearsay analysis for preliminary hearings is a factual basis for the information furnished. The victim's statement indicated that the Defendant inserted his fingers in her vagina on the bus. Witnesses that were present for the statements given by the victim to authorities confirmed that all the victim's statements were consistent; witnesses observed the non-verbal actions of the victim at the time of the incident, upset and crying; and the victim has no prior acquaintance with the defendant to warrant a suggestion or motive for a vindictive or false allegation. Similar grounds for a finding of admissibility of the victim's hearsay statement was cited in **Peyatt v Kopp**.

The third prong of the hearsay rule for preliminary hearings is an unreasonable burden on one or more of the parties, or on a witness, to require the primary source of evidence to be produced. In the present case the victim, a young college female, had been sexually assaulted just a few days before by the Defendant. It is certainly an unreasonable burden to require the victim to confront her accuser, testify to the assault which happened just a few days before, and then be subject to a hostile cross examination which is solely for the purpose of badgering her. All this with little to no opportunity for the State to prepare the victim as to how court proceedings work and what to expect. While the victim is technically an adult, she is still only 19 years old. The magistrate had the benefit of the complaint which outlined: 1) the victim's allegations, 2) the victim's detailed description of the Def, 3) surveillance video corroborating the victim's account of the events, 4) the observations of the officer which corroborated the victim's description, and 5) the Defendant's confession to his friend. The State has attached a

copy of the criminal complaint to this document. Testimony of the victim would have a traumatic effect on the victim and pose an undue burden on her at this preliminary stage of the proceedings. The magistrate properly allowed for the State to introduce the victim's hearsay statements in lieu of her actual testimony pursuant to **Peyatt v Kopp**.

The purpose of the preliminary hearing is not to determine guilt or innocence. It is simply a determination made to ensure the State has sufficient evidence to charge the Defendant. This is a check and balance system to monitor and prevent the State from depriving people of their liberty without a showing of validity for the liberty deprivation or other restrictions. Had the magistrate ruled the victim's statement was not admissible, the State had sufficient probable cause to proceed at the preliminary hearing without even introducing the content of the victim's recorded statement. The State is certainly permitted to introduce information received from Mecca regarding the purpose for which officers were called to the dormitory: a sexual assault against the victim. The Investigating Officer would have testified to his observations, surveillance video, and other evidence he found in his investigation. Finally, the officer would have testified to the Defendant's statements, and the State would have introduced the Defendant's confession, all of which meet the probable cause threshold for a preliminary hearing without having to admit the statement or testimony of the victim. However, the magistrate correctly ruled that the victim's hearsay statement is admissible by the State at the preliminary hearing without the testimony of the victim, because her statement soundly meets all the requirements outlined in Rule 5.1, and this determination is solely within the discretion of the magistrate pursuant to **Peyatt v Kopp**.

PRELIMANRY HEARINGS ARE NOT DISCOVERY TOOLS, THEREFORE, THE DEFENDANT MUST PROVIDE A PURPOSE RELATED TO PROBABLE CAUSE TO FORCE THE VICTIM TO TESTIFY

The Defendant subpoened the victim in this matter to force the victim to testify over the State's objection. The State filed a motion to quash the Defendant's subpoena, and requested the Court to require the Defendant to provide justification as to how the victim's testimony, when called as a defense witness, would rebut the State's probable cause evidence. The case directly on point which addresses the requirements of a defendant prior to being permitted to call a victim to testify as a witness in a preliminary hearing is **Desper v. State** (318 S.E. 2d 437 (W.Va. 1984) The State argued the holding of **Desper v State** to the magistrate at the preliminary hearing which provided the basis for the magistrate court's ruling in favor of the State. The issue of whether the defendant can force the victim to testify is discretionary upon the magistrate. *Syllabus 2* in **Desper v. State** states that:

> a defendant has a right to cross-examine witnesses for the State and to introduce evidence; the defendant is not entitled during a preliminary examination to explore testimony solely for discovery purposes. The magistrate at the preliminary examination has discretion to limit such testimony to the probable case issue, and the magistrate may properly require the defendant to explain the relevance to probable cause of the testimony the defendant seeks to elicit. **Desper v State at 445**

"The right to cross-examine and to introduce evidence may be curtailed by the presiding judge consistent with the screening purpose of the preliminary hearing. **Desper** citing **Rex v Sullivan**, 575 P. 2d at 410. **Desper v State** gave an example of a legitimate reason for allowing a defendant to call a victim in citing **McDonald v The District Court (Colorado)** 576 P. 2d at 171. The **McDonald** court's ruling refused to allow the defendant to call an adult victim as a witness for a reason irrelevant to probable cause

(conditions surrounding the apartment complex) which appeared to be an attempt simply to gain discovery; but did allow the defendant to call the same witness for the second stated purpose: identification of the defendant as the man who committed the crime. **Desper v State** citing **Coleman v Burnett** 477 F. 2d 1187 discussed the Government's motion to quash a defendant's subpoena for a government witness, holding that "certainly an accused will not in every instance qualify for a subpoena for the production of a Government witness at his preliminary hearing, but where he *succeeds in a plausible showing that that witness could contribute significantly to the accuracy of the probable cause determination*, the request for the subpoena should be granted." 477 F. 2d at 1205. (emphasis added)

Desper v State also cites a litany of cases supporting the premise that discovery is not the primary object of a preliminary examination, but rather the "only legal justification for its existence is to protect innocent persons from languishing in jail on totally baseless accusations" **Robins v United States** 476 F.2d 26 (1973), not for the purpose of affording discovery to the accused, nor to provide a preview of the State's case against him. **Coleman v Burnett** 477 F.2d at 1199-1200 held that a preliminary hearing is confined by the principle that a probe into probable cause is the end and aim of the proceeding, which the **Desper v State** court determined is similar to Rule 5 of the West Virginia Rules of Criminal Procedure. Any discovery resulting from a preliminary hearing is incidental and not a right of a defendant. **Desper** citing **State v Prevost** 118 Arizona at 103. The Defendant has other more formal discovery opportunities under the West Virginia Rules of Criminal Procedure such as: Rule 6, disclosure of Grand Jury

matters; Rule 7, Bill of Particulars and other specifics regarding the State's case; Rule 12, State's notice of intent to use evidence; Rule 16, the principal discovery rule.

The State in the current matter proffered to the magistrate court that it would be presenting the testimony of Detective Hasley, who would be testifying to the hearsay statement of the victim, his own observations of the dormitory room of Nicholas Cozine, collection of evidence corroborating the victim's facts, surveillance video corroborating the victims' facts, and the admissions of the Defendant to the officer. The State expressly stated that it did not intend to call the victim in this matter due to the traumatic effect it would have on the young female victim, and requested a ruling from the magistrate regarding the admissibility of the victim's hearsay statements. The State further informed the court that pursuant to **Desper v State**, the preliminary hearing is not for the purpose of the Defendant obtaining discovery; but rather, for the purpose of determining probable cause. The magistrate can, at its discretion, require the defendant to explain the relevance of the victim's testimony as to how it rebuts the state's probable cause showing, pursuant to **Desper v State**. The State requested, and the Magistrate inquired of the Defendant, to provide a proffer as to how the victim's testimony would rebut her statement to police relevant to probable cause. The Def *could not* and *did not* provide any explanation as to why he would be calling the victim to testify other than Counsel for defendant's answer "because we can". The Magistrate Court correctly decided that the Defendant had not provided sufficient grounds and justification to call the victim as a witness, and quashed the Defendant's subpoena. The court ruled that the victim was not required to testify pursuant to the Defendant's subpoena, and the State could introduce her hearsay statement without her testimony. The State indicated that it was ready to proceed and call

its first witness. The Defendant then requested the court to continue the hearing to appeal the court's decision. The magistrate granted the Defendant's request. In doing so, the Defendant prevented himself from making any further record in this matter for this Court's consideration.

THE DEFENDANT DOES NOT HAVE A CONSTITUTIONAL RIGHT TO A PRELIMINARY HEARING

In West Virginia, a preliminary examination is NOT constitutionally required. **Desper v State** citing *Syl. Pt 1* **State ex rel Rowe v. Ferguson** 268 S.E.2d 45 (1980). However, if a preliminary hearing is conducted, the Defendant is constitutionally entitled to Counsel. Nevertheless, there is nothing in our State Constitution which would give an individual a constitutional right to a preliminary hearing. Furthermore, West Virginia Criminal Procedure for Magistrate Courts Rule 5(e) provides "that a preliminary hearing shall not be held if the defendant is indicted or if an information is filed against the Defendant in circuit court before the date of the preliminary examination."

The undisputed litany of cases holding that a Grand Jury proceeding and subsequent indictment is a proper proceeding to make a finding of probable cause in lieu of a preliminary hearing, effectively removes any entitlement to a preliminary hearing in magistrate court, and no doubt provides the basis for Rule 5(e). Historically, the grand jury "serves a dual function: it is intended to operate both as a sword, investigating cases to bring to trial persons accused on just grounds, and as a shield, protecting citizens against unfounded malicious or frivolous prosecutions." **State ex rel Miller v Smith** 285 S.E. 500. The West Virginia Constitution protects citizens from abuse of the process, "for under the state constitution it is our sworn duty to support the fundamental principles

upon which our legal institutions are founded...we are therefore bound to preserve the dual function of the grand jury as both sword and shield. W. Va. Const. art 3, §20: art 4 §5. **State ex rel Miller v Smith**.

THE GRANTING OF A WRIT OF MANDAMUS AGAINST THE HONORABLE MAGISTRATE HERSHEL MULLINS WOULD BE ERRONEOUS

The magistrate has the discretion to allow hearsay evidence at a preliminary hearing under W. Va. Rules of Criminal Procedure 5.1. The magistrate in the present case found that it would impose an unreasonable burden on the state to have the victim testify at this stage of the proceedings because of the circumstances presented by the State at the hearing. In **Peyatt v Kopp** this Court stated that:

> while we recognize a circuit court's authority to issue a writ of mandamus against a magistrate to compel him or her to perform a mandatory nondiscretionary duty or to compel the exercise of discretion where the magistrate failed to act, we do not believe the issuance of a writ of mandamus was appropriate in this case. We emphasize that the proceeding was a preliminary hearing to determine whether there was probable cause, and it was not a trial upon the issue of Mr. Peyatt's guilt. The magistrate had the discretion to allow the hearsay testimony at the preliminary hearing to be admitted under W.Va. R.Crim P. 5.1 if the three conditions under the rule were met. It appears that the three conditions were met, and we do not believe the magistrate abused his discretion in this case by allowing the hearsay testimony. Thus, we conclude that the writ of mandamus compelling the magistrate to conduct another preliminary hearing should not have been granted by the circuit court. **Peyatt v. Kopp** at 540.

In finding that the three prongs were met, the magistrate in this present case did not abuse his discretion, as this decision is wholly within his province and a sufficient basis existed for his ruling. In his memorandum, the Defendant did not raise an objection to the first two prongs of the hearsay requirement: 1) credibility of Detective Halsey as the source of hearsay, and 2) factual basis for the information. Therefore, the Defendant presumably acknowledges that these prongs are met. The third prong of "unreasonable

burden" is the defendant's contention. The Defendant's argument is that **Peyatt v Kopp** deals with children and therefore the traumatic effect on an adult should be ignored, or simply does not exist. The Defendant's unpleasant opinion becomes more distasteful in noting the assertions that "[t]he seeming presumption that psychological harm will result from a court appearance is patronizing and demeaning." And further that "[the] State has not provided a factual basis to sustain the implied presumption that the entire cohort of adult alleged victims of sexual offenses must be deemed incapable of appearing in court without suffering some harm." As outlined above in the factual basis, this is a 19 year old girl who was visibly shaken, scared, upset and crying the night of the sexual assault. She was afraid to even disclose the sexual assault for fear that she would be in trouble for underage drinking. The traumatic state of mind of that night was only a few days old at the time of the first scheduled preliminary hearing. Cleary, it is unreasonable to require a young female who has just been sexually assaulted to come in like a lamb to a slaughter, allowing a defense attorney, whose purpose and opinions seem to suggest that the intent for forcing her to appear is for the purpose of harassment, intimidation and humiliation to badger her into admitting that she is not being psychologically harmed in any way by the events and proceedings, or maybe that she really was not even sexually assaulted at all. The only grounds provided for this demand by the Defendant was simply "because we can". Obviously, the defendant has never been the victim of a sexual assault subjected to the humiliating experience of describing violations of her intimate body parts with complete and total strangers, not to mention a hostile defense attorney. To proclaim that victims of sexual assault are deemed to be "cohorts" in some grand plan to avert court appearances is unconscionable. The State is confident that if the victim was a daughter,

granddaughter or wife of the defendant, the tone and assertions would be different. The Defendant's odious tone has uncovered his intentions regarding the true purpose in attempting to force the victim's appearance and break her down prior to a trial on the merits. The Defendant was unable to provide any rebuttal or proper reason to call the victim as witness, again supporting the intent that the sole purpose was to get discovery and intimidate the victim. As the State indicated previously, clearly there was probable cause even without the statements of the victim, solely by the officers and witnesses observations, and the Defendant's own confessions.

This court can only issue a writ of mandamus to compel a magistrate to perform a mandatory nondiscretionary duty, or to compel the exercise of discretion where the magistrate failed to act. Pursuant to such, the Defendant's request for a writ of mandamus cannot be granted by this court because the magistrate did not fail to act. He, in fact, acted appropriately and the issue is one of a discretionary determination that can only be reviewed by an abuse of discretion standard. There is absolutely no basis to support a finding that there was abuse of discretion, and therefore a writ cannot be issued. The Defendant's assertion that the magistrate's discretionary decision to prohibit the victim's testimony by the Defendant is "unprecedented" is unfounded, as the State has shown by solid and reliable case law. Furthermore, the magistrate is certainly permitted to follow through with his own ruling, and excuse a witness after the subpoena has been quashed.

Moreover, the Defendant's argument and request for a writ of mandamus is completely premature. The Defendant did not permit any testimony to be taken because he refused to proceed with the hearing, and requested a continuance to appeal the

magistrate court's pre-testimony ruling. If the defendant had proceeded with the hearing, he would have a record in which to argue his points. He could still have made the same arguments, but would have been capable of provided a record on which to refer regarding the testimony and probable cause decision of the magistrate. He did not, however, and now does not have a record to support his claims. In the Defendant's quick desire to grand stand, he has rendered the crux of his argument totally premature. Furthermore, he did not follow the proper chain of appeal process. Instead of appealing to the circuit court, the defendant jumped to the Supreme Court of Appeals presumable for some notoriety. The defendant stated it would be "beneficial for the criminal defense bar to have a precedent on this issue." As the State has outlined, a clear and undisputed precedent exists already, which is simply and plainly contrary to the Defendant's argument.

The facts that were submitted by the Defendant are false and misleading to the court. The Defendant asserts that "as a result of an uncorroborated accusation of sexual assault-which allegedly occurred on a well-lighted bus, with more than a dozen potential eye witnesses, none of which saw or heard anything unusual..." This is a gross and egregious mischaracterization of the facts. The criminal complaint in and of itself provides the facts that the victim's statement is corroborated BY THE DEFENDANT, as well as by the physical evidence of video surveillance and the recovery of the defendant's shirt. The Defendant further alleges that the bus, and specifically the drunk bus at 2:00 a.m., is allegedly "well lighted". Anyone with a common life experience of riding a bus at night would agree that none of them routinely operate with the interior lights on, and there is absolutely no evidence to support the Defendant's misplaced presumption. The

State further provided this Court with additional facts contained in witness statements that witnesses saw the victim upset and crying while on the bus, which they noted as unusual or noteworthy to the police. The defendant further disrespects the court system by claiming the Grand Jury process is a total joke: more specifically that a ham sandwich can be indicted, and that this "fact" is rarely disputed. This comment is improper, offensive and disrespectful of a critical stage in the judicial process, and will not be dignified with further comment. The Defendant's demeanor in the memorandum appears to further represent the lack of regard and esteem the Defendant exhibits for the dignity of sexual assault victims, as well as the judicial system as a whole when it does not serve to absolve him of his wrongdoing.

THE PROSECUTING ATTORNEY IS NOT SUBJECT TO A PROHIBITION FROM PRESENTING CASES TO THE GRAND JURY, AND THE COURT'S PREVIOUS ORDER STAYING THE PROCEEDINGS FROM PRESENTMENT IS ERRONEOUS.

West Virginia law states that "prosecuting attorneys are executive officers, and in the performance of their executive duties they are not subject to the judicial writ of prohibition" **State ex rel. Miller v Smith** 285 S.E. 2d 500 (1981) "...Actions on the part of the prosecuting attorney which constitute a usurpation of judicial power will be subject to a writ or prohibition." **State ex rel Miller v Smith** at 506. **Miller v Smith** further explained that "prohibition does not lie to control a legislative body...., nor to prevent an executive act." **Miller v Smith** at 506 Prosecuting attorneys are executive officers and in the performance of their duties they are not subject to the judicial writ of prohibition, and courts cannot prohibit the executive actions of the prosecuting attorney. **State ex rel Miller v Smith.** While the prosecuting attorney has been historically determined to

perform a quasi-judicial role, there is a distinction to be made between the duties of a prosecuting attorney and those of a magistrate or circuit judge. *Only those individuals in the latter category are normally subject to a writ of prohibition.* **State ex rel Miller v Smith** at 506 footnote 4 (emphasis added) More recently **Peyatt v Kopp** dealt specifically with this Court's holdings regarding the duty of the prosecuting attorney and presentment to the Grand Jury. The West Virginia Supreme Court of Appeals held "[t]his court has consistently recognized that, under W.Va Code 7-4-1 [1971], the prosecutor has a nondiscretionary duty to institute proceedings against persons when he has information giving him probable cause to believe that any penal law has been violated" **Peyatt v State** at 541. Further this Court held "we hold that prohibition does not lie against a prosecuting attorney to restrain him from presenting a case to a Grand Jury where the prosecuting attorney, in performing his statutory duties, has probable cause to believe that a criminal offense has been committed and that the defendant committed the offense." **Peyatt v State** at 542. The **Peyatt** court found that the circuit court should not have issued a writ of prohibition against the prosecuting attorney to prevent a presentation to the grand jury, and reversed the circuit court's ruling, further directing an order to be issued dissolving the writs against the prosecuting attorney.

The prosecuting attorney in the current matter did, in fact, inform the Defendant, with complete assurance, that the State would present this case to the May 2010 grand jury regardless of whether the preliminary hearing was conducted prior to that time [Rule 5(e)] or whether the case was dismissed for lack of probable cause due to the victim not testifying [**Desper v State**, dismissal does not preclude the State from subsequently prosecuting the defendant]. The State's assertions were made to inform the Defendant of

the appropriate and controlling law regarding preliminary hearings and the prosecution of this case. The State believed this information was necessary to explain to the Defendant because it appeared then, as it does now, that the Defendant is posturing and arguing this case as if a dismissal or finding of no probable cause somehow prevents the State from prosecuting him. The State wanted the Defendant to be clear that this is simply not the case. Regardless of the outcome of the preliminary hearing with regard to the victim's testimony, any discharge of the defendant's case for a finding of no probable cause by the magistrate shall not preclude the State from instituting a subsequent prosecution for the same offense. **Desper v State** and W. Va. R. Crim Proc 5.1 (b). The Defendant wishes to prevent the State from presenting this matter to the grand jury, and requested the Circuit Judge Phillip Gaujot to exercise its "supervisory powers" to instruct the prosecutor not to present this case. Judge Gaujot, having reviewed the **State ex rel Miller v Smith** and **State ex rel Hamstead v Dostert** cases, properly informed the Defendant that he did have such authority, and refused to exercise any supervisory power to interfere with the prosecutor's prosecutorial duties, hence the reason for the subsequent "Motion to Clarify" filed by the Defendant with this Court. The letter to Judge Gaujot states that the prior authorities [**State ex rel Miller v Smith** and **State ex rel Hamstead v Dostert**] may create some "confusion" on the roles of the Court and the prosecuting attorney. There is no confusion in these cases. The Defendant simply does not wish to accept the law. The law and authority is clearly and expressly stated in no uncertain terms, and is in direct conflict with the Defendant's argument. The Defendant's desires to prevent prosecution of this matter cannot be supported by this Court.

This Court has previously issued an order on March 30, 2010 in this matter that states the Court is of the opinion that a rule should be awarded, and ordered a show cause hearing as to why a writ of mandamus should not be awarded against the Honorable Hershel Mullins, Magistrate for Monongalia County. It was further ordered that all proceedings below in connection with Criminal Actions No. 10-F-45 be, and they hereby are, stayed, until further order. A subsequent order was issued by this Court on May 5, 2010 wherein the Court clarified its previous order staying the proceedings and further ordered that the stay "*included the presentation of the case to the grand jury*." (emphasis added) Clearly, this order is an order prohibiting the State from presentment of this case to the grand jury. The State is of the opinion that this order of prohibition is clearly in error, and contradicts this Court's own long held precedent.

State ex rel Hamstead v. Dostert 313 S.E. 2d 409 (W.Va. 1984) *Syllabus pt.6* held that "where a court has jurisdiction to issue a particular order, the fact that such order is erroneous, irregular, or is improvidently rendered, does not justify one in disregarding or violating the order, and then citing the court's error as a defense to a charge of contempt. Where however, the judge lacks jurisdiction, or is without power or authority to render the order, refusal to comply with such order may not be punished as contempt." The prosecutor in the present case complied with this Court's order and did not present the Defendant's case for indictment at the May 2010 grand jury. However, it appears clear that this Court cannot issue such a prohibition against the prosecutor, and such order was in error. There is no allegation that the State would be usurping its executive duties, as this response has shown this Court that the state has probable cause to present this case to the grand jury. Further, there is no indication whatsoever, that the

actions and intentions by the State for presentment would constitute a usurpation of judicial power, or an abuse of discretion of any kind.

PROPOSED REMEDY

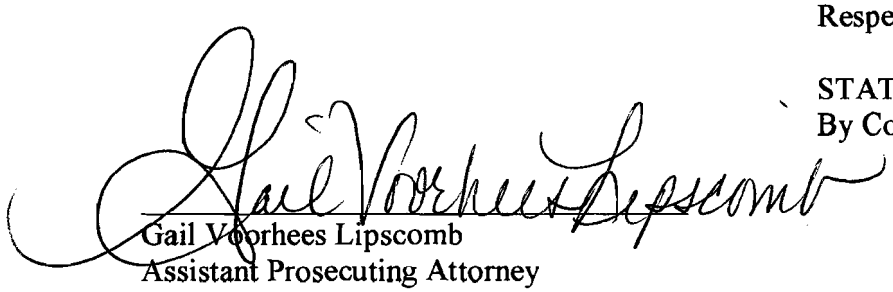
The Court has a limited remedy in this matter, as there is an insufficient record, as well as unsupported contentions, that would make issuance of a writ of mandamus against the magistrate both impossible and erroneous. The State requests this court to simply remand the case back to the magistrate level to be scheduled for a preliminary hearing. The Court has no basis to find the magistrate abused its discretion, nor can this Court order the magistrate to force the victim to testify, nor disturb the magistrate's decision in allowing the hearsay testimony of the victim. The Court should not interfere with the discretion of the magistrate, nor disturb the magistrate court's ruling, and has no basis on which to do so. This Court has no grounds to order the magistrate, as in **Desper v State**, to allow the testimony of the victim because there has been no grounds given by the Defendant, for which her testimony is solicited, in order to allow the State to seek curtailment of the testimony, and allow the magistrate to exercise discretion to insure the scope remained within permissible bounds. The Defendant has presented no bounds upon which to work, except simply "because we can", and no preliminary hearing was able to be conducted due to the Defendant's request for a stay.

The Court can only send the case back to the magistrate court to be scheduled and instruct the magistrate to conduct a preliminary hearing without disturbing or overturning his original rulings. If, after a preliminary hearing is conducted and testimony is taken, the Defendant believes the magistrate has abused his discretion in finding probable cause, he is free to appeal the lower court's determination to the appropriate forum. Further, the

State requests this court to withdraw, retract or dissolve its previous order prohibiting the State from presentment to the grand jury, due to the May 5, 2010 order being an erroneous order. The State requests the Court to find that pursuant to Rule 5 (e), if the preliminary hearing is not conducted prior to the next grand jury, the state can properly present this case without having conducted a preliminary hearing.

Respectfully submitted,

STATE OF WEST VIRGINIA
By Counsel

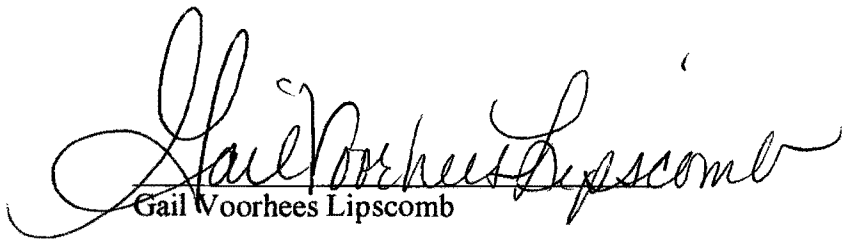


Gail Voorhees Lipscomb
Assistant Prosecuting Attorney
243 High Street
Morgantown, WV 26505

Certification of Service

I, Gail Voorhees Lipscomb, do hereby certify that I have served a true and correct copy of the forgoing "State's Response To Request For Writ of Mandamus" to the Counsel of record on the 1st day of August, 2010 by U.S. Mail.

Dave Frame
Counsel for Defendant
Suite 2, Nationwide Building
493 Washington Avenue
Clarksburg, WV 26301



Gail Voorhees Lipscomb

In the Magistrate Court of Monongalia County, West Virginia

State of West Virginia,

v.
Jordan A. Shaver
Defendant
240 Walker Valley Road, Pine Bush, NY 12566
Address

Social Security No. | 754-703-885 NY Drivers License No.

2/19/91
Date of Birth

Case No. 10F-45

☐ Misdemeanor
☒ Felony

CRIMINAL COMPLAINT

I, the undersigned complainant, upon my oath or affirmation, state the following is true and correct to the best of my knowledge and belief. On or about 1/23/2010 (date) in Monongalia County, West Virginia, in violation of W. VA. Code (*cite specific section, subsection, and/or subdivision as applicable*) 61-8B-4(a)(1)

2nd Degree Sexual Assault the defendant did (*state statutory language of offense*)

unlawfully and feloniously engage in sexual intercourse or sexual intrusion with the victim, Christine Neilan, without consent, and the lack of consebt did result from forcible compulsion.

I further state that this complaint is based on the following facts:

See attached.

Continued on attached sheet? ☒ Yes ☐ No

Complainant (who appears before magistrate):

L.E. Hasley
Name
300 SPRUCE STREET
Address
MORGANTOWN, WV 304-284-7459
Telephone
Detective
Office or title, if any

Complainant Signature

On this complaint, sworn or affirmed before me and signed this date by complainant in my presence, the item(s) checked below apply:

☒ Probable cause found
☐ Summons issued
☐ Warrant issued
☒ Warrantless arrest
☐ No probable cause found

Magistrate Signature

1-23-10
Date

Mag. Ct. Crim. Rules 3, 4
SCA-M310-1 / 1-98

On 1/23/10, around 0342 hours, Morgantown Police received a report of a sexual assault. PFC A. Dull identified the victim as Christie K.Neilan, who stated she was at a club in downtown Morgantown, Monongalia County, WV. The victim stated she and her friends left the club and got onto a Mountain Line bus in the area of High Street. The victim stated a white male wearing a white and blue striped button shirt got onto the bus at another location. The victim stated the suspect sat down beside her. The victim stated the male stuck his hand up her skirt. The victim stated she told the male to stop. The victim stated the male did not stop and inserted his fingers into her vagina. The victim stated she told the male several times "please stop, please stop," but he continued forcing his fingers inside her. The victim stated the suspect exited the bus at Towers Residence Hall and swiped his WVU student ID to get in right before she entered.

Upon investigation, Detective Hasley, with the assistance of the WVU Police, was able to retrieve a list of everyone who entered Towers around the time the victim entered. Detective Hasley also was provided a photo of video surveillance showing a white male in the Lyon Tower elevator who matched the description provided by the victim. Detective Hasley performed a knock and talk at room 2815 in Lyon Tower. Detective Hasley identified Nicholas Cozine as the resident. Cozine gave permission to Detective Hasley to enter his dorm room in an attempt to have him identify the suspect from the photo. While entering the room, Detective Hasley observed a white button-up dress shirt with blue stripes on the floor of the room. Detective Hasley asked Cozine if the shirt belonged to him. Cozine stated it belonged to his friend, Jordan Shaver, who was visiting for the weekend. Shaver was also present in the room.

Detective Hasley interviewed Cozine, who stated Jordan A. Shaver came back to his dorm room around 0230 hours on 1/23/10 and told him he had fingered a girl on the bus on the way back and she was frowning.

N.A.S

Sandy Holgut
1-23-10

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April 7, 2010

Honorable Phillip D. Gaujot, Judge
Circuit Court of Monongalia County
265 Spruce St., Suite 301
Morgantown, WV 26505

RE: STATE OF WEST VIRGINIA V. JORDAN SHAVER
Criminal Case No. 10-F-17 (Monongalia County Magistrate Court)
West Virginia Supreme Court of Appeals, No. 35518

Dear Judge Gaujot:

Enclosed you will find a copy of the order of the West Virginia Supreme Court of Appeals concerning a criminal case currently pending in the Magistrate Court of Monongalia County. The Court granted (5-0) the petition for a rule to show cause why a Writ of Mandamus should not issue requiring the magistrate to permit the defendant to subpoena the adult alleged victim of a sexual assault to testify at the preliminary hearing. Also enclosed you will find a copy of the memorandum I filed on behalf of the defendant. The State has made no response at this time. The magistrate granted the State's motion to excuse the subpoenaed witness and prohibit the defendant from calling her, but he agreed to postpone the preliminary hearing until the defendant could seek relief in the Circuit or Supreme Court. The Supreme Court filed and granted the petition on an emergency basis. They scheduled a hearing on the matter in September and stayed all further proceedings until that time.

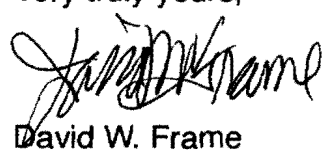
My concern is that the prosecuting attorney will treat the order as if it only stays further activity in the magistrate court, claim executive authority to proceed to present the case to the grand jury or otherwise attempt to circumvent the Court's desire to address this very important evidentiary/procedural issue and moot the question by obtaining an indictment before the Supreme Court addresses the merits of the petition. Both in my memorandum and in my conversation with Court personnel when they called to notify me of the Court's decision, I emphasized that the issue will be moot if it is not resolved before the case is presented to a grand jury. I believe it is their intention to stay the presentation of the matter to the grand jury because the issue is capable of repetition yet evading review. Yet I must concede that there may be some ambiguity in the Court's order.

I am writing to request the Court to exercise its supervisory power to instruct the prosecutor and/or the foreman of the grand jury to delay presenting this case until after the final disposition of the matter by the Supreme Court. Your authority is expressed on chapter 52, article 2 of the West Virginia Code, as well as Rule 6, West Virginia Rules of Criminal Procedure. The history and legal authority of the Court's relationship with the grand jury are discussed in *State ex rel. Miller v. Smith*, 168 W.Va. 745, 285 S.E.2d 500 (1981) and *State ex rel. Hamstead v. Dostert*, 173 W.Va. 133, 313 S.E.2d 409 (1984). Once again, I must concede that the prior authorities on this point may create some confusion on the roles of the Court and the prosecuting attorney.

If the court would like to meet with counsel to discuss this matter, I will be happy to oblige. If you desire further information about the Court's order, you may wish to call the Court yourself. If you believe that further clarification from the Court would help, please let me know, as the clerk's office suggested that I could seek further clarification if there is any dispute over the order, but I would need to act quickly.

The preliminary hearing was re-scheduled by Magistrate Mullins for April 29, 2010, and, of course, the grand jury convenes on Thursday, May 6, 2010. So, this matter needs resolved before then. Of course, the prosecutor may agree to not present the matter to the grand jury, and that would settle the matter. I will provide a copy of this letter to the prosecutor. If she will agree to forebear presenting the matter to the grand jury, I invite her to make that known to us. Thank you for your time and attention to this matter.

Very truly yours,



David W. Frame

cc: Marsha L. Ashdown, Esq.
Gail M. Vorhees, Esq.