What is So "Grand" About the West Virginia Grand Jury System? A Desperate Need for Reform After the Duek Lacrosse Rape Scandal

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WHAT IS SO "GRAND" ABOUT THE WEST VIRGINIA GRAND JURY SYSTEM? A DESPERATE NEED FOR REFORM AFTER THE DUKE LACROSSE RAPE SCANDAL

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I. INTRODUCTION

You wake up early on a Saturday morning with plans to attend your twelve-year-old daughter’s soccer game later in the afternoon. To start the day, you drive to Starbucks® and purchase a grande vanilla latte, pick up a newspaper at the local convenience store and return home. While enjoying your latte, you take the rubber band off the newspaper and open it. As you are looking over the local section, you scroll down a list of individuals in the community who have been indicted for various crimes by the grand jury the day before. Then you notice something: a person with the same name as yours. “Great, just my luck, now I’m going to have to convince all my detractors that it was not me.” Then it hits you; the address is the same as yours. “This can’t be.” It all seems surreal. Your anger turns to abject terror. In shock, you call your attorney. Your attorney informs you that there is nothing that can be done to immediately dismiss the indictment and the charge will linger for several months before any significant legal decisions are made.

Subsequently, the door bell rings. It’s the police! The officer is holding a capias.1 The Latin phrase doesn’t mean anything to you, but it becomes abundantly clear as the handcuffs are secured around your wrists. You are quickly whisked away to the regional jail to await arraignment in two days. Once in court, you are formally presented with an indictment for rape and the judge sets bail at $400,000, cash only, no corporate surety and no property! Several months pass.

Finally, you receive a phone call from your attorney, and she informs you that the prosecutor has decided to dismiss the rape charge due to a lack of evidence. Meanwhile, in the past several months you have lost your job, your wife has filed for divorce, your daughter has been ridiculed at school, and a permanent stigma has been attached to your name. You are labeled as “the guy who beat the rap.”

You may think this quagmire is extremely exaggerated and could never happen. Do not be fooled! This situation is realistic and can happen to you. The Duke lacrosse rape scandal is a prime example. In the Duke case, the men’s lacrosse team held a party on March 13, 2006, and hired two exotic dancers to perform.2 One of the exotic dancers claimed she was forcefully raped by three lacrosse players during the party.3 As a result, Reade Seligmann, twenty,

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1 A Latin phrase meaning “that you take.” “Any of various types of writs that require an officer to take a named defendant into custody.” BLACK’S LAW DICTIONARY 221 (8th ed. 2004).

At 1:22 a.m. [on March 14, 2006], a security guard at a Kroger grocery called 911 to report that a women outside the store had refused to get out of her car and that she appeared intoxicated. After the police arrived, she accused three
and Collin Finnerty, nineteen, both sophomores, were indicted for first-degree forcible rape on April 17, 2006. A third lacrosse player, David F. Evans, twenty-three, was later indicted on May 15, 2006, in the rape investigation.

The prosecutor, Mr. Michael Nifong, pursued the indictments based solely upon the alleged victim's highly speculative allegations. Eight long embarrassing months passed before finally, on December 22, 2006, the rape charges were formally dismissed after the accuser said she "could no longer testify with certainty that it [the rape] occurred."

What can be worse than the crime of rape? There is one thing worse; to be falsely accused of this crime. There is no question that rape is a horrific crime and all allegations must be taken seriously. At the same time, the Duke lacrosse players should not have suffered the extreme ramifications from an unfounded indictment. Robert S. Bennett, a former federal prosecutor and attorney for President Bill Clinton in the Paula Jones sexual harassment case, stated,

It is unfortunate that members of the Duke community, players and families are being judged before all the facts are in. A lot of innocent young people and families are being hurt, and unfortunately this situation is being abused by people with separate agendas. It is grossly unfair, and cool heads must prevail.

lacrosse players, whom she identified by first names, of forcing her into a bathroom at the house and sexually assaulting her for 30 minutes.


5 Shaila Dewan, 3rd Duke Lacrosse Player is Indicted in Rape Case, N.Y. TIMES, May 16, 2006, at A16.

6 Defense Criticizes Duke Case Accuser, supra note 2, at 22.

Joseph B. Cheshire, [defense attorney] spoke to reporters after Michael B. Nifong, the Durham County district attorney, delivered 536 pages of documents to defense lawyers. Mr. Cheshire said a quick review indicated that the women had given other versions of events. Mr. Cheshire described the women as "the false accuser" and said she had claimed rape by 3, 5, and 20 men.

7 David Barstow & Duff Wilson, Charges of Rape Against 3 at Duke are Abandoned, N.Y. TIMES, Dec. 23, 2006, at A1. "The Durham district attorney dropped rape charges against three former Duke lacrosse players on Friday, but he said he would continue to pursue kidnapping and sexual offense charges that carry equally stiff sentences." See also Editorial, Prosecutorial Indiscretion, WASH. POST, Dec. 31, 2006, at B6.

8 Juliet Macur, Lawyers for Lacrosse Players at Duke Say They Expect Indictment in Rape Case, N.Y. TIMES, Apr. 13, 2006, at A18.
The allegations made by the alleged victim were sufficient for the grand jury to return three indictments. Although it is not known what evidence the prosecutor presented to the grand jury, because the proceedings are held in secrecy, based upon the prosecutors' unethical practices, it is likely the grand jury heard highly unreliable evidence and were not presented with exculpatory DNA evidence. As a result of an overzealous prosecutor, during an election year, seeking an indictment on a scintilla of evidence in order to appease the public clamor in Durham, North Carolina, and due to the lack of procedural protections afforded by the grand jury system, three innocent lacrosse players were indicted for rape. Consequently, the lacrosse players were suspended from Duke University, the nationally ranked men's lacrosse team was suspended for the season, and the three indicted players were subject to sharp national criticism and embarrassment. The hyperbole and rhetoric surrounding the groundless rape indictments tarnished the lacrosse players' reputations and caused irreparable harm to their families, Duke University, and the criminal justice system.

9 New Duke DNA Tests are Reportedly Inconclusive, N.Y. TIMES, May 13, 2006, at A14. "A second round of DNA testing in the Duke University lacrosse rape case came back with the same result as the first: no conclusive match to any team member, defense lawyers said Friday." Id.

The North Carolina State Bar filed a formal ethics complaint yesterday [December 28, 2006] against the prosecutor in the Duke lacrosse sexual assault case, accusing him of making inflammatory remarks about the team to the news media and misleading the public about evidence. . . . [T]he bar also said Mr. Nifong [the prosecuting attorney] had engaged in "dishonesty, fraud, deceit or misrepresentation." . . . In addition to the bar complaint, Mr. Nifong is likely to face a separate accusation of prosecutorial misconduct before W. Osmond Smith III, the judge presiding over the sexual assault case. Defense lawyers have said they are preparing a motion seeking sanctions against Mr. Nifong for failing to reveal for seven months that tests had found DNA material from several men, none of them members of the lacrosse team, on rape kit swabs taken from the woman hours after the alleged attack.

Id.
II. EVOLUTION OF THE GRAND JURY SYSTEM

A. Prior to Henry II

The grand jury system originated in England and its development can be broken down into four eras. The first era occurred in England before Henry II ascended to the throne in 1154. During this time period, English monarchs had conceded considerable judicial power to the ecclesiastical courts, which had complete jurisdiction over all criminal charges. One could be privately charged with a wrongful act by an injured party, and once accused, the suspect's guilt or innocence was determined through trial by ordeal. The early grand jury system was not instituted to protect the innocent from unjust prosecution.

B. After Henry II

Prior to Henry II, the truly innocent were often subject to arbitrary consequences from trial by ordeal and the ease in forming unmeritorious accusations by disingenuous "injured parties." Due to Henry II's efforts to recapture judicial control from the church, a new grand jury system arose. The foundation for the modern grand jury system was shaped by the Assize of Clarendon, a decree of Henry II. Under the Assize of Clarendon, once accused of a misdeed, an injured party presented evidence to twelve men, who then decided

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16 Ecclesiastical courts were early European courts that had jurisdiction over spiritual and religious matters. Black's Law Dictionary 381 (8th ed. 2004).
17 Clark, supra note 15, at 8.
18 "A primitive form of trial in which an accused person was subjected to a usually dangerous or painful physical test, the result being considered a divine revelation of the person's guilt or innocence. The participants believed that God would reveal a person's culpability by protecting an innocent person from some or all consequences of the ordeal." Black's Law Dictionary 1129 (8th ed. 2004).
19 Id.
20 Clark, supra note 15, at 8.
21 Id. The Assize of Clarendon Act was created by Henry II which eliminated trial by ordeal. Also, the Act established judicial procedures regarding crimes, the use of the grand jury system and took away significant power retained by the courts.

One part of the Constitution of Clarendon abolished the practice of using charges from undisclosed informants as the basis for a bishop's accusation of a layman. Thereafter, an accuser had to make his charges publicly, or... the sheriff chose twelve men to hear the evidence against the alleged offender and present charges to the ecclesiastical court.

whether the suspect should be charged. Thus, Henry II had created an egalitarian means of charging individuals with crimes and controlling criminal prosecution. In essence, Henry II created the basic framework for the modern grand jury system. Eventually, in 1215, the grand jury system became a concrete animal within the English legal system and was incorporated into the Magna Carta.

C. 1700’s America

The Englishmen who settled the original thirteen American colonies brought the grand jury system with them across the waters of the Atlantic Ocean. When introduced into America around 1775, the American Revolution was just beginning. During this crucial time period in American history, the original colonies were small and compact, which resulted in greater responsibilities distributed among the grand juries. Unlike today, the colonial grand juries were responsible for running local governments and supervising municipal duties. Gradually, the grand juries were eased of many obligations as the United States grew expeditiously and the government expanded. Nonetheless, the grand jury was not stripped of its traditional duty to investigate and formally charge fellow peers with criminal offenses.

After 1776, the grand jury was included in many state constitutions, and the Fifth Amendment to the United States Constitution assured that any serious federal criminal charge would be screened by a grand jury. The Fifth Amendment was adopted because many colonists were fearful of creating a powerful central government that could arbitrarily use the criminal process against its opposition, as was done prior to Henry II. Whether or not it has been carried out, the intended purpose of the grand jury system in early America was to protect persons from arbitrary and capricious criminal accusations. It is arguable whether the grand jury system has ever developed fully into a “con-

23 MARVIN E. FRANKEL & GARY P. NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL, 6-9 (1977). The Magna Carta was created in 1215 and was known as the great charter of freedoms because it required the King to renounce certain rights and legal procedures.
25 FRANKEL & NAFTALIS, supra note 23, at 6.
27 FRANKEL & NAFTALIS, supra note 23.
28 Id.
29 CLARK, supra note 15.
30 Id.
31 In re Jordan, 439 F. Supp. 199 (1977). The dual role of the grand jury as investigator and protector is described in case law and legal authorities and passes along as part of our common-law heritage.
sistent ‘neutral’ institution, scrupulously sifting the evidence and providing protection for the innocent.”\(^{32}\) In fact, the United States Supreme Court in *Hartada v. California*,\(^ {33}\) held in 1884 that the protection afforded by the grand jury is not required by the individual states and is not so fundamental to criminal justice as to be a mandatory way of beginning prosecutions.

**D. Currently**

For good reason, less than half the states currently use the grand jury system.\(^ {34}\) More specifically, only eighteen states still require prosecution by indictment in all felony cases.\(^ {35}\) Even more telling, England, the creators of the grand jury system, abandoned it in 1933 after eight hundred years of precedent.\(^ {36}\) According to Yale Kamisar, “[a]s local police departments became a major element of law enforcement administration, and expanded their investigative capabilities, there was less need for grand juries to be involved in the investigation of many types of offenses that had previously attracted their attention.”\(^ {37}\) West Virginia, however, does not fall within the majority of states that have abandoned the grand jury system. Why? The grand jury system has Federal Constitutional stature.\(^ {38}\) Like the Federal Constitution, the West Virginia Constitution\(^ {39}\) mandates its use. As such, altering a constitutionally-grounded principle has most likely caused hesitation and concern within the legislature,\(^ {40}\) which has resulted in no changes in the grand jury system in West Virginia.\(^ {41}\)

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38 U.S. CONST. amend. V. (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . .”).
39 W. VA. CONST. art. III, § 4. (“No person shall be held to answer for treason, felony or other crime, not cognizable by justice, unless on presentment or indictment of a grand jury.”).
40 W. VA. CONST. art. XIV, § 2.

Any amendment to the Constitution of the State may be proposed in either house of the legislature at any regular or extraordinary session thereof; and if the same, being read on three several days in each house, be agreed to on its third reading, by two thirds of the members elected thereto, the proposed amendment, with the yeas and nays thereon, shall be entered on the journals, and it shall be the duty of the legislature to provide by law for submitting the same to the voters of the State for ratification or rejection, at a special election, or at the next general election thereafter, and cause the same to be published, at least three months before such election in some newspaper in every county in which a newspaper is printed. If a majority of the qualified voters,
III. COMPOSITION, RESPONSIBILITIES AND DUTIES

A. The West Virginia Grand Jury System

1. Comparing the Petit Jury and the Grand Jury

Most individuals are familiar with a petit jury. These traditional trial juries are commonly portrayed in Hollywood movies such as “To Kill A Mockingbird.”. Petit jurors passively sit in the courtroom and listen to evidence presented by the prosecution and the defense. Ultimately, in the criminal context, after considering all the evidence, the petit jury passes judgment on the defendant by returning a verdict of guilty or not guilty. Although in most instances petit jury service is generally brief, most Americans become discouraged when they find a summons in their mailbox and often create any excuse to avoid fulfilling his or her public duty to serve on a petit jury.

Grand juries are quite different than petit juries. The grand jury is not a typical jury in any way, shape, or form. While its function is to serve as a “shield” to protect individuals from arbitrary criminal accusations, but at the same time to serve as an investigative “sword,” the grand jury has become a proverbial “rubber stamp” for the state.

Truly, the only thing “grand” about a grand jury is its numbers. The grand jury is larger than a twelve-member petit jury, as it consists of sixteen members. The sixteen members chosen to serve on a grand jury must possess minimum qualifications, such as being eighteen years of age, literate and able to

voting on the question at the polls held pursuant to such law, ratify the proposed amendment, it shall be in force from the time of such ratification, as part of the Constitution of the State.

*See generally* Decker, supra note 34.

42 “A jury usually consisting of 6 or 12 persons summoned and empanelled in the trial of a specific case.” BLACK'S LAW DICTIONARY 874 (8th ed. 2004).


44 Under W. Va. Code § 52-1-11 (1986), “[a] summoned citizen ‘may be excused from jury service by the court upon a showing of undue hardship, extreme inconvenience, or public necessity, for a period the court deems necessary.’” Id.

45 W. VA. Code § 52-1-8 (2007) (stating that West Virginia residents are obligated to serve on a jury unless disqualified).


47 W. VA. R. CRIM. P. 6(a) (stating “[t]he grand jury shall consist of 16 members, but any fifteen or more members attending shall constitute a quorum.”).
speak and understand English. These sixteen members, once chosen, play a unique role in actively participating in the criminal investigation, rather than passively sitting back and listening to evidence presented by attorneys in a traditional adversarial proceeding. Unlike a petit jury, the grand jury can ask questions and subpoena witnesses and documents. The grand jury can even investigate simply on suspicion that the law has been violated, or just for self-confidence that it has not. Also, grand jurors serve much longer than petit jurors, sometimes up to eighteen months. The practice in West Virginia varies from circuit to circuit. In some circuits, grand jurors are relieved of their duties every term of court, while in other circuits service may be extended up to the statutory maximum of eighteen months.

At the federal level, the grand jury is only presented with cases involving "capital or infamous crimes." Allegations not involving "capital or infamous crimes" have been construed to elude the grand jury system altogether. In contrast, West Virginia law requires prosecution by indictment for all offenses which may be punished by life imprisonment. Other felony offenses may be prosecuted by information if the indictment is waived. Common examples of crimes in which prosecutors seek indictments in West

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48 W. VA. R. CRIM. P. 6(a); W.VA. CODE § 52-1-8 (2004) (stating the grounds for disqualification from jury service); State v. Austin, 117 S.E. 607 (W. Va. 1923).


50 "A hearing involving a dispute between opposing parties." BLACK'S LAW DICTIONARY 58 (8th ed. 2004).

51 W. VA. R. CRIM. P. 6 (1995). Due to its investigative role, the grand jury is surrounded by a shroud of secrecy, and only the prosecutor and witnesses called by the prosecutor are allowed to appear before the grand jury.


53 W. VA. R. CRIM. P. 6(g) ("A grand jury shall serve until discharged by the court, but no grand jury may serve more than one year unless the court extends the service of the grand jury for a period of six months or less upon a determination that such extension is in the public interest.").


55 U.S. CONST. amend. V.

56 See U.S. CONST. amend. V; Alexander v. Louisiana, 405 U.S. 625, 633 (1972) (holding Fifth Amendment right to be charged by grand jury indictment is not binding on the states); see also W. VA. R. CRIM. P. 7(b) (1995) ("[a] felony offense which is not punishable by life imprisonment may be prosecuted by information if the defendant, after [being] advised of the nature of the charge and of his or her rights by a written [signed] waiver by the defendant and his or her counsel . . . waives prosecution by indictment").

57 W. VA. R. CRIM. P. 7(a). Misdemeanor offenses may be charged by information. An information is simply a pleading that accuses a defendant of committing a crime. Grand jury approval is not necessary and the prosecutor has the individual power and discretion to issue an information. Id. See also United States v. Moss, 604 F.2d 569, 572 (8th Cir. 1979) (holding that no grand jury is required where the defendant could not be sentenced to more than one year).

58 Id.
Virginia include, inter alia, murder,\textsuperscript{59} robbery,\textsuperscript{60} burglary,\textsuperscript{61} perjury,\textsuperscript{62} embezzlement,\textsuperscript{63} treason,\textsuperscript{64} and larceny.\textsuperscript{65}

After listening solely to evidence presented by the prosecuting attorney, the grand jury, if satisfied that there is "probable cause" that a crime has been committed, issues an indictment or "true bill."\textsuperscript{66} At such time, the accused becomes a defendant and all subsequent responsibilities are relinquished to the prosecutor. "[U]pon the request of the attorney for the State" of West Virginia, the court must issue a warrant for each defendant named in an indictment,\textsuperscript{67} and the indictment must conclude that each count is "[a]gainst the peace and dignity of the State."\textsuperscript{68} The warrant must also describe the offense charged in the indictment and "command that the defendant be arrested and brought before the court."\textsuperscript{69} In addition, there is no requirement that an indictment remain sealed until the defendant is in custody.\textsuperscript{70} As such, it is feasible that one may discover that he or she had been indicted while reading the local section of the Sunday morning paper.

2. Secrecy

Grand jury proceedings are secret and are not held in open court.\textsuperscript{71} This may explain why many individuals are unfamiliar with the grand jury system. The West Virginia Rules of Criminal Procedure provide that prosecutors, grand jurors, grand jury stenographers, recording device operators, and typists who transcribe recorded testimony are prohibited from disclosing what transpires

\begin{itemize}
  \item \textsuperscript{59} W. VA. CODE § 62-9-3 (1923).
  \item \textsuperscript{60} W. VA. CODE § 62-9-6 (1931).
  \item \textsuperscript{61} W. VA. CODE § 62-9-9 (1979).
  \item \textsuperscript{62} W. VA. CODE § 62-9-17 (1931).
  \item \textsuperscript{63} W. VA. CODE § 62-9-11 (1923).
  \item \textsuperscript{64} W. VA. CODE § 62-9-2 (1931).
  \item \textsuperscript{65} W. VA. CODE § 62-9-10 (1931).
  \item \textsuperscript{66} "A grand jury's notation that a criminal charge should go before a petit jury for trial." BLACK'S LAW DICTIONARY 1546 (8th ed. 2004); see also W. VA. R. CRIM. P. 6. Before an indictment may be returned, a quorum of fifteen jurors must be present. Out of the fifteen, twelve or more must be in concurrence to return an indictment. The court must appoint both a foreperson and a deputy foreperson, who ensure a quorum is present. Id. See also W. VA. R. CRIM. P. 7(c) (requiring the indictment sufficiently give the defendant notice of the charges in order to plead accordingly).
  \item \textsuperscript{67} W. VA. R. CRIM. P. 9(a).
  \item \textsuperscript{68} W. VA. CONST. art. II, § 8; see also State v. Vaughan, 117 S.E. 127, Syl. Pt. 1 (W. Va. 1923).
  \item \textsuperscript{69} W. VA. R. CRIM. P. 9(b)(1).
  \item \textsuperscript{70} W. VA. R. CRIM. P. 6(e)(6).
  \item \textsuperscript{71} W. VA. R. CRIM. P. 6(e).
\end{itemize}
before the grand jury, unless ordered to do so in a judicial proceeding.\textsuperscript{72} The West Virginia Rules of Criminal Procedure, however, do not extend the secrecy requirement to grand jury witnesses.\textsuperscript{73}

The public policy behind the secrecy shroud include preventing those under grand jury investigation from fleeing, ensuring the grand jury is free to deliberate without undue public pressure, preventing subornation of perjury,\textsuperscript{74} encouraging witnesses with information relevant to a crime to speak freely, and protecting the truly innocent from disclosure of the fact that he or she was ever under investigation.\textsuperscript{75} Consequently, in the event a witness knowingly discloses matters occurring before the grand jury, he or she will be held in contempt.\textsuperscript{76}

3. Witnesses, Targets, Immunity and Privilege

In West Virginia, a witness cannot refuse to appear and testify before the grand jury if the court believes “justice will thereby be promoted.”\textsuperscript{77} If compelled to testify, witnesses are afforded complete immunity that precludes subsequent criminal prosecution.\textsuperscript{78} Only when immunity is granted, however, does it overcome a witness’s privilege against self-incrimination, unless another privilege applies.\textsuperscript{79} Traditional privileges against testifying before the grand jury that have been recognized by courts include the confidential marital communications privilege,\textsuperscript{80} the attorney-client privilege\textsuperscript{81} or privilege against self-incrimination.\textsuperscript{82} If charges are brought following the grant of immunity, the

\textsuperscript{72} W. VA. R. CRIM. P. 6(e)(2).
\textsuperscript{73} W. VA. R. CRIM. P. 6(e)(2).
\textsuperscript{74} W. VA. CODE § 61-5-1 (1996).
\textsuperscript{76} W. VA. R. CRIM. P. 6(e)(2).
\textsuperscript{77} W. VA. CODE § 57-5-2 (1923).
\textsuperscript{78} Id.
\textsuperscript{79} Kastigar v. United States, 406 U.S. 441 (1972); see also W. VA. CODE § 57-5-2 (1923). When immunity is granted to a witness in West Virginia, transactional immunity is issued, which bars subsequent prosecution for a transaction discussed in the immunized testimony. See, e.g., State ex. rel. Wright v. Stucky, 517 S.E.2d 36, 39 n.4 (W. Va. 1999).
\textsuperscript{80} See, e.g., United States v. Morris, 988 F.2d 1335, 1337-38 (4th Cir. 1993) (holding that if an accused’s spouse invokes the marital privilege before a grand jury, it could be reversible error for the prosecutor in a subsequent jury trial to ask the spouse about using the privilege).
\textsuperscript{81} W. VA. CODE OF PROF’L CONDUCT R. 1.6(a) (1989) (“A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation.”).
\textsuperscript{82} Counselman v. Hitchcock, 142 U.S. 547 (1892); see also Hoffman v. United States, 341 U.S. 479 (1951).
prosecutor bears the burden of proving that all of the state’s evidence was obtained independently and not from the immunized testimony.\textsuperscript{83}

In the event a witness refuses to appear and testify without legal justification, he or she will be held in contempt of the court that issued the subpoena to compel his or her testimony and is subject to a fine or incarceration for the remaining term of the grand jury.\textsuperscript{84} In the likely event a privilege is not claimed, a witness must answer all questions. If a witness testifies falsely to any questions, he or she may be separately prosecuted for perjury.\textsuperscript{85}

Interestingly, the target of a grand jury investigation has no right to testify unless subpoenaed, nor any right to compel the grand jury to hear specific witnesses or evidence.\textsuperscript{86} The only protection a target has in the grand jury room is within the prosecutor’s control and is very limited in application. More specifically, under United States v. Williams\textsuperscript{87}, the prosecutor is not required to present exculpatory evidence, unless the evidence would completely refute a finding of probable cause.\textsuperscript{88} As such, grand juries are rarely presented with ex-

\textsuperscript{83} State ex rel. Brown v. MacQueen, 285 S.E.2d 486 (W. Va. 1981) (holding defendant who was compelled to testify, over a claim of self-incrimination, concerning his sale of a certain stolen weapon to another could not be prosecuted for buying, receiving, or aiding in the concealment and transfer of stolen property, but could be prosecuted for burglary or grand larceny of the weapons); see also State v. Hanson, 382 S.E.2d 547, 556 (W. Va. 1989).

\textsuperscript{84} State v. Cottrill, 511 S.E.2d 488 (W. Va. 1998) (imposing indefinite sentences was warranted by defendant’s continued refusal to testify regarding the location of stolen property after being granted immunity by the circuit court).

The contemnor may be held in either civil or criminal contempt. Civil contempt is used to coerce the contemnor into complying with the subpoena. The contemnor is sentenced to imprisonment or to a fine . . . but he may purge himself of the sentence by complying with the subpoena. As courts have frequently noted, he ‘carries the keys to the prison in his pocket.’ The civil contemnor who refuses to purge himself will remain under sentence until the grand jury completes its term and is discharged. Moreover, if the information the contemnor possesses is still needed, he may be subpoenaed by a successor grand jury and held in contempt again if he continues to refuse to supply that information.

KAMISAR, supra note 35, at 791 n.C.

\textsuperscript{85} W. Va. Code § 61-5-1 (2004) (defining perjury); see also KAMISAR supra 35, at 792 (“The grand jury subpoena ad testificandum also has the advantage of requiring witnesses to testify under oath. If a witness fails to tell the truth, he may be prosecuted for perjury. Generally, a person who gives false information to a police officer will not have committed a crime (though there is such a crime as to federal investigators.”).

\textsuperscript{86} See W. Va. R. CRIM. P. 6(d).

\textsuperscript{87} 504 U.S. 36 (1992) (holding that a prosecutor’s failure to present the grand jury with evidence exculpating the defendant does not merit dismissal of an indictment because the grand jury is an accusatory, not adjudicative, body and the prosecutor has no duty to present even substantial exculpatory evidence to the grand jury).

\textsuperscript{88} Id.
culpatory evidence. When they are presented with exculpatory evidence, however, it is often de minimis.

B. The North Carolina Grand Jury System

The North Carolina grand jury system, in which the three Duke lacrosse players were indicted, closely mirrors the grand jury system in West Virginia. Similarities include the following: the grand jury system convenes in secrecy; the jury consists of not less than twelve nor more than eighteen members; all persons present during grand jury proceedings are not permitted to disclose anything that transpires; the presiding judge may, at his or her discretion, require that a bill of indictment be kept secret until the defendant is arrested; and immunity may be granted to a witness if necessary to the public interest. Overall, however, the North Carolina grand jury system provides more protection to the accused than the grand jury system in West Virginia. For instance, unlike the West Virginia grand jury system, to protect a defendant’s constitutional rights, only upon approval by a three-judge panel is the district attorney permitted to subpoena witnesses in North Carolina.

IV. TIME FOR A CHANGE

The grand jury system has its weaknesses. There is an old adage, "If it’s not broken, don’t fix it." The current grand jury system in West Virginia has been broken for many years. In a new era, the grand jury system has lost its flavor, and reform is greatly needed.

This Note explores a prospective that militates against the grand jury system currently in place in West Virginia. More specifically, this Note explores the downfalls to the grand jury system, including prosecutorial abuse, the lack of procedural protections afforded, the waste of judicial time and resources involved, constitutional limitations, limitations on defense counsel and the extreme injustice imposed on the criminally accused. In addition, this Note advances a proposal in which the grand jury system in West Virginia is reformed

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89 See United States v. Waldon, 363 F.3d 1103, 1109 (11th Cir. 2004) (finding indictment valid though government failed to provide grand jury with exculpatory evidence).
96 See discussion infra Part V.
with procedures that ensure fairness and just results. Reform calls for, *inter alia*, the right of the accused to be present during the proceeding, the right to counsel, removal of the secrecy shroud, the right to present evidence, the right to cross-examine witnesses, and many other legal protections that are not currently afforded by the grand jury system in West Virginia.

V. EXPOSING THE FALLACIES IN THE "GRAND" JURY SYSTEM

A. The Grand Jury System Inevitably Leads to Prosecutorial Misconduct

1. Subpoena Power

The Fifth Amendment of the United States Constitution, the West Virginia Constitution, and the West Virginia Rules of Criminal Procedure allow the "grand jury" to act independently, allow the "grand jury" to require the presence of witnesses to testify, and allow the "grand jury" to require the production of documentation. Nowhere in the Federal Constitution, the West Virginia Constitution, or the West Virginia Rules of Criminal Procedure are these duties delegated to the prosecutor. Accordingly, the grand jury has extraordinary and wide sweeping investigative powers, which has left open numerous areas for prosecutors to take advantage and misconduct to result. Unlike the three branches of the government which operate to keep each other in balance, the grand jury is free to act with complete independence.

At best, the grand jury simply acts as a conduit through which the prosecutor operates. The prosecutor’s power over the grand jury is cause for worry and well deserved criticism. Although not intended to be an exclusive list, prosecutorial misconduct can occur in the following instances:

1. Improper treatment of witnesses,
2. Undermining legal safeguards,

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97 See discussion infra Part VI.
98 U.S. CONST. amend. V.
100 W. VA. R. CRIM. P. 6; see also W. VA. R. CRIM. P. 17.
102 Branzburg v. Hayes, 408 U.S. 665, 688 (1972). The United States Supreme Court has held that the grand jury is entitled to "every man's evidence, except for those persons protected by a constitutional, common-law or statutory privilege." Id.
3. Failing to disclose exculpatory evidence,

4. Failing to correct improper police techniques to obtain evidence,

5. Intruding into the grand jury deliberations,

6. Conflict of interest, and

7. Using the grand jury process by the prosecutor to accommodate his or her investigative needs.105

Although prosecutors are forbidden to utilize the grand jury for the purpose of gathering evidence,106 prosecutors rely heavily on the grand jury’s inherent power to subpoena witnesses in order to build their cases before indictment. This type of exploitation occurs due to the inherent power of the grand jury to issue subpoenas.107

Unlike North Carolina prosecutors, who must pass the scrutiny of a three judge panel for a subpoena request,108 West Virginia prosecutors can issue a subpoena duces tecum109 to gather tangible documents or a subpoena ad testificandum110 to gather testimonial evidence without any inquiry.111 A prosecutor can even issue a subpoena ad testificandum without showing that the person subpoenaed is likely to have relevant information.112

The Third Circuit has recognized the potential for abuse stemming from the issuance of grand jury subpoenas and stated, “[t]he court exercises no prior control whatsoever upon their [the subpoena] use.”113 The Third Circuit has also recognized that grand jury subpoenas “are in fact almost universally in-

105 Kim, supra note 104, at 1124. Examples of prosecutorial misconduct include referring to the defendant as a “‘real hoodlum’ who should be indicted, and accus[ing] defendant of other crimes not being investigated by [the] grand jury and on which no charges had been brought, and [making] false and misleading statements to [the] grand jury that prejudiced [the] defendant.” Id. at 1129 n.768. See also United States v. Hogan, 712 F.2d 757, 761-62 (2d Cir. 1983).

106 United States v. Moss, 756 F. 2d 329, 332 (4th Cir. 1985) (“[P]rosecutors cannot utilize the grand jury solely or even primarily for the purpose of gathering evidence in pending litigation. Once a [criminal] defendant [is] indicted, the government is precluded from using the grand jury for the ‘sole or dominant purpose’ of obtaining additional evidence against [the defendant].”)


111 See W. VA. R. CRIM. P. 17(a).

112 See id.

113 In re Grand Jury Proceedings, 486 F.2d 85, 90 (3d Cir. 1973).
instrumentalities of the United States Attorney’s office.”114 Unfortunately, only a very limited number of recognized grounds for refusing to comply with a grand jury subpoena.115 In essence, the investigative power of the grand jury is virtually in complete control of the prosecutor, and is left to his or her good faith.116

In United States v. Kovaleski,117 the district court in Michigan attempted to address the issue of prosecutors improperly using the grand jury subpoena power. The Kovaleski court created a test to determine whether subsequent prosecutorial action is proper in an indicted case. It focuses on whether there is a “dominating purpose of the additional inquiry.”118 This test is inadequate. Prosecutors can easily find a loophole in the “dominating purpose” test by simply delaying their presentation to the grand jury until after a reasonable amount of evidence to establish probable cause has been collected. To avoid tainting an indictment, a prosecuting attorney can simply allege that a continuing grand jury investigation is necessary under the circumstances of the case.

But even when prosecutorial misconduct is prevalent in a grand jury proceeding, it is unlikely that it will result in the dismissal of an indictment for two reasons. First, in order to prove prosecutorial abuse, a grand jury target must overcome a strong presumption of regularity in the grand jury proceedings.119 This legal presumption is difficult to overcome because grand jury proceedings are not held in open court and the information revealed during the proceedings is not publicly disclosed.120

Second, assuming prosecutorial abuse occurred, becomes known by defense counsel, and overcomes the presumption of regularity, the “harmless error rule”121 acts as a death trap to any plausible objections defense counsel may raise. In United States v. Mechanik,122 the prosecuting attorney violated Rule 6(d) of the Federal Rules of Criminal Procedure by questioning two witnesses

114 Id.
115 In re Sealed Case, 676 F.2d 793, 806 (D.C. Cir. 1982); see also Hale v. Henkel, 201 U.S. 43 (1906) (overbreadth doctrine); see also United States v. R. Enters., Inc., 498 U.S. 292 (1991) (objecting to subpoena ducet tecum); see also discussion supra Part III.A.3.
116 See generally United States v. Waldon, 363 F.3d 1103, 1109 (11th Cir. 2004) (finding no dismissal of indictment despite assertion that government withholding of exculpatory evidence from grand jury, combined with other errors to achieve cumulative error, because government has no legal duty to disclose exculpatory evidence to grand jury).
118 Id.
120 W. VA. R. CRIM P. 6(e)(2).
121 W. VA. R. CRIM. P. 7(c)(3) (“Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of the conviction if the error or omission did not mislead the defendant to his or her prejudice”).
simultaneously in the grand jury proceeding. Subsequently, the case proceeded to trial and the defendant was found guilty.\textsuperscript{123} The Supreme Court, in an opinion written by Justice William H. Rehnquist, upheld the conviction and indictment, stating, "[t]here is a greater burden in finding guilty beyond a reasonable doubt than in establishing probable cause in a grand jury proceeding and therefore probable cause must have existed and the Rule 6(d) violation was harmless error."\textsuperscript{124} Justice Marshall, dissenting, raised concern with the majority rule by stating,

[g]iven defendant’s difficulty in discovering Rule 6(d) violations, it is all the more important that dismissal of the indictment be certain when violations of the Rule are found.\textsuperscript{125}

... 

There are few limitations imposed on a prosecutor before the grand jury and not dismissing an indictment when a clear violation is found works very ‘unfair’ and ‘mischievous’ results.\textsuperscript{126}

In effect, both the strong presumption of regularity and the harmless error rule have acted to camouflage prosecutorial abuse in grand jury proceedings. In Justice Marshall's own words, "prosecutors are free to engage in prohibited conduct subject only to ‘purely ceremonial’ words of appellate displeasure."\textsuperscript{127}

2. Secrecy Shroud

Secrecy serves no useful objective in most cases because an accused has already been arrested and there is no concern for flight, or the need to protect the reputation of the accused.\textsuperscript{128} In actuality, secrecy is counterintuitive. In cases where racial issues have been provoked, given considerable media coverage, or where a public figure is under investigation, secrecy may create skepticism and distrust among the public.\textsuperscript{129} Rumors may quickly spread that a prosecutor did not attempt to vigorously investigate a case or is vigorously pursuing a case for improper purposes. In these particular situations public disclosure of

\textsuperscript{123} Id.
\textsuperscript{124} Id. at 70-71.
\textsuperscript{125} Id. at 86.
\textsuperscript{126} Id. at 83 (citing Chapman v. California, 386 U.S. 18, 22 (1967)).
\textsuperscript{127} Id. at 83 (citing United States v. Antonelli Fireworks Co., 155 F.2d. 631, 661 (2d Cir. 1946), cert. denied, 329 U.S. 742 (1946)).
\textsuperscript{128} BLANCHE DAVIS BLANK, THE NOT SO GRAND JURY 67 (1993).
\textsuperscript{129} KAMISAR, supra note 35, at 798; see generally BLANK, supra note 128, at 67.
actions taken by the prosecutor would likely calm any public suspicion that the state has been involved in collusion. In New York City these exact concerns were raised in the infamous subway slaying in which a white man shot four young black men.\textsuperscript{130} As one court stated, "[w]here corruption is charged, it is desirable to have someone outside the administration act, so that the image, as well as the fact, of impartiality in the investigation can be preserved and allegations of cover-up or white-wash can be avoided."\textsuperscript{131}

The West Virginia Rules of Criminal Procedure do not extend secrecy to grand jury witnesses.\textsuperscript{132} Consequently, "a witness that is hostile to the target may be eager to inform a curious media of questioning relating to the target."\textsuperscript{133} In such case, the grand jury secrecy requirements are of no value. Assuming arguendo, that West Virginia extended grand jury secrecy to witnesses, it is not certain that the state may prohibit the witness from "going public" after the investigation has ended.\textsuperscript{134}

In Butterworth v. Smith, the Supreme Court sustained a First Amendment challenge to a state secrecy requirement because it was so broad as to prohibit the witness from disclosing the "content, gist, or import" of his testimony, albeit the discharge of the grand jury.\textsuperscript{135}

Secrecy has also resulted in the loss of necessary data that could be used to reveal abuse in the legal system.\textsuperscript{136} In the small towns of West Virginia, "Barney Fife,\textsuperscript{137} investigations may result and even worse, collusive deals may be "cooked" up between prosecutors and police officers or "favored defendants." These unscrupulous activities are realistic, but their ultimate veracity will remain uncovered as long as the secrecy shroud remains in place. Only when the lid to the grand jury is loosened will answers to questionable activities be resolved and dispel public concerns. As Blanche Davis Blank stated, "[t]he rather heated atmosphere that surrounds many cases involving, for example, law enforcement personnel who are often thought to have collusive relationships with prosecutors, crisis climate . . . might be cooled with a little judicious ventilation."\textsuperscript{138}

Unfortunately, Rule 6(e) of the West Virginia Rules of Criminal Procedure has created a grand jury room that has been used as an independent and

\begin{footnotesize}
\begin{enumerate}
  \item See generally Stephen Carter, When Victims Happen to be Black, 97 YALE L.J. 420 (1988).
  \item W. VA. R. CRIM. P. 6(e)(2).
  \item KAMISAR, supra note 35, at 797.
  \item Id. at 627.
  \item BLANK, supra note 128, at 68.
  \item Barney Fife was the fictional deputy sheriff in the American TV sitcom The Andy Griffith Show. Calling one 'Barney Fife' is an American slang term for an incompetent or overzealous police officer or authority figure.
  \item BLANK, supra note 128, at 68.
\end{enumerate}
\end{footnotesize}
emancipated safe haven for the prosecution, which has undermined the constitutional rights of grand jury targets. For instance, what if it has been known that prosecutors will use the grand jury to “not” indict where the prospective indictee is aligned with the “right people”? What if the victim’s family may be simply told by the prosecutor that if they can’t get to first base with just the state’s version, then it would be futile to go any further? Without a transcript of the grand jury proceedings, or testimony by the grand jurors, how would one know what the prosecutor told the grand jurors?

B. Constitutional Troubles

1. Fourth Amendment Challenge

The Fourth Amendment to the United States Constitution states in pertinent part, “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”139 Fourth Amendment rights are not respected in grand jury proceedings due to the grand juries’ inherent power to issue subpoenas.140 The Fourth Amendment problem is twofold. First, a grand jury subpoena duces tecum can arguably be viewed as producing a “seizure” under the Fourth Amendment, especially when a witness is forced to produce evidence and the prosecutor offers no proof that it is linked to criminal activity.141 Second, it is important to note that the protection of the Fourth Amendment is not limited to “papers,” but also extends to “persons.” Thus, it is also arguable that a grand jury subpoena requiring a witness to appear and testify is a “seizure” under the Fourth Amendment.142

Several Supreme Court decisions lend weight to these arguments. For instance, the Supreme Court in Hale v. Henkel143 stated in dictum that a subpoena duces tecum issued by a grand jury may constitute an unreasonable search

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139 U.S. Const. amend. IV.
141 A subpoena duces tecum directs the production of books or records. See Braswell v. United States, 487 U.S. 99, 103-14 (1988) (citing Curcio v. United States, 354 U.S. 118, 125 (1957)); see also Kamisar, supra note 35, at 794. Kamisar lists several advantages of using a subpoena rather than a search warrant. First, the subpoena may broadly describe the documents sought, thereby ensuring that relevant documents are missed. Second, a search warrant requires an affidavit setting forth the specifics of the probable cause supporting the search. Third, the subpoena avoids the risk of a complete loss of evidence. Where the search was made pursuant to a warrant so deficient as to preclude police reliance upon the “good faith” exception to the exclusionary rule, or the execution of the search was unconstitutional, the government loses the use of the unconstitutionally seized documents and any additional evidence that falls within the “fruit of the poisonous tree doctrine.” Id.
142 See Kamisar, supra note 35, at 794.
143 201 U.S. 43, 76 (1906).
and seizure within the Fourth Amendment. In another case, commenting on Hale, Justice Marshall stated, "[c]onsidered alone, Hale would certainly seem to carry a strong implication that a subpoena compelling an individual's personal appearance before a grand jury, like a subpoena ordering the production of private papers, is subject to the Fourth Amendment standard of reasonableness." Other Supreme Court cases, however, seem to contradict Hale. In United States v. Dionisio, the Court allowed a prosecutor to call twenty people before the grand jury to obtain voice exemplars. Prosecutors asked witnesses questions based on material seized illegally. The Dionisio Court held that even though the accused could have objected to the use of the evidence to interrogate him were he a defendant at trial, he could not object in the grand jury proceedings because it would "impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." In Davis v. Mississippi, however, the United States Supreme Court reversed a conviction where the police detained twenty-four people for fingerprinting. The difference between Dionisio and Davis are that the facts in Dionisio occurred in the context of a grand jury proceeding, while the facts in Davis occurred in the context of custodial interrogation.

Dionisio, Davis and their progeny teach a bad lesson: When a prosecutor chooses to conduct an otherwise illegal investigation all he or she must do is convene a grand jury. In addition, these two cases demonstrate that a grand jury target is not afforded the legal rights afforded to defendants who have been indicted because he or she is not, at that point, formally charged with a crime. In other words, a witness whom the prosecutor seeks to indict does not have the protections that he or she must be afforded in interrogation. Justice Marshall, dissenting in Dionisio stated, "the Court's decision today can serve only to encourage prosecutorial exploitation of the grand jury process, at the expense of both individual liberty and the traditional neutrality of the grand jury." Commenting on the Court's holding, Justice Marshall stated further, "law enforcement officials may seek to usurp the grand jury process for the purpose of

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144 Id. (holding that the subpoena was "far too sweeping in its terms to be regarded as reasonable").
147 Id.
148 Id. at 17.
150 See CLARK, supra note 15, at 69.
151 See id.
securing incriminating evidence from a particular suspect through the simple expedient of a subpoena.”

2. Fifth Amendment Challenges

   a. Self Incrimination

   The Fifth Amendment to the United States Constitution guarantees that one shall not be compelled in any criminal case to be a witness against himself or herself. Under the Fifth Amendment, a grand jury witness has an obligation to testify before the grand jury to all questions, absent those to which he or she makes specific, timely objections on Fifth Amendment grounds, or on the basis of some well established privilege. But even when a grand jury witness makes a timely Fifth Amendment objection, in certain situations he or she must testify. Unlike custodial interrogation, once a grand jury witness begins to discuss activities that may be incriminating, he or she is required to continue to discuss them. For this very reason, Fifth Amendment protections are compromised in grand jury proceedings.

   In Rogers v. United States, the grand jury was investigating a Communist Party branch and various documents. Rogers, the witness, simply admitted that he had been the treasurer of the Communist Party branch, but stated she turned the various documents over to another person. Rogers was asked to name the person to whom she turned the documents over, but refused to answer the question on Fifth Amendment grounds. The Court overruled her Fifth Amendment objection and she was required to answer. In Rogers, the Court stated, “disclosure of [an incriminating] fact waives the privilege as to details, as the further disclosure does not then present a reasonable danger of

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154 Id.
155 U.S. CONST. amend. V.
156 U.S. CONST. amend. V.
159 Id.
160 Id. at 368.
161 Id. at 368-70.
162 Id. at 369-70.
further incrimination in light of all the circumstances, including [the] previous disclosures.\textsuperscript{163}

Although one can claim the Fifth Amendment privilege in a grand jury proceeding,\textsuperscript{164} witnesses face several problems in doing so. First, as defined in \textit{Counselman},\textsuperscript{165} the Fifth Amendment privilege against self-incrimination only applies to testimony which may "tend to show" that the witness himself or herself "had committed a crime." An average layperson witness faced with making the legal decision as to when to claim the Fifth Amendment privilege is ill-equipped to know when a matter is self-incriminating. As proven in \textit{Rogers}, the standard becomes more difficult and the waters become even more muddied.\textsuperscript{166} First, witnesses may make an otherwise non-incriminating statement, but bind themselves to make a full disclosure, including incriminating statements.\textsuperscript{167} Second, assuming witnesses have the legal skills to spot self-incriminating matters and have the courage to invoke the Fifth Amendment, prosecutors may attempt to intimidate witnesses into surrendering their Fifth Amendment right by resorting to forceful interrogation because they are not monitored by a judge.\textsuperscript{168} According to Yale Kamisar, "[n]o person stands more alone than a witness before a grand jury; in a secret hearing he faces an often hostile prosecutor and twenty-three strangers with no judge present to guard his rights, no lawyer present to counsel him, and sometimes no indication of why he is being questioned."\textsuperscript{169} Third, a grand jury witness need not be warned that he or she is a target of the grand jury investigation.\textsuperscript{170} As such, a grand jury witness may haphazardly answer all questions without consideration to possible legal ramifications.

\textbf{b. Right to Counsel}

As interpreted by the Supreme Court, the Fifth Amendment to the United States Constitution guarantees one the right to counsel during custodial

\textsuperscript{163} \textit{Id.} at 372-74.

\textsuperscript{164} \textit{Counselman v. Hitchcock}, 142 U.S. 547, 562 (1892) (holding that the Fifth Amendment privilege against self-incrimination is available to a grand jury witness because the grand jury inquiry into criminal liability is itself a "criminal case").

\textsuperscript{165} \textit{Id.; see also} \textit{Hoffman v. United States}, 341 U.S. 479 (1951) (setting forth guidelines to determine when the Fifth Amendment privilege against self-incrimination should be sustained).

\textsuperscript{166} \textit{Rogers v. United States}, 340 U.S. 367 (1951).

\textsuperscript{167} \textit{Id.}

\textsuperscript{168} \textit{See, e.g.}, \textit{United States v. Shuck}, 895 F.2d 962 (4th Cir. 1990) ("[a]lthough prosecutor's repeated questioning of grand jury witness about his involvement with drugs, after the witness had claimed his Fifth Amendment privilege, could not be condoned, witness was not unduly prejudiced by the repeated questions").

\textsuperscript{169} \textit{Kamisar}, \textit{supra} note 35, at 793.

interrogation. The Supreme Court in United States v. Mandujano, however, rejected the contention that a grand jury target had a Miranda right to counsel under the Fifth Amendment. The Supreme Court added that the target, if he or she desired, could have retained the assistance of private counsel. In Kirby v. Illinois, the Supreme Court also held the Sixth Amendment right to counsel does not come into play in grand jury proceedings. Mandujano and Kirby are damaging to indigent grand jury targets who cannot afford private counsel. Although a grand jury target is not permitted to have counsel present in the grand jury proceedings in West Virginia, witnesses are permitted a reasonable opportunity to step outside the grand jury room to consult with counsel. As such, all grand jury targets, rich or poor, should be afforded the Fifth Amendment right to counsel. As Justice Brennan stated:

[At] a minimum, the putative defendant is entitled to be told that he has a right to consult with an attorney prior to questioning, that if he cannot afford an attorney one will be appointed for him, that during the questioning he may have that attorney wait outside the grand jury room, and that he may at any and all times during questioning consult with the attorney prior to answering any question posed.

Justice Brennan also observed that, "the presence of counsel inside the grand jury room is required," and that there "certainly . . . is no viable argument that allowing counsel to be present in the grand jury room for the purposes of con-

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173 Id. at 779.
175 U.S. CONST. amend. VI. The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." Id. See also W. VA. CONST. art. III, § 14 (regarding assistance of counsel and reasonable time to prepare).
176 Kirby v. Illinois, 406 U.S. 682 (1972) (holding no right to counsel because no criminal proceedings have been instituted).
177 U.S. CONST. amend. VI; see also United States v. Bollin, 264 F.3d 391 (4th Cir. 2001); State v. Miller, 336 S.E. 2d 910, 919 (W. Va. 1985) (Neither defendant nor his counsel has a right under the Sixth Amendment of the U.S. Constitution to be present at and participate in the grand jury proceeding, since no adversary judicial proceedings had yet been initiated against him.)
178 United States v. Mandujano, 425 U.S. 564 (1976) (Although a witness cannot have his or her lawyer present in the grand jury room, witnesses are usually permitted to leave the grand jury room to consult with their attorney); see also U.S. DEPT. OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-11.151 (Supp. 2002).
179 Mandujano, 425 U.S. at 605 (Brennan, J., concurring).
sultation regarding testimonial privileges would subvert the nature or functioning of the grand jury proceeding." \(^{180}\)

3. Equal Protection Challenge

An arbitrary line has been drawn between target witnesses of the grand jury and the indicted. Under current West Virginia law, grand jury targets are deprived of important Fourth, Fifth, and Sixth Amendment constitutional protections, while such rights are afforded to those who have been indicted.

Under the Equal Protection Clause of the United States Constitution, individuals who are similarly situated must be treated substantially the same under the law. \(^{181}\) To make a *prima facie* equal protection case, one must prove that a law has a disparate impact between individuals and intentional discrimination. \(^{182}\) Intentional discrimination may be inferred from the circumstances surrounding the application of a statute, such as the manner in which the law is applied. \(^{183}\)

The Equal Protection Clause applies in instances where the government discriminates among people as to the exercise of a fundamental right: \(^{184}\) for example, the right to fee waiver for indigents in filing for divorce, \(^{185}\) the right to counsel on appeal for indigents, \(^{186}\) the right to free transcripts on appeal for indigents, \(^{187}\) and the right to vote. \(^{188}\) A court must find which class of persons has been disadvantaged to determine what level of scrutiny to apply. Those government infringements that involve a fundamental right are subject to strict scrutiny. \(^{189}\) If a right is not fundamental, then only rational basis review is used. \(^{190}\) The Supreme Court has clearly held that equal protection does not require allegations that the government discriminated against a group or on the basis of group characteristics. \(^{191}\) One can make a claim under the Equal Protection

\(^{180}\) *Id.* at 605 n.22.


\(^{183}\) *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886).


\(^{189}\) *See* United States v. Carolene Product Co., 304 U.S. 144, 153 n.4 (1938).

\(^{190}\) *See, e.g.*, Vacco v. Quill, 521 U.S. 793 (1997) (applying rational basis review to an equal protection challenge to laws prohibiting physician-assisted suicide).

Clause even for discrimination against a "class of one."192 The Olech Court emphasized that equal protection safeguards individuals and not groups.193

In applying the Equal Protection Clause to target witnesses of the grand jury and those who have been indicted, it is arguable that the former have been deprived of equal protection under the law in West Virginia. Grand jury targets and the criminally indicted are similarly situated due to the simple fact that they are under a formal state investigation for a criminal act. It is arguable that a grand jury target is a de facto or putative defendant. In fact, the United States Attorney's Manual, in its provisions on target subpoenas and target notification uses the following definition of a grand jury target: "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant."194 The only difference between a grand jury target and the indicted is that a grand jury target has not been given a piece of paper styled "indictment." This slight difference is de minimis due to the simplicity in having the grand jury return an indictment under current law in West Virginia.195

Under an Originalist's theory, fundamental rights are limited to those liberties explicitly stated in the text of the constitution.196 In the alternative, the Supreme Court has held that fundamental rights are those that are "deeply rooted in this Nation's history and tradition."197 Regardless of which view one may accept, it is clear that the rights afforded by the Fourth, Fifth and Sixth Amendments are fundamental. As such, since grand jury witnesses are denied the protections of the Fourth, Fifth and Sixth Amendments, they have been denied fundamental rights, and strict scrutiny applies.198 A grand jury target's fundamental rights have been infringed by Rules 6 and 17 of the West Virginia Rules of Criminal Procedure, which deny a target the right to the assistance of counsel for his or her defense, the right to confront witnesses against him or her and the right to be secure against unreasonable searches.199 The burden therefore shifts to the government, and it must present a compelling interest to justify its infringement on grand jury targets. Under strict scrutiny, it is not enough for the government to prove a compelling purpose behind a law.200 The government

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192 Id.
193 See id.
195 See generally Macur, supra note 8, at A18.
198 See Miller v. Johnson, 515 U.S. 900, 920 (1995) (Under strict scrutiny, the government has the burden of proof, that is, the law will be struck down unless the government can show that the law is necessary to accomplish a compelling governmental purpose.).
200 See, e.g., Adarand Constructors v. Pena, 515 U.S. 200 (1995) (Under strict scrutiny, a law will be upheld if it is necessary to achieve a compelling governmental purpose.).
must show that the law is necessary to achieve its objective. This requires the government to prove that it could not attain its goal through less restrictive means. The government’s goal in enacting Rules 6 and 17 of the West Virginia Rules of Criminal Procedure is to aid the grand jury in acting as a “shield” against vindictive prosecutions and to act as a “sword” to investigate alleged criminal activity. Clearly, grand jury targets are disproportionately burdened by the lack of procedural and constitutional protections not afforded. The state should be hard pressed to successfully argue that Rules 6 and 17 are necessary to achieve its compelling purpose. Rules 6 and 17 are over-inclusive and should not survive strict scrutiny. As stated by Professor Gerald Gunther, strict scrutiny is virtually always fatal to the challenged law.

Instead of cutting off all procedural protections afforded by the Fourth, Fifth and Sixth Amendments, the government could simply afford a grand jury target the right to counsel. In fact, “[r]oughly twenty states now have statutes permitting at least certain witnesses to be assisted by counsel located within the grand jury room.” Such statutes commonly contain provisions limiting the role of counsel before the grand jury. For example, a Kansas Statute allows counsel to “interpose objections on behalf of the witness.” By granting just one of the many procedural protections afforded by the Fourth, Fifth, or Sixth Amendments, the state takes a baby step toward a least discriminatory alternative. Based upon the disparate treatment currently in place among grand jury targets in West Virginia and those who have been indicted, equal protection has not been afforded. Both grand jury targets and the indicted must be treated alike and the constitutional protections in the Fourth, Fifth and Sixth Amendments must apply equally.

C. Lack of Official Procedure

1. Jury Instructions

West Virginia grand jurors need not be instructed with the same degree of precision that is required when the court instructs a petit jury. How can a

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201 See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986) (“Under strict scrutiny the means chosen to accomplish the State’s asserted purpose must be specifically and narrowly framed to accomplish that purpose.”).


203 Kamisar, supra note 35, at 788.


205 Kamisar, supra note 35, at 847.


grand jury make a probable cause determination if it is not properly instructed? The grand jury is not in a better position to make a probable cause determination when instructions are not accurately stated than they would be if no instructions were given. Not clearly instructing the grand jury is analogous to the dangerous situation when the legislature passes a vague law. In other words, a law void for vagueness "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." 209

Unquestionably, it is difficult to apply legal concepts without proper guidance. Law students and attorneys spend years struggling to learn how to apply substantive and procedural concepts within the criminal law. By not accurately charging the grand jury, the legal system becomes ineffective. The goals themselves are not ineffective, but the attempt to put them into practice is. Instead of relying on the definition of a particular crime as defined by the legislature or interpreted by the courts, grand jurors are essentially left free to individually determine whether probable cause exists on an ad hoc basis. To protect against civil liberty abuses, it is imperative that the grand jury is charged with specific and clear instructions. The underlying concern is the core due process requirement of adequate notice. As the Supreme Court stated, "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." 210

The legislature created the criminal code with the intent of reducing criminal activity by giving notice of proscribed conduct and the corresponding penalties required by law. 211 In addition, the criminal code ensures order, peace and security for the people. 212 When the grand jury is not properly instructed and lay people are given the responsibility to determine the law, legislative goals become ineffective, and the possibility that a groundless indictment is issued increases. When "men of common intelligence must necessarily guess at its [the penal code's] meaning and differ as to its application, [this] violates the first essential of due process of law." 213 Individuals of the community can prescribe their conduct to the law, but yet find their name on an indictment because the grand jury was not properly educated on the law or the burden of proof. This is a very scary situation.

The West Virginia Rules of Criminal Procedure give grand juries broad power to issue subpoenas and to gather evidence. 214 What is the purpose of giving the grand jury an investigative role if the jury is not accurately instructed on

211 Id. at 456.
212 Id.
the law? After all, the purpose of this broad power is to aid the grand jury in making a final decision as to whether they will issue an indictment.\(^{215}\) When not clearly and concisely instructed on the law, the subpoena power delegated to the grand jury becomes an exercise in futility.

In a criminal trial, judges in West Virginia routinely give petit jurors a written charge to read as the judge orally instructs. They also are permitted to take the instructions to their deliberation room. Why not give grand jurors offense-defining instructions on each case as they consider the evidence? Also, why not instruct the grand jury that they have the right to consider lesser included crimes, just as a trial jury would? It would be more just to the putative defendant to start the search for the truth with the glass being half full as opposed to over-charging by the prosecuting attorney.

2. The Rules of Evidence

The Rules of Evidence do not apply in grand jury proceedings.\(^{216}\) Evidence that is otherwise objectionable at trial is permitted in the grand jury room.\(^{217}\) Among other inadmissible evidence, leading questions, hearsay, irrelevant questions and character evidence are all admissible.\(^{218}\) The grand jury can even hear evidence that violates the exclusionary rule.\(^{219}\) As such, a judge is generally needed only to rule on privilege issues or issues relating to contempt.\(^{220}\)

Common justifications for not applying the Rules of Evidence include

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\(^{215}\) Blair v. United States, 250 U.S. 273, 282 (1919) ("the scope of [the grand jury's] inquires is not . . . limited narrowly by questions of propriety . . . ").

\(^{216}\) See McKethan v. United States, 439 U.S. 936, 938 (1978) (holding that "in grand jury proceedings, the ordinary rules of evidence do not apply. Leading questions and multiple hearsay are permitted and common. Grand jury investigations are not adversary proceedings"); see also, United States v. Reyes-Echevarria, 345 F.3d 1, 5 (1st Cir. 2003) (stating that the validity of an indictment is not affected by alleged insufficiency of evidence because grand jury proceeding is a preliminary phrase of the criminal justice process).

\(^{217}\) McKethan, 439 U.S. at 938.

\(^{218}\) See Costello v. United States, 350 U.S. 359, 363-64 (1956) (holding indictment valid despite presentation of only hearsay evidence to grand jury); United States v. Taylor, 154 F.3d 675, 681 (7th Cir. 1998) (holding indictment valid despite being based solely on hearsay evidence); United States v. Overmyer, 899 F.2d 457, 465 (6th Cir. 1990) (holding indictment valid despite presentation of information regarding unrelated prior prosecution without informing grand jury of subsequent acquittal).

\(^{219}\) United States v. Calandra, 414 U.S. 338, 351-52 (1974) (stating that the exclusionary rule does not limit grand jury's power to compel witnesses to answer questions based on evidence obtained by illegal search and seizure).

\(^{220}\) See Application of Jordan, 439 F. Supp. 199, 205-06 (W.D. Va. 1977) (A grand jury is subject to the supervision of a judge, who should exercise his or her powers when appropriate); see also United States v. Williams, 504 U.S. 36, 47-48 (1992) ("Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office . . . In its day to day functioning, the grand jury generally operates without the interference of a presiding judge. It swears its own witnesses, and deliberates in total secrecy.").
the fact that grand jury proceedings are not adversary proceedings and that grand jury testimony is more trustworthy than out of court statements because the statements are made under oath.\footnote{221}

Blanche Davis Blank, who spent two years on a federal grand jury, describes a typical grand jury proceeding from start to finish in a wire fraud case:

In the midst of one of our regular days of work on one of our typically long-winded matters, we were asked to indulge a new prosecutor who needed ‘only a little of our time.’ Indeed! What then ensued was a very speedy description of a wire fraud case that had been under investigation a year or more. We were presented with an FBI agent, our only witness, who was duly sworn, and whose total evidence (all of it hearsay—he was not even the agent who had done the original legwork) was to identify and very briefly testify to the gist of the earlier, copious testimony. In all, this took the agent about thirty minutes. We were then read the law, and the indictment that was being requested . . . . The necessary twelve affirmative votes were easily achieved.\footnote{222}

In this real case, a grand jury target was indicted solely on hearsay evidence.\footnote{223} This paradigm is inherently unfair and the justice system demands that the rules of evidence apply in grand jury proceedings. When the grand jury is presented with improper evidence it can easily be misled and the risk that an unfounded indictment is returned increases. Conversely, application of the Rules of Evidence reduces the risk of confusion and narrows the focus of inquiry.

Rule 402 of the West Virginia Rules of Evidence sets a threshold, requiring that all evidence is relevant before it is admissible.\footnote{224} The policy behind this rule is that irrelevant evidence has no bearing on any issues and may mislead a jury, and therefore must be excluded. Rule 102 of the Federal Rules of Evidence states, “[t]hese rules shall be construed to secure fairness in administration, elimination of unjustifiable expense, and delay, and promotion of growth and development of the law of evidence to the end that the truth may be

\footnote{221} McKethan v. United States, 439 U.S. 936, 938 (1978).
\footnote{222} BLANK, supra note 128, at 72.
\footnote{223} See W. VA. R. EVID. 801.
\footnote{224} W. VA. R. EVID. 402. Relevancy is a two part test. First, the evidence must have probative value. In other words, the evidence must have a tendency to make a fact more probable or less probable than it would be without the evidence. Second, the evidence must be material. In other words, the evidence must relate to the existence of any fact of consequence.
\footnote{225} See W. VA. R. EVID. 403 (describing a judge’s authority to exclude evidence on grounds of prejudice, confusion, or waste of time).
ascertained and proceedings justly determined."226 The lack of evidence rules in grand jury proceedings does not secure fairness, creates unjustifiable expenses, and does not promote the policy of seeking the truth. The lack of evidence rules also creates opportunities for subsequent perjury charges227 to be brought against witnesses, as was done in the Lewis "Scooter" Libby, Jr. case.228 A witness does not have any protection against other witnesses lying to the grand jury, or against the use of unconstitutionally obtained evidence.229 The only redress is to challenge the evidence at trial. A witness cannot risk testifying contrary to other witnesses who have lied, for fear of being charged with perjury if the prosecutor does not believe his or her testimony. The only option a witness has is to assert the Fifth Amendment.230 Asserting the Fifth Amendment, however, poses its own problems. By asserting the Fifth Amendment a witness may be perceived by the grand jury as hiding information from them, or the witness may not know when the privilege should be invoked.231 In addition, since the Fifth and Sixth Amendment rights to counsel do not apply in grand jury proceedings,232 many witnesses may be unaware of the Fifth Amendment privilege against self-incrimination altogether.233 By implementing the rules of evidence, the risk that an unfounded perjury charge results decreases significantly. Although there is no true method of preventing a witness from lying, the Rules of Evidence reduce this possibility due to the fact that many statements that would otherwise be admissible will be objectionable.

3. Grand Jurors

Pursuant to Rule 6 of the West Virginia Rules of Criminal Procedure, a grand jury shall consist of sixteen members, but only a quorum of fifteen grand jury members must be present before the grand jury can convene.234 Once a quorum is formed, twelve members of the grand jury must be in concurrence in

226 Fed. R. Evid. 102.
228 See Eric Lipton, The Libby Verdict: Members of a Sympathetic Jury Describe an Emotional but Inevitable Conclusion, N.Y. Times, Mar. 7, 2007, at A17. Irve Lewis "Scooter" Libby, Jr. was the Chief of Staff to Vice President Dick Cheney. On October 28, 2005, Libby resigned his government position, after being indicted on five felony counts, including perjury for allegedly lying to the grand jury. On March 6, 2007, Libby was found guilty.
229 See, e.g., Costello v. United States, 350 U.S. 359, 363-64 (1956) (refusing to establish rule permitting defendants to challenge indictments on basis of incompetent evidence).
230 U.S. Const. amend. V ("Nor shall any witness in any criminal case be compelled to testify against himself").
231 See supra Part V.B.2.a.; see also U.S. Const. amend. V.
232 See supra Part V.B.2.b.
233 See U.S. Const. amend. V.
234 W. Va. R. Crim. P. 6(a) ("The grand jury shall consist of 16 members, but any fifteen or more members attending shall constitute a quorum.").
order to return an indictment. There is no requirement, however, that the same twelve grand jurors whose votes are required to return an indictment be present for the entire presentation of the evidence.

Fairness to an accused is jeopardized by Rule 6. Assume a grand jury convenes for two days on a single case and that on the second day the grand jury votes on whether or not to return an indictment. It is plausible that a grand juror may be absent on the first day, but present on the second day. It is also plausible that a grand juror who was present on the first day may be absent on the second day. In this situation, the grand juror who heard evidence on the first day will not vote on the indictment, while the grand juror who was absent on the first day and did not hear evidence will vote on the indictment. Although proponents of the grand jury system argue an absent juror may catch up on materials missed during his or her absence, this is unlikely to occur. Blanche Davis Blank stated that when she made an attempt to obtain and read the transcript from a missed proceeding, she was told that she could not have the transcripts. In addition, she was apparently the first juror to have made a request to read the transcripts from a missed session. Even assuming jurors take the responsibility to ask for missed transcripts and are actually given access to them, it is unlikely that the jurors will read the entire transcripts or understand the substantive material.

D. Limitations on Defense Counsel

1. The Jencks Act

Approximately fifty years ago a criminal defendant was absolutely barred from obtaining grand jury testimony. This rule changed in 1957 in Jencks v. United States. In Jencks, the Supreme Court held that a defendant is entitled to obtain the prior statements of persons to government agents when those persons testify against him or her at trial. This rule announced by the Supreme Court was subsequently codified in the United States Code and is most commonly known as the Jencks Act. The Jencks Act requires in a federal prosecution that a criminal defendant is entitled to discover any witness “statement” against him which is relevant to the witness’s testimony and which is in

235 W. VA. R. CRIM. P. 6(f) ("An indictment may be found only upon the concurrence of 12 or more jurors.").
236 See id.; Blank, supra note 128, at 70.
237 Blank, supra note 128, at 70.
238 Id.
239 Id.
241 Id. at 668-69.
the possession of the United States government.\footnote{Id. § 3500(b).} Testimony of a grand jury witness is specifically included in the definition of “statement” in an amendment to the Jencks Act.\footnote{Id. § 3500(e)(3).} Unfortunately, the Jencks Act restricts a defendant’s access to such material until after the witness has testified in court against him or her, and such material can be used for impeachment purposes only.\footnote{Id. § 3500(a).} Consequently, pretrial discovery of such material is not permitted.\footnote{W. Va. R. CRIM. P. 17(h) (noting that statements made by witnesses may only be subpoenaed subject to West Virginia Criminal Procedure Rule 26.2, which is West Virginia’s codified version of the Jencks Act).}

In 1981, West Virginia adopted Criminal Procedure Rule 26.2.\footnote{W. Va. R. CRIM. P. 26.2.} Rule 26.2 mirrors the Jencks Act and requires in relevant part that

[a]fter a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the state . . . to produce for examination and use of the moving party any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

Like the Jencks Act, Rule 26.2 also applies to statements given by witnesses during grand jury proceedings.\footnote{See State v. Watson, 318 S.E.2d 603, 608 (W. Va. 1984).} There are several inherent problems with Rule 26.2 of the West Virginia Rules of Criminal Procedure. With limited time and limited access to testimony, defense counsel cannot represent his or her client to the best of his or her ability. Non-disclosure of witness statements made during grand jury proceedings until after the witness testifies at trial undermines the adversary system by giving the state the benefit of more preparation time than defense counsel. Even worse, in some cases disclosure of witness statements will never be made. For example, when a witness testifies before the grand jury, his or her testimony is ordered transcribed, so that during the trial after he or she testifies defense counsel may receive the transcript in the “heat of the battle.” To avoid turning over transcripts altogether, the state can call upon an officer not connected to the case to read portions of the investigative report to the grand jury. Defense counsel will be denied the opportunity to receive any Jencks material when the investigating officer is called to testify at trial because he or she is not the same officer who testified before the grand jury. This loophole to Rule 26.2 is created because the rules of evidence do not apply in grand jury proceedings. Unfortunately, Rule 26.2 has significantly limited defense counsel’s role as an advocate.
VI. SUGGESTIONS TO THE WEST VIRGINIA LEGISLATURE

The biggest downfall to the grand jury system is the lack of procedural protections afforded to grand jury targets. The Duke lacrosse rape scandal epitomizes how the lack of procedural protections in grand jury proceedings can be extremely damaging to an accused. Perhaps the lacrosse players would not have been indicted for rape if grand jury proceedings were not held in secrecy, if an accused was afforded the right to cross-examine witnesses, or if the Rules of Evidence applied.

An accused in a grand jury proceeding is given the least amount of procedural protection of any stage of the criminal process.\textsuperscript{249} Consider the following examples as proof. A defendant facing a criminal charge for which he or she can receive at least six months in jail has an absolute constitutional right to a trial by jury.\textsuperscript{250} Under \textit{Miranda v. Arizona},\textsuperscript{251} the police must tell a suspect whom they arrest and interrogate that he or she has the right to remain silent, to have a lawyer present during the questioning and to stop talking at any time he or she desires.\textsuperscript{252} During a preliminary examination in West Virginia, one has the right to have his or her attorney present and to cross-examine prosecution witnesses.\textsuperscript{253} None of these legal protections is afforded to grand jury targets; this clearly reveals how extensive the absence of procedural protections are in grand jury proceedings.\textsuperscript{254}

The Duke lacrosse rape scandal paints a clear picture as to why the grand jury system desperately needs reform in West Virginia. If three unfounded rape indictments can be returned against lacrosse players at Duke University under a North Carolina grand jury system that affords more protection to an accused than the West Virginia grand jury system, the same can happen to any resident, college student, or athlete in the State of West Virginia.

Commenting on the Duke rape scandal before it went to the grand jury, Robert S. Bennett, former United States Attorney stated, “I still have great hope that we would persuade the prosecutor not to go forward with the case,” adding that if the case did go to the grand jury, the prospect of an indictment and subsequent arrest was high.\textsuperscript{255} “Grand juries pretty much do what the prosecutor tells them to do.”\textsuperscript{256} As proven in the Duke case, weak cases are often brought be-

\textsuperscript{249} See generally \textit{Miranda v. Arizona}, 384 U.S. 436 (1966) (broadening the right against self-incrimination to cover all custodial police interrogations); \textit{Frankel & Naftalis, supra} note 23, at 142.


\textsuperscript{251} 384 U.S. 436 (1966).

\textsuperscript{252} Id. at 524.


\textsuperscript{254} See generally \textit{W. Va. R. Crim. P. 6}.

\textsuperscript{255} \textit{Macur, supra} note 8, at A18.

\textsuperscript{256} Id.
fore the grand jury and indictments are often returned. Perhaps a prosecutor does not want to take the responsibility for the decision not to prosecute, or perhaps a prosecutor has simply been misled by the allegations of an alleged victim. Regardless, in either case, an accused has not been protected against improper or politically inspired charges. Although the grand jury does not make a final guilt determination, it plays an important role due to its inherent power to eliminate unmeritorious prosecution. Under the current grand jury system it is too easy for a prosecutor to obtain an indictment under a probable cause standard and ruin the hard earned reputation, career and life of the accused. In fact, probable cause has already been decided twice before the grand jury even convenes. Probable cause is determined upon the issuance of an arrest warrant and at a preliminary hearing. As Justice Stewart noted, "[t]he grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor . . .".

1. Redefining Prosecutorial Achievement

Prosecutors, as representatives of the State of West Virginia in criminal cases, set a one-dimensional tone by presenting non-exculpatory evidence to the grand jury. Prosecutors are elected officials and are out to win the votes of the community. As with any occupation or profession, performance is always scrutinized. In part, one factor analyzed by the community in determining the success of a prosecutor is to quantitatively measure how many indictments were issued by a grand jury in a given term.

Measuring prosecutorial success by quantitatively counting the number of indictments issued is not a proper factor to consider and is an overture to groundless prosecutions. Quantitatively measuring the number of indictments issued by a grand jury, unfortunately, creates a one-dimensional method of analyzing and presenting a case among prosecutors. In return, this creates the opportunity for the prosecution of weak cases in order to appeal to public sentiment, as was done in the Duke lacrosse rape scandal.

Prosecutorial success must be redefined! While a prosecutor’s role is routinely referred to as “quasi-judicial,” in reality this quite often is not the case. One factor that must be weighed heavily in judging the performance of a prosecutor is the amount of exculpatory evidence presented to the grand jury. Unfor-

260 See U.S. DEP’T. OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-11.233 (2006) Although it is the internal policy of the Department of Justice to present exculpatory evidence to the grand jury, this policy creates no substantive right for the defendant. See generally U.S. v. Williams, 504 U.S. 36 (1992) (holding a prosecutor’s failure to present the grand jury with evidence exculpating the defendant does not merit dismissal of an indictment).
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tunately, this in turn may result in fewer indictments, which in turn would reflect poorly upon a prosecutor. To end this cyclical and illogical way of thinking, prosecutorial productivity must be redefined in order to create a neutral and impartial prosecutorial and community mind set. Prosecutorial success must be measured by fairness to the accused. Fairness can only be achieved when an accused is granted adequate procedural protections. Unfortunately, the grand jury system is not a necessary or an acceptable method to establish fairness. Fairness will only be achieved when prosecutors seek indictments from the grand jury only when they are confident that probable cause exists and that admissible evidence will lead to conviction at trial.262

2. Modeling the Rules of Civil Procedure

In theory, the grand jury acts independently, using its own judgment in making a probable cause determination that a crime has or has not been committed. In reality, however, the grand jury is essentially an extension of the prosecutor, nothing more than a "rubber stamp" and a "prosecutor's puppet." In fact, in 1984, "federal grand juries returned 17,419 indictments and only 68 no true bills."263 This large disparity is due to the fact that the grand jury hears only cases brought to it by the prosecuting attorney, the prosecutor decides which witnesses to call, the prosecutor decides which witnesses will receive immunity,264 the basic questioning is done by the prosecutor, and the prosecutor decides if he or she has enough evidence to seek an indictment.265 In addition, an indictment doesn't magically appear after a "true bill" is returned. Instead, the prosecuting attorney drafts the prospective indictment in his or her office before the grand jury even convenes. Simply stated, the grand jury system does not serve any constructive purpose when the proceedings are so unbalanced.

In stark contrast, the West Virginia and Federal Rules of Civil Procedure are designed to quickly eliminate claims that are not meritorious. Rule 12 of the West Virginia Rules of Civil Procedure lists seven defenses that may be made in a responsive pleading.266 Rule 11 of the West Virginia Rules of Civil Procedure requires that all pleadings, written motions and other papers submitted to the court be to the best of the person's knowledge, information and belief after an inquiry reasonable under the circumstances.267 Rule 56 of the West Virginia Rules of Civil Procedure allows a party against whom a claim is asserted at any time after the expiration of thirty days from the commencement of

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263 BLANK, supra note 128, at 66.
265 W. VA. CODE § 7-4-1 (stating prosecutorial duties).
266 See W. VA. R. CIV. P. 12(b).
267 W. VA. R. CIV. P. 11(b).
the action to move for summary judgment in the party's favor. The grand jury system must model the Rules of Civil Procedure in seeking the quick termination of unfounded civil suits. This is especially true since there is more at stake in a criminal case, one's liberty, than in a civil case. Although it is important that criminal cases be given special attention, in an era where the courts are flooded due to the nature of our litigious society willing to quickly pull the trigger of a "hired gun," the glacial pace in which our justice system moves and the irreparable harm an unfounded criminal allegation can cause, it is even more imperative to quickly filter unmeritorious criminal accusations.

3. Fifth Amendment Antidote

*Miranda v. Arizona* is an antidote to most Fifth Amendment self-incrimination issues in grand jury proceedings. In *Miranda*, the United States Supreme Court held that during custodial interrogation a suspect has a constitutional right not to be compelled to make incriminating statements in the interrogation process and has the right to remain silent. *Miranda* gives more realistic protection to the Fifth Amendment because it may be very difficult for a layman to define precisely which matters may or may not be self-incriminatory. The option of total silence under *Miranda* relieves the suspect of making difficult selective responses.

4. The Quintessential Grand Jury System

Justice O'Connor in 1986 is quoted in *United States v. Mechanik* as stating that the grand jury serves "the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or dictated by an intimidating power or by malice and personal ill will." Unfortunately, the West Virginia grand jury system has not abided by these powerful words spoken by Justice O'Connor. Before the grand jury can serve as bulwark of protection, it must first be reformed. The grand jury system in West Virginia must include procedures that advance the administration of justice, do not waste valuable judicial time or resources, and are fair to the criminally accused. Reform calls for a practice in which the grand jury acts as a "shield" and not as a "sword."


270 Id. at 478-79.

271 Id.

272 Id.


274 Id. at 74 (quoting Wood v. Georgia, 370 U.S. 375, 390 (1962)).
Ideally, reform would involve the West Virginia Legislature taking the following actions:

1) Granting a target witness the right to counsel;
2) Making grand jury proceedings adversarial;
3) Informing every grand jury witness of the privilege against self incrimination;
4) Requiring prosecutors to disclose all exculpatory evidence;
5) Charging grand jurors with written and accurate instructions, including instructions regarding lesser included crimes;
6) Closely scrutinizing prosecutorial conduct for abuse;
7) Requiring grand jurors who vote on the indictment be present for the entire presentation of evidence;
8) Require the rules of evidence to apply;
9) Removing the shroud of secrecy by holding grand jury proceedings in open court; and
10) Providing transcripts of all grand jury proceedings to defense counsel before trial.

The West Virginia Legislature should take special note of the United States Attorneys’ Manual and use it as a guide in reforming the West Virginia grand jury system. This manual is based on the principle that federal prosecutions must “promote the reasoned exercise of prosecutorial authority and contribute to the fair, evenhanded administration of the Federal criminal laws.”

The manual notes that probable cause is only a threshold consideration. More specifically, the manual states, “[m]erely because this requirement [probable cause] can be met in a given case does not automatically warrant prosecution; further investigation may be warranted, and the prosecutor should still take into account all relevant considerations . . . in deciding upon his or her course of action.” Furthermore, and most importantly, the manual states, “both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the gov-

276 Id. at § 9-27.200(B).
ernment believes that the person probably will be found guilty [beyond a reasonable doubt] by an unbiased trier-of-fact."277

VII. CONCLUSION

What is the objective of the criminal justice system? Is it to rehabilitate? Is it to punish? Is it to deter? Perhaps the most common belief is that the policy of the criminal justice system is to seek the truth.278 Although not conclusive, there is strong evidence that the criminal justice system is designed to seek fairness and just outcomes, rather than to seek the truth.279 This scheme is supported by the fact that in a criminal trial, the petit jury decides whether a defendant is guilty or not guilty. The jury is never given the option of deciding whether a defendant is innocent. The fact that a defendant is found not guilty does not necessarily indicate he or she is innocent. There is a vast spectrum between "not guilty" and "truly innocent." To those who believe this is a semantic distinction without difference, the Author posits the fact that at no point in American legal history has a criminal defendant been proven innocent, and at no point has the burden of proof been on defense counsel to prove his or her client is innocent. Also, if seeking the truth were the main objective of the criminal justice system, there would not be a rule of law like the exclusionary rule that requires the exclusion of trustworthy evidence because it was illegally seized by the police.280 An early English court once said, "[t]ruth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much."281

Until the grand jury system is reformed in West Virginia the goal of the criminal justice system in seeking fairness and just outcomes will fail. The democratic society we live in today requires a reformed grand jury system in order to serve as a true wall against injustice. When originally created in England, the purpose of the grand jury system was to act as a safeguard measure between the Monarch and members of the community.282 In the words of the Supreme Court:

277 Id. at § 9-27.220.
279 See Sawyer v. Whitely, 505 U.S. 333, 356 (1992) (Blackmun, J., concurring) (criticizing the Court's "single-minded focus" on truth-finding, and stating that "[t]he accusatorial system of justice adopted by the Founders affords a defendant certain process-based protections that do not have accuracy of truth-finding as their primary goal").
280 Mapp v. Ohio, 367 U.S. 643 (1961) (holding the Fourth Amendment guarantees the right to be free from unreasonable searches and seizures and to have any illegally seized evidence excluded from criminal trials).
[h]istorically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious, and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.\(^{283}\)

The safeguarding role of the grand jury system has eroded over time. Instead of protecting the innocent against oppressive prosecution, the grand jury is now used as a weapon and no longer plays a significant role in protecting an accused.\(^{284}\) The Duke lacrosse rape scandal is on point. Michael Nifong, the prosecutor involved in the Duke scandal, admitted that he failed, as required, to turn potentially exculpatory information over to the defense, including test results that showed the presence of semen from several other men, but not the Duke players.\(^{285}\) Mr. Nifong stated that “until [the alleged victim] tells me these are not the right guys, we’re prosecuting this case.”\(^{286}\) In the Duke lacrosse case, the grand jury did not carry out its safeguarding role against unwarranted governmental prosecution. In fact, “Mr. Nifong badly misconceives his job as a prosecutor, which is not simply to robotically prosecute claims or seek a conviction at all costs but to make an independent analysis of whether justice would be served by continuing with the case.”\(^{287}\)

Robert H. Jackson, then U.S. attorney general, spoke these words to a group of federal prosecutors in 1940:

\[\text{[T]he prosecutor has more control over life, liberty and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated, and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. . . . [The prosecutor] can have no better asset than to have his profession recognize that his attitude toward those who feel his power has been dispassionate, reasonable and just.}^{288}\]

When one thinks of the word “grand,” they may think of something illustrious, magnificent or astounding. One should not be deceived by the use of the word “grand” in grand jury. Perhaps the use of the word “grand” is attri-

\(^{284}\) See Brenner, supra note 282, at 68.
\(^{286}\) Id.
\(^{287}\) Id.
\(^{288}\) Id.
able to the fact that a petit jury is composed of twelve members\textsuperscript{289} and a grand jury is composed of sixteen members.\textsuperscript{290} Regardless, the use of the word “grand” in grand jury is a misnomer. Judge Sol Wachtler, Chief Judge of the State of New York best summed up the grand jury system when he stated, “a grand jury would indict ‘a ham sandwich.’”\textsuperscript{291} Although the grand jury does not make a final guilt determination, it plays an important role due to its inherent power to eliminate unmeritorious prosecution. In a new era, the grand jury system has lost its flavor, and reform is greatly needed in West Virginia in order to carry out the original purpose of the grand jury as a protective bulwark against erroneous and vindictive prosecution.

\textit{Nicholas James}\textsuperscript{*}