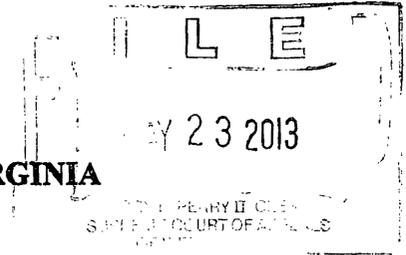


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



Docket No.: 13-0458

**STATE OF WEST VIRGINIA EX REL. SCOTT ASH,
PROSECUTING ATTORNEY FOR
MERCER COUNTY, WEST VIRGINIA**

Petitioner,

v.

**DEREK SWOPE, JUDGE OF THE CIRCUIT COURT
OF MERCER COUNTY OF WEST VIRGINIA,**

Respondent.

Mercer County Criminal Case Number 13-F-358-DS

VERIFIED RESPONSE TO PETITION WRIT OF PROHIBITION

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VERIFIED RESPONSE TO PETITION WRIT OF PROHIBITION

Comes now Chubby Hoston, the defendant in the above-styled Mercer County criminal case, by and through his counsel, Joseph T. Harvey, and files a Verified Response to Scott Ash's Verified Petition for Writ of Prohibition pursuant to Rule 16 of the West Virginia Revised Rules of Appellate Procedure. The defendant, Chubby Hoston, opposes the Petitioner's Writ of Prohibition that seeks to prohibit the Circuit Court of Mercer County from quashing a subpoena and barring the use of video evidence in a criminal prosecution.

I. QUESTIONS PRESENTED.

- A. Did the Circuit Court of Mercer County exceed its legitimate authority by quashing a subpoena seeking the testimony of a guardian *ad litem* for an incarcerated on the grounds that such grounds would violate the rules of confidentiality in the attorney-client relationship?
- B. Did the Circuit Court of Mercer County exceed its legitimate authority by suppressing the video recorded family court proceedings in this matter where the guardian *ad litem* told the court that Hoston directed him to tell the “court and everybody in this room that . . . I am going to go to her place of employment and kill her”?

II. STATEMENT OF THE CASE.

The defendant, Chubby Hoston, is facing a felony charge in the Mercer County Circuit Court. On July 17, 2012, Colin Cline was appointed to represent him as a *guardian ad litem* in a Domestic Violence Petition filed against him by Lisa Jones Martin. At the Mercer County Family Court hearing before Lisa Clark, Family Court Judge, Mr. Cline revealed what he perceived to be a conflict of interest in further representation of Mr. Hoston. By that conflict, Mr. Cline meant that Mr. Hoston directed him to tell the Court that he would kill Lisa Jones Martin if she did not leave him alone. Mr. Hoston was then charged under W. Va. Code § 61-5-27(a)(b)(4)(c)(3) with “Intimidation of and Retaliation Against a Witness” based solely on the comments allegedly made to Mr. Cline. Mr. Cline had then been subpoenaed to testify against Mr. Hoston about an alleged threat made by him during their brief conversation at the Southern Regional Jail. Mr. Cline moved to quash the subpoena stating that any

disclosure made by him was made pursuant to Rule 1.6 of the West Virginia Rules of Professional Conduct and not in the direction of Mr. Hoston. Mr. Hoston also moved to prohibit the admission of his statement as well as the testimony of Mr. Cline, asserting that such communication was protected by the attorney/client privilege. On April 25, 2013, the Honorable Derek C. Swope ordered that an attorney/client privilege existed between Mr. Cline and Mr. Hoston; that Mr. Cline's disclosure in Family Court was made pursuant to Rule 1.6(b)(1) of the West Virginia Rules of Professional Responsibility; that Mr. Cline could not be compelled to testify against Mr. Hoston in this proceeding without a waiver of attorney/client privilege; that Mr. Hoston had not waived his attorney/client privilege; and that the video of said Family Court hearing was not admissible. Subsequently, the Petitioner, Scott A. Ash, Mercer County Prosecuting Attorney, filed a Verified Petition for Writ of Prohibition seeking to prohibit the Mercer County Circuit Court from quashing a subpoena and barring the use of video evidence in a criminal prosecution. The defendant, Chubby Hoston, by and through his counsel, Joseph T. Harvey, hereby responds to said Petition.

III. SUMMARY OF ARGUMENT.

The Mercer County Circuit Court did not err in quashing the subpoena issued to Colin Cline, Mr. Hoston's *guardian ad litem*, because the alleged communication was protected by the attorney/client privilege under In re Chrissy W., Sissy W., and Lisa W., 219 W. Va. 678, 699 S.E.2d 770 (2006). The Mercer County Circuit Court did not err in suppressing the video recording the family court proceeding because no one was present at the hearing to represent Mr. Hoston's penal interest, as well as the fact that the alleged

communication was once again protected by the attorney/client privilege.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION.

Oral argument is necessary in this case pursuant to Rules 19 and 20 of the Revised Rules of Appellate Procedure.

V. ARGUMENT.

A. The attorney/client privilege clearly exists between a *guardian ad litem* and the ward he is appointed to represent.

The controlling case on this issue is In re Chrissy W., Sissy W., and Lisa W., 219 W. Va. 678, 699 S.E.2d 770 (2006). In this case, the court was asked to resolve the question of whether the attorney/client relationship existed between a *guardian ad litem* and her ward. In deciding the case, the court stated that “[d]ue to the legal nature of a significant portion of the duties of a guardian ad litem, we believe that, as a general rule, the West Virginia Rules of Professional Conduct, which govern the conduct of lawyers practicing within the State of West Virginia, should apply to the conduct of guardians ad litem”. *Id.* The court then went on to specifically list the attorney/client privilege as a duty upon guardian ad litem. *Id.* The court further held that the duties of a guardian ad litem must be balanced by the best interest of the ward. *Id.*

While In re Chrissy W. involved children and required the disclosure of abuse in that case, clearly that is not a concern in the instant case. In fact, if we analyze the facts of the present case under the standard set out in In re Chrissy W., the attorney/client privilege becomes even stronger. In fact, the duties of a *guardian ad litem* for an incarcerated adult would be much more akin to the traditional duties of attorney/client

representation, because the incarcerated person, like any adult, would be presumed to be competent and capable of making his or her own decisions and assisting own counsel in the representation. Hence, the attorney/client relationship clearly existed between Mr. Cline and Mr. Hoston, and it would certainly not be in Mr. Hoston's best interest for Mr. Cline to actually deliver Mr. Hoston's alleged threat.

Accordingly, while in a normal context, Mr. Hoston's alleged direction to Mr. Cline may not be protected, the additional duties of a *guardian ad litem* require that the alleged statement be kept confidential.

B. Based upon the evidentiary standard in regards to attorney/client privilege, Mr. Hoston's alleged threat should be ruled inadmissible.

In West Virginia, in order for a communication to fall under the attorney/client privilege, three main elements must be present: 1) both parties must contemplate that the attorney/client relationship does or will exist; 2) the advice must be sought by the client from the attorney in his capacity as a legal adviser; and 3) the communication between the attorney and client must be intended to be confidential. State v. Burton, 163 W. Va. 40, 254 S.E.2d 129 (1979).

In the present case, there is no question that the first two requirements are satisfied. Mr. Cline was only there as Mr. Hoston's guardian/attorney. Mr. Cline did not drive to Southern West Virginia Regional Jail to have a generic, free-wheeling conversation with Mr. Hoston. He was there for one purpose - to discuss Mr. Hoston's legal situation.

The Petitioner contends that while the first two elements may have been met, that

Mr. Hoston allegedly directing Mr. Cline to convey his alleged threat to the court nullifies the third requirement. This argument, however, takes a much too simplistic view of the rule. The rule states that the client intention is what governs, not the actual words used. In this case, even if Mr. Hoston did, in fact, say what Mr. Cline alleges he said, the question becomes whether he actually intended for the threat to be delivered.

In order to answer this question, we must consider the circumstance surrounding Mr. Hoston's alleged statement. Mr. Hoston was locked up in jail. Out of the blue, he was informed that a DVP has been filed against him. Mr. Hoston was shocked and confused and allegedly uttered a threat. Under these circumstances it is very reasonable to conclude that Mr. Hoston was not actually directing Mr. Cline to deliver a threat, but was, in fact, blowing off steam and had no intention of the threat actually being delivered.

Moreover, the defendant certainly agrees with the Mercer County Circuit Court's ruling that the video is not admissible to be played to the jury as a substitute for his testimony for the fact that Mr. Hoston had no counsel present at the hearing to protect his penal interest, and thus playing this video to the jury in lieu of Mr. Cline's testimony would certainly have a prejudicial impact greater than its probative value. Public policy is also of a concern here because the comments of Rule 1.6 provide that "[t]he public is better protected if full and open communication by the client is encouraged rather than discouraged". W. Va. R. Prof. Conduct 1.6. Hence, this policy and the rule's language indicate that this exception is limited and should be very strictly construed.

VI. CONCLUSION AND PRAYER FOR RELIEF.

WHEREFORE, based on the foregoing, the defendant, Chubby Hoston, prays that this Court deny the Petitioner's Verified Petition for Writ of Prohibition and affirm the Order entered by the Honorable Derek C. Swope on April 26, 2013.

Respectfully submitted,

CHUBBY HOSTON,
Defendant,
By Counsel,



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VERIFICATION

STATE OF WEST VIRGINIA
COUNTY OF MERCER, to-wit:

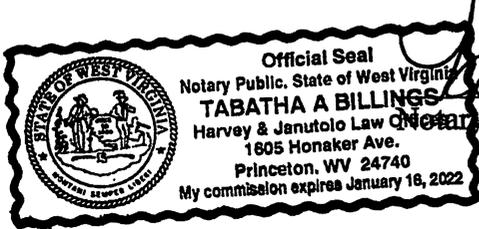
I, Joseph T. Harvey, Esq., counsel for the defendant, Chubby Hoston, in the foregoing VERIFIED RESPONSE TO VERIFIED PETITION FOR WRIT OF PROHIBITION, after being duly sworn according to law, depose and say that the facts and allegations contained in the foregoing document are true, except insofar as they are stated therein to be upon information and belief, and that so far as they therein stated to be upon information and belief, I believe them to be true.

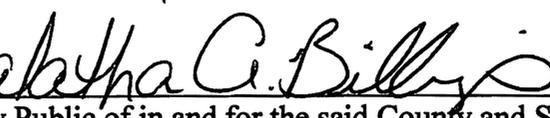


Joseph T. Harvey

Taken, sworn to and subscribed before me this 23 day of May, 2013, by Joseph T. Harvey.

My commission expires: January 16, 2022





Notary Public of in and for the said County and State aforesaid

CERTIFICATE OF SERVICE

I, Joseph T. Harvey, counsel for the defendant, Chubby Hoston, hereby certify that on this 23rd day of May, 2013, a true and accurate copy of the foregoing

Verified Response to Verified Petition for Writ of Prohibition was deposited in the

U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to

this appeal as follows:

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State of West Virginia Office of Attorney General
812 Quarrier Street, 6th Floor
Charleston, WV 25301

The Honorable Derek C. Swope
Mercer County Circuit Court
1501 Main Street
Princeton, WV 24740

Colin Cline, Esq.
1426 E. Main Street
Princeton, WV 24740

Signed: _____


Joseph T. Harvey (WV 9666)
Counsel for Defendant, Chubby Hoston