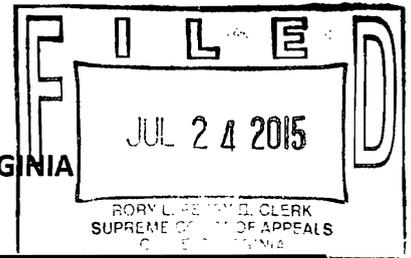


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



IN CHARLESTON, WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent.

VS.

Supreme Court Number 15-0343
(Upshur County Case No. 13-F-21)

JESSE LEE HEATER,

Petitioner.

APPEAL FROM THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

PETITION FOR APPEAL

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Assignments of Error

- I. The Court erred by allowing the State of West Virginia to move to replace Mr. Heater's court-appointed attorney, James E. Hawkins, Jr., with Thomas G. Dyer and Zachary S. Dyer, based upon the State's own motion to remove Mr. Hawkins from the case; when Mr. Heater had a good attorney-client relationship with Mr. Hawkins; did not seek the appointment of new counsel; waived any conflict Mr. Hawkins might have had with respect to prior representation of a potential State witness in the case, when hundreds of potential witnesses were listed by the State; and when the State's motion in truth was merely a pretext to remove Mr. Hawkins from representing Mr. Heater, in violation of Mr. Heater's 6th Amendment right to counsel; and when his subsequent counsel failed to proffer any defense of Mr. Heater despite the nature of the charges; failed to retain the services of a private investigator as previously granted by the Court; failed to move for a change of venue due to serious prejudicial pretrial publicity; and the Court failed to appoint Mr. Heater a new attorney once his attorney-client relationship deteriorated with Thomas G. Dyer and Zachary S. Dyer, until after his initial sentencing hearing.
- II. The Court erred by not polling the jury, offering a curative instruction, or declaring a mistrial, when a spectator later identified as Luke Stout's mother appeared in the Courtroom in a wheelchair with an inflammatory protest sign during the trial referencing the missing status of Luke Stout, a missing person whose disappearance had nothing to do with the trial of the murder of Joshua Oberg; and when the bailiff noted on the record that the jury could have seen the sign, which would have caused extreme prejudice to the defendant with respect to his murder trial, by both confusing and compounding the issues at hand pertaining to Mr. Heater; causing a violation of his right to a fair trial in violation of his 6th Amendment rights. Mr. Heater contends a mistrial should have automatically been granted under these circumstances; and it was reversible error for the Court not to poll the jury, offer a curative instruction, or declare a mistrial.

III. The Court erred by not requiring that a mercy hearing be held following Mr. Heater's conviction of First Degree Murder in this case, by simply allowing the jury to return a verdict of guilty along with a recommendation of no mercy, instead of requiring the jury to consider both mitigating and aggravating factors pertaining to the Defendant; pursuant to W.Va. Code §62-3-15; in light of the fact that life imprisonment without the possibility of parole is the most severe penalty which a Court in West Virginia may impose, akin to capital punishment in State's which have that penalty; hereby denying Mr. Heater his fundamental right to due process under both the West Virginia and United States Constitutions.

Statement of the Case

On July 24, 2012, Jesse Lee Heater was arrested on the charge of “First Degree Murder,” the State of West Virginia having alleged that he conspired to carry out, and did in fact carry out the killing of Joshua Oberg, along with his co-defendants in this case, Robert Eugene Siron III, (who was a co-indictee of Mr. Heater during the January 2013 term of Court) (appendix pages 569-570), and Rodolfo Villagomez Correa, who was not indicted until later, during the December 2013 term of Court.

Mr. Oberg had been reported as a missing person on or about January 24, 2012, and following a tip from a confidential informant, some six months later, a thorough search was carried out, leading to the discovery of the remains of Mr. Oberg. The three Defendants were all arrested on or about the 24th day of July, 2012. The State alleged that this case was a murder for hire, wherein Mr. Villagomez Correa paid Mr. Heater and Robert Eugene Siron III, the co-defendant, to kill Mr. Oberg, who was allegedly carrying on an affair with Mr. Villagomez Correa’s wife, Kelly Villagomez Correa.

Following a three day trial held from June 16-18, 2014, Mr. Heater was convicted of all counts, essentially based on the testimony of his alleged co-conspirator Robert Eugene Siron III alone (who, it should be noted, was allowed to plead to Voluntary Manslaughter in exchange for his cooperation with the State), as the forensic evidence presented was inconclusive, viewed in the best light for the State, and Mr. Heater was found guilty of First Degree Murder, Conspiracy to Commit First Degree Murder, Concealment of a Deceased Human Body, and Conspiracy to Commit Concealment of a Deceased Human Body. The jury simultaneously returned a verdict of no mercy, despite the utter lack of a hearing considering any circumstances of the person of Mr. Heater.

Initially in this case, Attorney James E. Hawkins, Jr. was appointed to represent Mr. Heater. He appeared in that capacity during Mr. Heater’s initial bond hearing (in which bond was denied), and during the preliminary hearing (during which probable cause was found to

bound this case over for consideration by the Upshur County grand jurors). He represented Mr. Heater as well during his first appearance after the grand jury indictment in January 2013. Mr. Heater has repeatedly explained to appellate counsel that he had a good and positive working relationship with Mr. Hawkins.

Mr. Hawkins continued to represent Mr. Heater for quite some time in this case, as a matter of fact, until the State of West Virginia filed a "Motion to Determine Whether Defense Counsel Should be Disqualified Due to Conflict of Interest," on or about June 19, 2013 (see appendix pages 934-935). It should also be noted that the State of West Virginia also filed the same type of motion to recuse Mr. Hawkins in at least one other murder case in Upshur County, involving Howard Clarence Jenner (Upshur County Number 12-F-17), and Mr. Hawkins was subsequently removed from that case as well.

Pursuant to the State's own motion, the State indicated that Mr. Hawkins had previously represented one of the State's witnesses in a prior criminal case. During the hearing on June 19, 2013, Mr. Hawkins expounded at length his frustration with the State's maneuvering to have him removed from this case:

MR. HAWKINS: Your Honor, I received Mr. Reger's motion this morning, however, I've obviously been aware of it. I've provided the information to Mr. Heater and discussed it with him. This is a little bit different situation than Mr. Jenner's case because this is a situation where it's purported that there is a letter with Mr. Heater's name on it. Mr. Heater, without divulging a privileged communication, denies any involvement in that and wants me to stay on his case, *vehemently objects to me being removed from his case.* (Petitioner's emphasis added.) If the Court wants to inquire of him of that, that's fine.

So as far as that is concerned, and just looking into it a little bit, I don't know if we're in the same situation here, because it's not a matter of Jenner being called to testify against Mr. Heater in this case, so it may be a little different, as least as far as I'm concerned.

Now, there was another matter raised in Mr. Reger's motion, in paragraph three, that says, 'The State has taken a statement from a witness who states that he has knowledge of inculpatory statements made by the Defendant regarding the crimes alleged in this case.' So this is a whole separate matter and although the name of the individual is not divulged in this motion, Mr. Reger and

I have discussed it and this is an individual whom I had represented in the past. I don't presently represent him, but have represented him in the past.

Now, I have not talked to this individual about this and I have not seen these statements myself, so I'm not really fully prepared to argue that matter at this point in time.

I will say, and I don't know that this matters or not, *but I'm a little bit frustrated by this, because although these two cases are intertwined because there is a statement that has Jesse Heater's name on it, I'm getting bumped off these cases that, you know, I get pretty well involved in and want to go forward with them and it's-this is the third time now this has happened to me in a murder case, so I'm not-you know, I'm just saying, for what that's worth.* (Petitioner's emphasis added.)

But nonetheless, Mr. Heater wants me to stay on this case. I don't know that the Jenner letter situation necessarily bumps me off of Mr. Heater's case, because whether or not he's the author of that, I don't know if it affects his defense in this case. This issue in paragraph number three may be on (sic) we're going to have to look into a little further. I'd like to see these statements and I'd, rather than just concede the point on it, I'd kind of like to have an evidentiary hearing on it to see if I need to be kicked off for that reason.

So I'm not going to stand here and just concede the point and jump off."

(See Appendix pages 581-582).

The Court subsequently acknowledged the legitimacy of Mr. Hawkins' concern, pointing out that we have a small bar in this area who deal with these type of cases.

BY THE COURT: All right sir. Well, all right, well, certainly, Mr. Hawkins, you know, one of the --- this may be another murder case that you're removed from, but you know, there is a relatively small Bar around here and you are---well-known as a criminal defense attorney. In fact, as far as I know, that's the only work that you do, is criminal defense and juvenile work. So for there to be these conflicts is not---it's perhaps regrettable, but it's not surprising. And I understand that---your reluctance to withdraw until you've had an opportunity to gain further information.

(See Appendix page 583).

The Court then allowed Mr. Hawkins to inquire of Mr. Heater as to what his desires were in this case.

Q. All right, now, do you have any particular feelings about me being removed from the case or remaining on the case?

A. I mean, I personally would like for you to stay on my case. I don't understand---I mean, I kind of understand, I just don't---I mean, I agree with you, I think that we should have an opportunity, in open Court to address the situation and cross examine the people, you know, the witnesses, the so-called witnesses or whatever, but that's what I would like to do.

Q. All right, but even before getting into that, is it your desire, I mean, just generally speaking, that I stay on the case or that I just concede this point and be removed and have somebody else appointed?

A. I would like for you to stay on the case.

Q. Okay. Do you have any conflicts with---just between us or my representation of you?

A. None whatsoever.

(See Appendix page 585).

At a hearing held on June 21, 2013, Mr. Hawkins reluctantly agreed to be removed as counsel for the Defendant, as he had indeed previously represented the State's jailhouse informant, a certain Mr. Roy, following a meeting he evidently had with Prosecuting Attorney Reger between June 19 and 21, 2013. (See Appendix pages 594-595). Subsequently, attorneys Thomas G. Dyer and Zachary S. Dyer were appointed to represent Mr. Heater in this case. They continued to do so, up through the trial, Mr. Heater's subsequent conviction, and even the Sentencing hearing, despite the obvious conflict of interest which had long existed between Mr. Heater and both Mr. Dyers'; to the point where Mr. Heater pro se wrote to the Court asking for new counsel, even before the trial (See Appendix page 987-988).

This is further illustrated by the colloquy held during the first sentencing hearing for Mr. Heater. The first sentencing hearing was held on August 14, 2013, following a back and forth between the Court, Mr. Dyer, and Mr. Heater, regarding Mr. Heater's dissatisfaction with Mr. Dyer's representation (including, but not limited to, his failure to utilize court-approved funds to retain a private investigator) and Mr. Heater's request that he be removed as his counsel, Mr. Dyer declined to even address the Court for his client during sentencing:

MR. DYER: Your Honor, under the present circumstances, I think it's best if I say nothing. I don't believe I have anything to add, in any event, given the verdict in this case, but under the current circumstances, I'll just leave it to Mr. Heater, who I know does want to address the Court."

(See Appendix Page 642.)

At the beginning of the three (3) day trial of this case, held from June 16-18, 2014, a major issue arose in that a spectator appeared in the Courtroom wearing a sign referring to her son, who is a missing person, Luke Stout. The Court acknowledged its serious concerns over this matter:

BY THE COURT: Okay, and that's fine, but the other thing is you're going to have to remove that sign, because the Court's not going to allow any evidence or any notion or anything to enter into this trial that deals with the disappearance of your son, do you understand that? Do you understand---

MS. STOUT: Oh, Lukey?

BY THE COURT: Yeah, that's got to---you've got to remove that, ma'am, and the Court's going to tell you right now, if that comes out during the trial and the jury sees that, I'm going to find you in contempt, do you understand that? Now, I want---actually, I don't want it there, ma'am, I want it someplace outside of this Courtroom. Ma'am, you're going to have to give that to the Bailiff, he'll---

MS. STOUT: (inaudible)---stays with me.

BY THE COURT: No, that's going to be taken out of the Courtroom, ma'am. I'm sorry, but that's not going to be in the Courtroom.

MS. STOUT: That's not right.

BY THE COURT: Well, it is right, and if you can't deal with that, then I'm going to ask you to leave the Courtroom. If anybody thinks they can't abide by these rules, they need to leave right now. You hand that over to the Bailiff, ma'am, and I'm sorry to have to be so hard on you, but Mr. Heater is going to get a fair trial.

Again, ma'am, and this is directed at everybody, but if you don't think you can control your emotions and refrain from making any outbursts, you probably should leave right now, you understand that? You understand that, ma'am? I need you to answer me.

MS. STOUT: I'm trying to.

BY THE COURT: Okay. This case is not about the disappearance of your son, I want to make that clear, you understand that?

(See Appendix pages 37-38.)

This was during the first day of the trial, June 16, 2014, and as the Bailiff noted, the jury could indeed have been in a position to have seen the sign in question.

BY THE COURT: Chief Deputy, we were discussing at the Bench, Ms. Stout had came in wearing a ---some kind of sign that reflected some information about her son. Did---were you outside when the jury was shown in?

CHIEF DEPUTY MILLER: Yes, sir.

BY THE COURT: Did---was she in a position where the jury could have seen that?

CHIEF DEPUTY MILLER: Possibly.

BY THE COURT: Okay.

CHIEF DEPUTY MILLER: She was seated to the left of the aisle way. The jury was in the Family Courtroom, and they filed past her.

BY THE COURT: Okay. As far as you know, did any of them look down at Ms. Stout?

CHIEF DEPUTY MILLER: Not as far as I know.

BY THE COURT: Was there any eye contact with Ms. Stout?

CHIEF DEPUTY MILLER: Not that I'm aware of.

BY THE COURT: Okay. I guess my question is why---did anybody see that sign on her before she came in the Courtroom?

CHIEF DEPUTY MILLER: Yes, sir, I saw it.

BY THE COURT: Okay, well, I wish somebody would have informed me of that and taken that away from her before we brought the jury out, but is it your belief that anybody had made contact with her or had any conversation with her, no matter how brief?

CHIEF DEPUTY MILLER: No, the jury was secluded, sir.

(See Appendix Pages 45-.)

However, subsequent to the appointment of co-counsel, during the post-trial motions heard in this case on February 11, 2015, Chief Deputy Miller was questioned again by counsel with respect to this issue. Although Chief Deputy Miller's testimony kept referring to this sign as a "button," when questioned by the Court, his testimony in fact actually indicated it was a little more than the size of just a button:

BY THE COURT: About this big?

WITNESS: Six inches diameter, maybe, something like that.

BY THE COURT: Or, at least six inches, maybe seven.

WITNESS: Something like that.

BY THE COURT: Yeah, six, seven inches. Yeah.

MR. GODWIN: And so---

BY THE COURT: I do that for the record.

MR. GODWIN: He's fixing my mistakes.

(See Appendix Page 785.)

Following the conclusion of the three day trial, the jury returned a Guilty verdict against Mr. Heater on all four counts of the Indictment (Murder, Conspiracy to Commit Murder, Concealment of a Human Body, and Conspiracy to Commit Concealment of a Human Body.)

The jury returned a recommendation of no mercy, without any evidence being presented on Mr. Heater's behalf (as indeed none was presented on his behalf during the Defense case-in-chief.) This is despite the fact that the jury at least presumably had a question about the difference between first and second degree murder, during the point in time when they were deliberating for a verdict in this case:

BY THE COURT: Okay, let me first of all mark this filed and I'll file it. And the note reads as follows, it says, 'Dear Judge, we want to be absolutely sure we...', and then it's crossed out, but you can still read what it says, it says, '...we need to know the difference between First and Second Degree Murder. We would like the definitions read to us again. Thanks, P. Cowley, Foreperson.'

(See Appendix Page 547.)

The Court responded to the question from the foreman in a manner which essentially instructed them to read the instructions as a whole:

BY THE COURT: All right, you may be seated.

Now, ladies and gentlemen of the jury, the Court will note that all 12 regular jurors are present in the Courtroom. The Court had received a note that your Foreperson had sent out and I think the question, paraphrasing it, you wanted to be reinstructed on the difference between First and Second Degree Murder.

Now, if you'll recall the charge that I read to you before I began reading the specific case instructions, and I'll quote from it, it says, 'The law as it applies in this case is contained within these instructions. It is your duty to follow them. You must consider these instructions as a whole, not picking out one and disregarding the others.

So I think I have an obligation to reinstruct you on all of them together, but what the attorneys have agreed and what the Court suggested is that rather than sit here and read them to you, like you're in school, I've taken the written

documents that I read the instructions from and we're going to send back a --- one set of those written instructions and that way, you all can have a written copy of the instructions, again, to take as a whole rather than to single out certain instruction or two or three certain instructions out. Do you that will resolve your question, Madame Foreperson?

FOREPERSON: Yes.

BY THE COURT: Okay and while you were in there, I've asked the attorneys if they had any objections to that, and they don't, so that's the procedure that we're going to use, so if the Bailiff will approach and get this copy of the instructions and deliver that to the foreperson and if you'll return to your jury room and continue your deliberations."

(See Appendix Pages 550-551.)

Nevertheless, after continued deliberation by the jury, they returned with a verdict which both found Mr. Heater guilty of Murder, and gave no recommendation of mercy, without even going through the process of having a hearing, which resulted in the most severe penalty that can be imposed in the State of West Virginia, akin to a death penalty case in the majority of states which still have capital punishment on the books:

BY THE COURT: Okay. Mr. Clerk, if you will publish these verdicts.

CLERK: Yes, sir.

Ladies and gentlemen of the jury, harken to the verdict as reported by your foreperson.

Verdict form in the case State of West Virginia versus Jesse Lee Heater, in regards to the first count, "We, the jury, find the Defendant, Jesse Lee Heater, guilty of the offense of Murder in the First Degree, a felony, as charged in the first count of the indictment. Dated June 18th, 2014, signed, Foreperson, Paulette A. Crowley."

Verdict form in regards to mercy recommendation, case styled State of West Virginia versus Jesse Lee Heater, "We, the jury, do not recommend mercy for the Defendant, Jesse Lee Heater. Signed, June 18th, 2014, Foreperson, Paulette A. Crowley."

(See Appendix Page 554.)

As a result of these proceedings, Mr. Heater seeks appellate relief due to legal error on the issues as set forth in this brief.

Summary of Argument

The Prosecuting Attorney improperly sought the dismissal of Mr. Heater's court-appointed counsel, James E. Hawkins, Jr., which motion was granted by the Court, merely on a pre-textual basis, in order to obtain a less effective attorney to represent Mr. Heater going forward. This motion was granted by the Court, to the ultimate detriment of the Defendant, who was convicted of First-Degree Murder following a unitary trial, and was ultimately granted no opportunity for mercy by the same jury.

"Where the State moves for disqualification of a criminal defendant's counsel of choice due to counsel's former representation of a State witness, the State bears a heavy burden of proving disqualification is necessary and justified. A presumption in favor of defendant's counsel exists. However, this presumption may be overcome where the State demonstrates that an actual conflict of interest exists or that there exists a significant potential for a serious conflict of interest. In determining whether a conflict of interest should overcome the presumption in favor of defendant's counsel of choice, the circuit court must balance: (1) the defendant's right to be represented by counsel of choice; (2) the defendant's right to a defense conducted by an attorney who is free of conflicts of interest; (3) the court's interest in the integrity of its proceedings; (4) the witness's interest in protection of confidential information; (5) the public's interest in the proper administration of justice; (6) the probability that continued representation by counsel of choice will provide grounds for overturning a conviction; and (7) the likelihood that the State is attempting to create a conflict in order to deprive the defendant of his counsel of choice. Factors which the circuit court should weigh in conducting this balance include, but are not limited to: (1) the potential for use of confidential information by defendant's counsel when cross-examining the State's witness; (2) the potential for a less than zealous cross-examination by defendant's counsel of the State's witness; (3) the defendant's interest in having the undivided loyalty of his or her counsel; (4) the State's right to a fair trial; and (5) the appearance of impropriety should the jury learn of the conflict. These factors are to be considered in light of the individual facts and circumstances of each case."

Syllabus Point 4, *State of West Virginia ex rel. Blake v. Hatcher*, 624 S.E. 2d 844, 218 W.Va. 407 (W.Va. 2005).

The Court should have stopped the proceedings following revelations from the bailiff that a spectator wearing an inflammatory protest sign referencing the missing person Luke Stout could have indeed been viewed by the jurors; when the nature of this particular case, a missing-person case which later became a first degree murder case after the discovery of the body of the victim, was similar in many respects, even if that particular case remains a cold case. The Court should have at the very least stopped and polled the jury, issued a limiting instruction, or even granted a mistrial. "An important element in this process is insuring the jury is always insulated, at least to the best of the Court's ability, from every source of pressure or prejudice." *State v. Franklin*, 327 S.E. 2d 449, at 455, 174 W.Va. 469 (W.Va. 1985). The Court simply could not 'un-ring the bell' of the prejudice involved in this case, under any circumstances.

The Court erred by not clarifying its instructions to the jury regarding the mercy issue; when the jurors inquired as to the difference between first and second degree murder; yet nevertheless came back following deliberation with an immediate verdict of First Degree Murder without any possibility of mercy. The Court's failure to clarify the separate issue of mercy to the jury constituted grave, and unconstitutional error on its part, and was an abuse of its discretion. "A trial court has discretionary authority to bifurcate a trial and sentencing in any case where a jury is required to make a finding as to mercy." Syllabus Point 4, *State v. LaRock*, 196 W.Va. 294, 470 S.E. 2d 613 (W.Va. 1996.)

Statement Regarding Oral Argument and Decision

The Defendant prays that oral argument be granted under Rule 20 of the West Virginia Rules of Appellate Procedure, as this case involves a conviction of First Degree Murder without the possibility of parole following a unitary trial; where the Defendant's Constitutional Rights to counsel of his choice under the 6th Amendment was infringed; his Constitutional Right to a Fair

Trial under the 6th Amendment was infringed by the Court's brushing aside of the inflammatory protest sign; and his substantive due process rights under the 14th Amendment to the Constitution to have his personal circumstances considered by the jury were infringed by the process applied in this case.

Argument

- I. **The Court erred by allowing the State of West Virginia to move to replace Mr. Heater's court-appointed attorney, James E. Hawkins, Jr., with Thomas G. Dyer and Zachary S. Dyer, based upon the State's own motion to remove Mr. Hawkins from the case; when Mr. Heater had a good attorney-client relationship with Mr. Hawkins; did not seek the appointment of new counsel; waived any conflict Mr. Hawkins might have had with respect to prior representation of a potential State witness in the case, when hundreds of potential witnesses were listed by the State; and when the State's motion in truth was merely a pretext to remove Mr. Hawkins from representing Mr. Heater, in violation of Mr. Heater's 6th Amendment right to counsel; and when his subsequent counsel failed to proffer any defense of Mr. Heater despite the nature of the charges; failed to retain the services of a private investigator as previously granted by the Court; failed to move for a change of venue due to serious prejudicial pretrial publicity; and the Court failed to appoint Mr. Heater a new attorney once his attorney-client relationship deteriorated with Thomas G. Dyer and Zachary S. Dyer, under after his initial sentencing hearing.**

The first assignment of grave Constitutional error asserted by Mr. Heater was the Court's acquiescence in the State of West Virginia's legal maneuvering, which had the sole

purpose of depriving Mr. Heater of his counsel of choice in this matter. His right to counsel is of course a fundamental Constitutional Right:

“For it is clear that the judgment before us must in any event be affirmed upon the ground that Williams was deprived of a different constitutional right—the right to the assistance of counsel. This right, guaranteed by the Sixth and Fourteenth Amendments, is indispensable to the fair administration of our adversary system of justice.”

Brewer v. Williams, 430 U.S. 387, at 397-398, 97 S.Ct. 1232, at 1239, 51 L.Ed. 2d 424, at 435-436 (1977).

As Mr. Heater is asserting Constitutional error by the Court in this instance, the appropriate standard of review is *de novo*, for the error asserted is a legal one in its essence. “In syllabus point one of *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E. 2d 172 (1996), this Court held that “[t]he appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.” *Id.* Likewise, a *de novo* standard of review governs the interpretation of any statutory provision as it involves a purely legal question. Syl. Pt 1, *Appalachian Power Co. v. State Tax Dep’t*, 195 W.Va. 573, 466 S.E. 2d 424 (W.Va. 1995); *State v. McGlaughlin*, 226 W.Va. 229, 700 S.E. 2d 289, at 292-293 (W.Va. 2010).

In the above-styled appeal, the Prosecuting Attorney went to great lengths to deprive Mr. Heater of his court-appointed counsel, James E. Hawkins, Jr. The record even reflects that Mr. Hawkins indicated that the State had developed a pattern of doing so in murder cases in which he was involved:

MR. HAWKINS: Your Honor, I received Mr. Reger’s motion this morning, however, I’ve obviously been aware of it. I’ve provided the information to Mr. Heater and discussed it with him. This is a little bit different situation than Mr. Jenner’s case because this is a situation where it’s purported that there is a letter with Mr. Heater’s name on it. Mr. Heater, without divulging a privileged communication, denies any involvement in that and wants me to stay on his case, *vehemently objects to me being removed from his case.* (Petitioner’s emphasis added.) If the Court wants to inquire of him of that, that’s fine.

So as far as that is concerned, and just looking into it a little bit, I don't know if we're in the same situation here, because it's not a matter of Jenner being called to testify against Mr. Heater in this case, so it may be a little different, as least as far as I'm concerned.

Now, there was another matter raised in Mr. Reger's motion, in paragraph three, that says, 'The State has taken a statement from a witness who states that he has knowledge of inculpatory statements made by the Defendant regarding the crimes alleged in this case.' So this is a whole separate matter and although the name of the individual is not divulged in this motion, Mr. Reger and I have discussed it and this is an individual whom I had represented in the past. I don't presently represent him, but have represented him in the past.

Now, I have not talked to this individual about this and I have not seen these statements myself, so I'm not really fully prepared to argue that matter at this point in time.

I will say, and I don't know that this matters or not, *but I'm a little bit frustrated by this, because although these two cases are intertwined because there is a statement that has Jesse Heater's name on it, I'm getting bumped off these cases that, you know, I get pretty well involved in and want to go forward with them and it's-this is the third time now this has happened to me in a murder case, so I'm not-you know, I'm just saying, for what that's worth.* (Petitioner's emphasis added.)

But nonetheless, Mr. Heater wants me to stay on this case. I don't know that the Jenner letter situation necessarily bumps me off of Mr. Heater's case, because whether or not he's the author of that, I don't know if it affects his defense in this case. This issue in paragraph number three may be on (sic) we're going to have to look into a little further. I'd like to see these statements and I'd, rather than just concede the point on it, I'd kind of like to have an evidentiary hearing on it to see if I need to be kicked off for that reason.

So I'm not going to stand here and just concede the point and jump off."

(See Appendix pages 581-582).

Mr. Hawkins' frustration is plain for all to see, even by a cold after the fact reading of the record in this case. The State of West Virginia had submitted an extremely lengthy witness list in this case, naming dozens of possible witnesses; including, but not limited to, confidential informants who were incarcerated with the Defendant at the jail. It was practically inevitable that such a conflict was bound to arise in our local bar, as Judge Henning fully acknowledged:

BY THE COURT: All right sir. Well, all right, well, certainly, Mr. Hawkins, you know, one of the --- this may be another murder case that you're removed from,

but you know, there is a relatively small Bar around here and you are---well-known as a criminal defense attorney. In fact, as far as I know, that's the only work that you do, is criminal defense and juvenile work. So for there to be these conflicts is not---it's perhaps regrettable, but it's not surprising. And I understand that---your reluctance to withdraw until you've had an opportunity to gain further information.

(See Appendix page 583).

The Court further allowed Mr. Hawkins to inquire of Mr. Heater as to whether he desired to retain Mr. Hawkins as his attorney:

Q. All right, now, do you have any particular feelings about me being removed from the case or remaining on the case?

A. I mean, I personally would like for you to stay on my case. I don't understand---I mean, I kind of understand, I just don't---I mean, I agree with you, I think that we should have an opportunity, in open Court to address the situation and cross examine the people, you know, the witnesses, the so-called witnesses or whatever, but that's what I would like to do.

Q. All right, but even before getting into that, is it your desire, I mean, just generally speaking, that I stay on the case or that I just concede this point and be removed and have somebody else appointed?

A. I would like for you to stay on the case.

Q. Okay. Do you have any conflicts with---just between us or my representation of you?

A. None whatsoever.

(See Appendix page 585).

Nevertheless, the Court ultimately bowed to the wishes of the State of West Virginia, and Mr. Hawkins very reluctantly acquiesced, acknowledging his representation of a jailhouse informant who conveniently offered to testify on behalf of the State. (See Appendix pages 594-595.)

Subsequent to the removal of Mr. Hawkins from this case by the Court, Mr. Thomas G. Dyer, and Mr. Zachary S. Dyer, were appointed to represent Mr. Heater in this case, since are were counsel from Clarksburg, and therefore not strictly members of the usual court-appointed counsel in the 26th Judicial Circuit; presumably, because they were less likely to be conflicted

out than any local counsel, based on the dozens of witnesses. The case eventually went to trial, which was held on June 16, 17, and 18 of 2014. (See transcript, pages 1-558.) As the Court can plainly see by reading the transcripts, Mr. Heater's new attorneys did not even bother to submit a scintilla of evidence of behalf of Mr. Heater. They did not carry out his wishes, unlike Mr. Hawkins. Their representation was reprehensible under the extremely serious circumstances of this case. Mr. Heater certainly made this plain as day, both prior to trial, and at his sentencing hearing. He asked for new counsel, and was denied this right by the Court. When it came time for Mr. Dyer to speak on Mr. Heater's behalf during sentencing, he offered as follows for the Court:

MR. DYER: Your Honor, under the present circumstances, I think it's best if I say nothing. I don't believe I have anything to add, in any event, given the verdict in this case, but under the current circumstances, I'll just leave it to Mr. Heater, who I know does want to address the Court."

(See Transcripts Page 642.)

This Court has set forth parameters for the removal of counsel in the important case of *State ex. rel. Blake v. Hatcher*, 624 S.E. 2d 844, 218 W.Va. 407 (W.Va. 2005.) "The State of West Virginia, through a prosecuting attorney, has standing to move for disqualification of defense counsel in a criminal proceeding in limited circumstances where there appears to be an actual conflict of interest or where there is significant potential for a serious conflict of interest involving defense counsel's former (or current) representation of a State witness." *Id*, Syl. Pt. 3, at page 847.

In this case, Mr. Hawkins had previously represented James Roy, one of the literally dozens of potential State witnesses which were listed by the State. Mr. Roy testified at trial that he overheard Mr. Heater confessing his involvement in this murder, during a period of time when he was incarcerated at the Tygart Valley Regional Jail along with Mr. Heater (See Transcript page 398.)

This is despite the fact that under cross-examination, Mr. Roy acknowledged that he had a prior conviction for providing false information to police officers, which is a blatant crime of dishonesty (See Transcript, page 403.)

This Court has made clear that the State carries a heavy burden when it seeks disqualification of an attorney. In fact, in *Hatcher*, it set forth a very lengthy, and detailed syllabus point which spoke directly to that issue:

“Where the State moves for disqualification of a criminal defendant’s choice of counsel due to counsel’s former representation of a State witness, the State bears a heavy burden of proving disqualification is necessary and justified. A presumption in favor of a defendant’s choice of counsel exists. However, this presumption may be overcome where the State demonstrates that an actual conflict of interest exists or that there exists a significant potential for a serious conflict of interest. In determining whether a conflict of interest should overcome the presumption in favor of defendant’s counsel of choice, the circuit court must balance: (1) the defendant’s right to be represented by counsel of choice; (2) the defendant’s right to a defense conducted by an attorney who is free of conflicts of interest; (3) the court’s interest in the integrity of its proceedings; (4) the witness’s interest in protection of confidential information; (5) the public’s interest in the proper administration of justice; (6) the probability that continued representation by counsel of choice will provide grounds for overturning a conviction; and (7) the likelihood that the State is attempting to create a conflict in order to deprive the defendant of his counsel of choice. Factors which the circuit court should weigh in conducting this balance include, but are not limited to: (1) the potential for use of confidential information by defendant’s counsel when cross-examining the State’s witness; (2) the potential for a less than zealous cross-examination by defendant’s counsel of the State’s witness; (3) the defendant’s interest in having the undivided loyalty of his or her counsel; (4) the State’s right to a fair trial; and (5) the appearance of impropriety should the jury learn of the conflict. These factors are to be considered in light of the individual facts and circumstances of each case.”

Id., Syl. Pt. 4.

The Court has set forth a very in-depth balancing test in this matter, as can be gleaned by the length of its syllabus point. In the case at hand, Mr. Heater clearly desired to be represented by Mr. Hawkins, Jr. This is set forth on the record. As far as “the defendant’s right to a defense conducted by an attorney who is free of conflicts of interest,” while there may have been a conflict of interest to the extent that Mr. Roy was previously represented by Mr. Hawkins, it is clear that Mr. Hawkins desired to remain in this case, and Mr. Heater was in agreement with this. It should also be noted that the conflict of interest belongs to the client, not to the attorney, in a situation as serious as the one at hand.

If one considers “the court’s interest in the integrity of its proceedings,” Mr. Heater would posit that the Court’s acquiescence in the maneuvering of the Prosecuting Attorney is much more damaging to the interests of justice, than some possible conflict of interest which belongs to the client, who chooses not to assert that conflict. The pre-textual nature of the maneuvering, which as Mr. Hawkins noted, was the 2nd or 3rd time he had been removed from a case by the Prosecuting Attorney, is self-evidence from reading the record.

As far as “the witness’s interest in protection of confidential information,” one cannot surmise much of a problem from the record in this case. Mr. Roy testified that “I have a statutory rape charge in 1994 and then several DUI convictions, including the third, it’s a felony DUI conviction.” (See Appendix, page 399.) It must be noted this information was elicited from Mr. Roy on *direct examination* by the Prosecuting Attorney himself, no doubt in an attempt to get out in front of the issue to bolster Mr. Roy’s credibility before he could be cross-examined by defense counsel. One can otherwise only speculate as to what interest Mr. Roy may have had based on his prior representation by James Hawkins.

“The public’s interest in the proper administration of justice,” Mr. Heater would submit, is a similar factor as “the court’s interest in the integrity of its proceedings.” No doubt the public seeks justice in a case as serious as First Degree Murder, but the other side of the same coin is that justice is not served by a weaker defense for the Defendant, which potentially opens the door to appeal. The proper administration of justice is best served when the

Defendant is given the fairest possible trial, and at the conclusion of that trial, a verdict is rendered based on the evidence presented at that trial. That plainly did not occur in this case, when counsel was removed for pre-textual reasons, causing Mr. Heater to reckon with counsel who ultimately failed to even put on a scintilla of evidence on his behalf.

As far as “the probability that continued representation by counsel of choice will provide grounds for overturning a conviction,” Mr. Heater would assert that the exact opposite has occurred in this instance. Had Mr. Hawkins been allowed to continue to represent Mr. Heater, this particular basis for appeal would not even be a ground being raised by Mr. Heater. In fact, one can easily argue the State would have been in a better position with this issue had Mr. Hawkins continued to represent Mr. Heater, and obtained its conviction under those circumstances. But that *precisely* illustrates the point being raised. Because the State feared the result should Mr. Hawkins continue to represent Mr. Heater, they used whatever pre-text was necessary to see to it that he was removed as counsel, as was their habit in murder cases.

As far as point number seven, “the likelihood that the State is attempting to create a conflict in order to deprive the defendant of his counsel of choice,” that is demonstrated in this case by Mr. Hawkins’ uncontroverted point to the Court that this was not the first time that this happened:

I will say, and I don’t know that this matters or not, but I’m a little bit frustrated by this, because although these two cases are intertwined because there is a statement that has Jesse Heater’s name on it, I’m getting bumped off these cases that, you know, I get pretty well involved in and want to go forward with them and it’s-this is the third time now this has happened to me in a murder case, so I’m not-you know, I’m just saying, for what that’s worth. (Petitioner’s emphasis added.)

(See appendix page 582.)

Because of the clearly pre-textual nature of the State’s successful attempt to remove Mr. Heater’s counsel of choice, as well as the Court and the defense attorney’s very reluctant acquiescence as outlined in the Statement of the Case and the point argued above, and

particularly in light of the subsequent subpar representation of Mr. Heater, the Circuit Court violated Mr. Heater's 6th and 14th Amendment right to counsel in this case. Accordingly, under these circumstances, Mr. Heater prays that the Court will reverse and remand due to this grave Constitutional error.

- II. The Court erred by not polling the jury, offering a curative instruction, or declaring a mistrial, when a spectator later identified as Luke Stout's mother appeared in the Courtroom in a wheelchair with an inflammatory protest sign during the trial referencing the missing status of Luke Stout, a missing person whose disappearance had nothing to do with the trial of the murder of Joshua Oberg; and when the bailiff noted on the record that the jury could have seen the sign, which would have caused extreme prejudice to the defendant with respect to his murder trial, by both confusing and compounding the issues at hand pertaining to Mr. Heater; causing a violation of his right to a fair trial in violation of his 6th Amendment rights. Mr. Heater contends a mistrial should have automatically been granted under these circumstances; and it was reversible error for the Court not to poll the jury, offer a curative instruction, or declare a mistrial.**

At the beginning of Mr. Heater's trial, a woman appeared in a motorized scooter seated to the left of the aisle way in the courtroom. The woman, Ms. Stout, showed up in Circuit Court wearing a large campaign style button bearing the image of Luke Stout. Luke Stout is a missing person in Upshur County. Many folks in the community have associated his disappearance with the Petitioner, Jesse Heater, based on Mr. Heater's alleged involvement in the present murder case involving Mr. Oberg. The importance of the Luke Stout matter to the community and to the Heater trial can be seen by the Circuit Court's admonition to folks present in the courtroom:

BY THE COURT: Okay, now that we've got some more people in the audience, the Court is going to caution everybody in the audience here today and again, most of you – I look out, I see a number of people in suits, so I would imagine, I wouldn't – and a couple of the news reporters, I would imagine that I could not expect to have any outbursts from those individuals, but if there's any family members of Mr. Oberg, family members of Mr. Heater, family members of Luke Stout, there is to be no outburst in this courtroom.

(See Appendix pages 21-22).

It is clear that from the Court's statement that the Stout matter had become inextricably intertwined with the Oberg case in the minds of the local Upshur County community. When Ms. Stout presented herself in court wearing a sign as a form of protest against Mr. Heater, it caused Deputy Sheriff Vergil Miller to report the incident to the Judge:

MR. DYER: Your Honor, Deputy Miller just informed me that the woman that just wheeled in in the wheelchair is Mrs. Stout and –

BY THE COURT: Okay, I'm going to warn them all again.

MR. DYER: And she's wearing a sign about her missing son –

BY THE COURT: Okay.

MR. DYER: - according to the Deputy, and you know –

BY THE COURT: Okay.

MR. REGER: (inaudible) she called there yesterday –

BY THE COURT: Okay.

MR. REGER: (inaudible)

BY THE COURT: Okay. All right, we'll take that – let's take the issue with Mr. Rowan first and then – the jury was in the room, they didn't see that, did they, as far as anybody know?

BY THE COURT: Okay, Ms. Stout, we're on the record, I'm going to – I haven't had a chance to talk to you, but the Court is going to advise, now that the Courtroom here is – more spectators have entered the courtroom, number one, there is not going to be any outbursts, there's not going to be any talking during this trial, do you understand that? And this is directed at everybody. If there's any family of Mr. Heater, there's any family of Mr. Oberg, if there's any family members of Mr. Stout that are in here, there's not going to be an outbursts or any talking out loud. Now. The other thing is – and if there is, you are going to be promptly removed from the courtroom. The Court's not going to tolerate that, Mr. Heater is going to get a fair trial and there's not going to be any outbursts.

(End of bench conference)

MS. STOUT: (inaudible) – being treated different because I’m handicapped, want to be put way back in the corner.

BY THE COURT: Well, now I –

MS. STOUT: And I am hard of hearing.

BY THE COURT: Okay. We’ve got devices that you can wear that’ll help your hearing. The other thing is –

MS. STOUT: No, I don’t.

BY THE COURT: Well, I can’t help you, then, ma’am. I’m not going to permit you to be in the aisle here; that poses a security problem for us. The deputies –

MS. STOUT: Well, I’ll sit in the pew and – (inaudible) -

BY THE COURT: Okay, and that’s fine, but the other thing is you’re going to have to remove that sign, because the Court’s not going to allow any evidence or any notion or anything to enter into this trial that deals with the disappearance of your son, do you understand that? Do you understand –

MS. STOUT: Oh, Lukey?

BY THE COURT: Yeah, that’s got to – you’ve got to remove that, ma’am, and the Court’s going to tell you right now, if that comes out during the trial and the jury sees that, I’m going to find you in contempt, do you understand that? Now, I want – actually, I don’t want it there, ma’am, I want it someplace outside of this courtroom. Ma’am, you going to have to give that to the Bailiff, he’ll –

MS. STOUT: (inaudible) – stays with me.

BY THE COURT: No, that’s doing to be taken out of the courtroom, ma’am, I’m sorry, but that’s not going to be in the Courtroom.

MS. STOUT: That’s not right

BY THE COURT: Well, it is right, and if you can’t deal with that, then I’m going to ask you to leave the courtroom. If anybody thinks they can’t abide by these rules, they need to leave right now. You hand that over to the Bailiff, ma’am, and I’m sorry to have to be so hard on you, but Mr. Heater is going to get a fair trial. Again ma’am this is directed at everybody, but if you don’t think you can control your emotions and refrain from making any outbursts, you probably should leave right now, you understand that? You understand that, ma’am? I need you to answer me.

MS. STOUT: I’m trying to.

BY THE COURT: Okay. This case is not about the disappearance of your son, I want to make that clear, you understand that?

MS. STOUT: I know.

BY THE COURT: Okay. Now, you’re going to have to sit some place other than in the middle of the aisle.

MS. STOUT: I don’t see why you all don’t have the right – (inaudible) – for the –

BY THE COURT: Well, ma’am, this courthouse was built in 1899 and there’s a lot of things in here the I understand why they’re arranged the way they are, but –

it's not very conducive for a trial in the twenty-first century, but I can't have you in the aisle. You all right with that, Sheriff? Is that acceptable to you?

BALIFF: I'd prefer her to be over there, Your Honor.

BY THE COURT: Can she get back there?

BALIFF: I believe so.

BY THE COURT: Well, that's where you need to be, ma'am. Okay, than you, Sheriff.

(See Appendix Pages 35-39).

At this point in the proceedings, Mr. Heater insisted that Mr. Dyer lodge an objection.

The trial transcript records Mr. Dyer brining the Defendant's concerns to the attention of the Court as follows:

MR. DYER: The Defendant is over here insisting that I question the jury and it might be that bad of an idea, about whether or not – questioned Mrs. Stout about whether she had a conversation with any of the jurors on her way in.

(Petitioner's emphasis added.) Apparently she was sitting out near the entrance to the Family Court –

BY THE COURT: Well, I think we had Bailiffs out there, I mean, I'll ask the Bailiffs.

MR. DYER: You want to ask the Bailiffs?

BY THE COURT: But I'm going to – we're not going to get in any more exchanges with Ms. Stout, so – unless it's necessary.

MR. DYER: That's fine.

BY THE COURT: Okay.

(See Appendix Pages 43-44).

Defense counsel then requests that the Court question the Deputy regarding Ms. Stout's presence near the jury. Chief Deputy Virgil Miller notes that it is possible the jury could have seen her and her sign bearing information about her son.

MR. DYER: Do you want to inquire of Virgil about whether anybody had any –

BY THE COURT: Okay, yeah, ask him to come in, would you? Chief Deputy, we are discussing at the Bench, Ms. Stout had came in wearing – some kind of a sign

that reflected some information about her son. Did – were you outside when the jury was shown in?

CHIEF DEPUTY MILLER: Yes, Sir.

BY THE COURT: Did – was she in a position where the jury could have seen that?

CHIEF DEPUTY MILLER: Possibly.

BY THE COURT: Okay.

CHIEF DEPUTY MILLER: She was seated to the left of the aisle way. The jury was in the Family Courtroom, and they filed past her.

BY THE COURT: Okay. As far as you know, did any of them look down at Ms. Stout?

CHIEF DEPUTY MILLER: Not as far as I know.

BY THE COURT: Was there any eye contact with Ms. Stout?

CHIEF DEPUTY MILLER: Not as I'm aware of.

BY THE COURT: Okay. I guess my question is why – did anybody see that sign on her before she came in the courtroom?

CHIEF DEPUTY MILLER: Yes, sir, I saw it.

BY THE COURT: Okay, well, I wish somebody would have informed me of that and take that away from her before we brought the jury out, but is it your belief that anybody had made contact with her or had any conversation with her, no matter how brief?

CHIEF DEPUTY MILLER: No, the jury was secluded, sir.

BY THE COURT: Okay. All right. Thank you, sir.

CHIEF DEPUTY MILLER: Yes, sir.

BY THE COURT: Mr. Reger, anything on the record?

MR. REGER: No, your Honor.

BY THE COURT: Mr. Dyer, anything on the record?

MR. DYER: I don't – I mean –

BY THE COURT: I mean, it's my thought that they ushered past her so quickly they couldn't have seen anything, but if I start asking questions about the jury, that's just going to –

(at the bench.)

MR. REGER: I'm kind of concerned about her, because I don't know what she might do.

BY THE COURT: Right.

MR. REGER: I'm just telling you, I wanted to relay that to you – (inaudible) _

MR. DYER: I just want the recorded to be protected and we only want to do this once, what do you think?

BY THE COURT: I do, too.

MR. DYER: I mean, you know, I don't want to be a pain, but – I mean, what do you think?

BY THE COURT: I don't want to ask the jury because then it's just going to _ then it's going to wreck the whole –

MR. DYER: Oh, yeah, obviously –

BY THE COURT: I think we need to have Ms. Stout leave, so – to prevent any – yeah.

MR. DYER: I feel so sorry for her –

BY THE COURT: I do, too, but –

MR. REGER: The other part of it is, I didn't know that she – well, I'm concerned that they might get somebody outside the courthouse or do something – (inaudible) –

BY THE COURT: Well –

MR. REGER: You now, I just –

BY THE COURT: We'll see. I mean, just let me –

(End of Bench Conference)

BY THE COURT: Can I have all of the deputies that are going to be security here approach the bench here? And actually, don't, just – what I want you to do, okay, gentlemen, if there's any outbursts, this is the procedure I want to use. Usher the jury into the jury room promptly, get them in there, don't hesitate, get them in the jury room and number two is remove the source of the outburst forthwith from the courtroom, however you need to do that, so just – and Rick, you can take care of the jury, you get them in the jury room, and – if there is any outbursts, we'll try to limit what that's – what they're going to be exposed to, but if it takes two or more of you to get the source of the outburst out of the courtroom, do what you need to do, so – I'm going to let – Ms. Stout, I'm going to let you remain in the courtroom right now, I think you're on – you're already on the borderline of not being able to watch this trial, do you understand that, ma'am?

MS. STOUT: No, I don't.

BY THE COURT: Well, I'm making it clear to you. Don't wear any signs in, don't wear any t-shirts in. If you see the jurors outside the courtroom –

MS. STOUT: No, I thought you meant right now –

BY THE COURT: Right now or in the future, do you understand that?

MS. STOUT: Yeah, I know that, Your Honor.

(See Appendix Pages 45-48).

The West Virginia Court has long held that the decision to declare a mistrial under the above-mentioned circumstances is within the sound discretion of the trial court. *State v. Williams* 305 S.E.2d 251, 172 W.Va. 295 (W.Va. 1983). The Court has held that "a trial court is empowered to exercise this discretion only when there is a "manifest necessity" for discharging the jury before it has rendered its verdict." *Id* at 260.

The case of *Lowrey* deals with a court room outburst. *State v. Lowrey* 222 W.Va. 284, 664 S.E.2d 169 (W.Va. 2008). The *Lowrey* case involves a spectator in the courtroom shouting, "You Bastard! You Bastard." The spectator in *Lowrey* was promptly escorted out of the courtroom, and the judge gave the jury a curative instruction to disregard the outburst. The trial court then denied the appellant's motion for a mistrial and the appellant's post-trial motion for a mistrial. The court in *Lowrey* held that the trial court used the appropriate discretion in deciding that a brief outburst, followed by an immediate ejection, and a curative instruction, did not create require a mistrial.

In the case of *Moss*, the appellant moved for a mistrial based on statements of the prosecuting attorney made during a radio interview. *State v. Moss*, 376 S.E.2d 569, 180 W.Va. 363 (W.Va. 1988). The prosecutor stated: "No doubt in my mind that he in fact is the murderer of Vanessa Reggett and her two children." The appellant moved for a mistrial and a polling of the jury concerning the prosecutor's prejudicial remark. The Court held that "by refusing to poll the jurors the trial court left unanswered the critical question of whether any or all of the jurors were exposed to this inherently prejudicial statement." *Id* at 573. The Court noted that, "where publicity has been disseminated which raises a serious question of prejudice and either party has made a motion to poll the jurors about their exposure to the publicity, a trial court's refusal to undertake such questioning constitutes reversible error." *Id* at 573.

The case of *State v. Larry Dale Franklin* bears a strong resemblance to the Petitioner's case. See *State v. Larry Dale Franklin* 327 S.E. 2d 449, 174 W.Va. 469 (W.Va. 1985). During voir dire on the first day of Mr. Franklin's trial a lady summoned for jury duty appeared at the bar of the court wearing a large bright yellow MADD button. The lady had been given the MADD

button by the Sheriff. The Lady was excused from the jury and the sheriff was censured by the court. However, the sheriff and other members of MADD remained highly visible in the courtroom throughout the trial. Counsel requested a mistrial and the removal of MADD buttons from the courtroom. The court denied counsel's motion. The appellant argued that it was reversible error for the court to deny his motion for a mistrial because of the presence and activities of the representatives of Mothers Against Drunk Drivers. He asserts that his right to a fair trial by an impartial jury was denied him. The Court in *Franklin* noted that the right of public access to a criminal trial be coordinated with the constitutional right of a defendant to a fair trial. *Id.* at 455. The Court noted, "An important element in this process is insuring that the jury is always insulated, at least to the best of the court's ability, from every source of pressure or prejudice." *Id.* at 455. The trial court's actions in *Franklin* were held to be reversible error.

The petitioner's case bears a strong resemblance to the *Franklin* case. Deputy Sheriff Miller testified that Ms. Stout appeared the isle of the courtroom as the jury was shown in. She placed herself in an area where her protest button was most like to be seen by the jurors. Deputy Miller testified that he saw the sign and that it was "possible" the jury had seen it. (See Appendix Page 45). The trial court failed to offer a curative instruction, poll the jury, or declare a mistrial regarding the sign. In addition, Ms. Stout was permitted to remain in the courtroom. The petitioner's constitutional right to a fair trial was compromised by Ms. Stout's public access presence in the courtroom. At a minimum, the Court should have granted a polling of the jury and a curative instruction. The Court's actions left the jury uninsulated from pressure and prejudice. Unlike the *Lowrey* case where a curative instruction was given, the level of prejudice that infected the jury in Mr. Heater's murder trial remains unknown. The fearful thing for the

petitioner in this capital case is that he may have been convicted due to unknown influence of bias or prejudice brought on by Ms. Stout's sign. Such prejudice being permitted to fester and grow at trial unaided by the Court's inquiry or the aid of a curative instruction. As the Court in *Moss* noted, "by refusing to poll the jury the Court left unanswered the critical question of whether any or all of the jurors were exposed to this inherently prejudicial statement." *Id* at 573. Mr. Heater contends that the trial court abused its discretion in refusing to poll the jurors to determine whether a manifest necessity existed to discharge the jury and declare a mistrial. Therefore Petitioner asserts that it was reversible error: 1) for the court not to grant a mistrial; 2) for the court not to poll the jury members regarding the sign; and 3) for the court not to provide a curative instruction to the jury to disregard the Stout protest.

III. The Court erred by not requiring that a mercy hearing be held following Mr. Heater's conviction of First Degree Murder in this case, by simply allowing a jury to return a verdict of guilty along with a recommendation of no mercy, instead of requiring the jury to consider both mitigating and aggravating factors pertaining to the Defendant; pursuant to W.Va. Code §62-3-15; in light of the fact that life imprisonment without the possibility of parole is the most severe penalty which a Court in West Virginia may impose, akin to capital punishment in State's which have that penalty; hereby denying Mr. Heater his fundamental right to due process under both the West Virginia and United States Constitution.

When reviewing the cold record of the trial transcript, a particular point sticks out regarding the deliberations of the jury in this case. It became apparent during the deliberations that the jury had a question regarding the difference between First and Second Degree Murder.

BY THE COURT: Okay, let me first of all mark this filed and I'll file it. And the note reads as follows, it says, 'Dear Judge, we want to be absolutely sure we...', and then it's crossed out, but you can still read what it says, it says, '...we need to know the difference between First and Second Degree Murder. We would like the definitions read to us again. Thanks, P. Cowley, Foreperson.'

(See Appendix Page 547.)

The Court responded to the question from the foreman in a manner which essentially instructed them to read the instructions as written, as a whole:

BY THE COURT: All right, you may be seated.

Now, ladies and gentlemen of the jury, the Court will note that all 12 regular jurors are present in the Courtroom. The Court had received a note that your Foreperson had sent out and I think the question, paraphrasing it, you wanted to be reinstructed on the difference between First and Second Degree Murder.

Now, if you'll recall the charge that I read to you before I began reading the specific case instructions, and I'll quote from it, it says, 'The law as it applies in this case is contained within these instructions. It is your duty to follow them. You must consider these instructions as a whole, not picking out one and disregarding the others.

So I think I have an obligation to reinstruct you on all of them together, but what the attorneys have agreed and what the Court suggested is that rather than sit here and read them to you, like you're in school, I've taken the written documents that I read the instructions from and we're going to send back a --- one set of those written instructions and that way, you all can have a written copy of the instructions, again, to take as a whole rather than to single out certain instruction or two or three certain instructions out. Do you that will resolve your question, Madame Foreperson?

FOREPERSON: Yes.

BY THE COURT: Okay and while you were in there, I've asked the attorneys if they had any objections to that, and they don't, so that's the procedure that we're going to use, so if the Bailiff will approach and get this copy of the instructions and deliver that to the foreperson and if you'll return to your jury room and continue your deliberations."

(See Appendix Pages 550-551.)

While the Court may have been trying to maintain the proper legal standard of reviewing the jury instructions as a whole, the process agreed to surely could not have satisfactorily provided an answer to the Foreperson, despite her assurances that it did. If that

was the case, then one struggles to believe that the jury came back so quickly with a verdict of Guilty of First Degree Murder, along with no recommendation of mercy, shortly after asking to clarify the difference between First and Second Degree Murder.

BY THE COURT: Okay. Mr. Clerk, if you will publish these verdicts.

CLERK: Yes, sir.

Ladies and gentlemen of the jury, harken to the verdict as reported by your foreperson.

Verdict form in the case State of West Virginia versus Jesse Lee Heater, in regards to the first count, "We, the jury, find the Defendant, Jesse Lee Heater, guilty of the offense of Murder in the First Degree, a felony, as charged in the first count of the indictment. Dated June 18th, 2014, signed, Foreperson, Paulette A. Crowley."

Verdict form in regards to mercy recommendation, case styled State of West Virginia versus Jesse Lee Heater, "We, the jury, do not recommend mercy for the Defendant, Jesse Lee Heater. Signed, June 18th, 2014, Foreperson, Paulette A. Crowley."

(See Appendix Page 554.)

When the jury raises the issue of the difference between First and Second Degree Murder, yet so quickly comes back in a unitary trial with a finding that no mercy is warranted for the defendant, one can only conclude that fair and just consideration of the mercy issue was not afforded to the defendant by the jury. This is especially troubling in view of the fact that in West Virginia, this is the most severe penalty a Court may impose under the law.

Mr. Heater raises the point that W.Va. Code §62-3-15 as such violates his Constitutional Rights to Due Process. The statute provides in relevant part as follows:

"If a person indicted for murder be found by the jury guilty thereof, they shall in their verdict find whether he or she is guilty of murder of the first degree or second degree. If the person indicted for murder is found by the jury guilty thereof, and if the jury find in their verdict that he or she is guilty of murder of the first degree, he or she shall be punished by imprisonment in the penitentiary for life, and he or she, notwithstanding the provisions of article twelve [§§ 62-12-1 et seq.], chapter sixty-two of this code, shall not be eligible for parole: Provided, That the jury may, in their discretion, recommend mercy, and if such

recommendation is added to their verdict, such person shall be eligible for parole in accordance with the provisions of said article twelve, except that, notwithstanding any other provision of this code to the contrary, such person shall not be eligible for parole until he or she has served fifteen years....”

W.Va. Code §62-3-15 (1994).

The Court seems to have initially established the possibility of the bifurcation process during the seminal case of *State v. LaRock*, 196 W.Va. 294, 470 S.E. 2d 613 (W.Va. 1996):

“Although it is virtually impossible to outline all factors that should be considered by the trial court, the court should consider when a motion for bifurcation is made: (a) whether limited instructions to the jury would be effective; (b) whether a party desires to introduce evidence solely for sentencing purposes but not on the merits; (c) whether evidence would be admissible on sentencing but would not be admissible on the merits or vice versa; (d) whether either party can demonstrate unfair prejudice or disadvantage by bifurcation; (e) whether a unitary trial would cause the parties to forego introducing relevant evidence for sentencing purposes; and (f) whether bifurcation unreasonably would lengthen the trial.”

Syl. Pt. 6, *Id*, at page 618.

In 1996, Justice Cleckley properly stated that the constitutionality of W.Va. Code §62-3-15 had been confirmed. As he stated in his opinion,

“Thus, we accept this Court’s prior opinion on this issue as well as the judgment of our federal courts that a unitary criminal trial in a first degree murder case meets muster under both the United States and West Virginia Constitutions. On the other hand, we cannot dismiss so easily the alternative contention of the defendant that we should construe the statute in such a way a trial court would have discretion to bifurcate the two stages of a criminal trial.”

Id at page 632.

The Court subsequently went on to establish the precedent of a bifurcated trial when necessary. This pertained to the issue of mercy. As Justice Cleckley stated, “The judiciary, like

every other institution, must be open to discarding habits that have outlived their usefulness and must bend under the pressures of modern life to find the most effective procedure in accomplishing its mission.” *Id* at page 632-633.

He further cited with approval Justice Workman’s dissent in the *Schofield* case: “The determination of whether a defendant should receive mercy is so crucially important that justice for both the state and defendant would be best served by a full presentation of all relevant circumstances without regard to strategy during trial on the merits.” *Schofield v. West Virginia Dept. of Corrections*, 406 S.E. 2d 425, at 433, 185 W.Va. 199, at page 207 (W.Va. 1999).

In the particular case at hand, this plainly never occurred. No doubt the State will attempt to suggest this was a matter of trial strategy by the Defendant and his counsel (with whom, as has been previously noted in this brief, he had a hostile relationship, not a cooperative one.) However, an issue of such staggering constitutional importance as whether a Defendant will even be given the opportunity to be granted mercy cannot be so easily brushed aside by the State.

Consistent with what Justice Cleckley noted about discarding old habits which have outlived their usefulness, and with what Justice Workman stated about the crucial importance of the mercy issue, Mr. Heater now urges this Court to rule that the Constitution commands a bi-furcated mercy hearing in cases of First Degree Murder. Such a process is consistent with how most states which have the death penalty proceed, as well as with the Federal Government’s process (See, e.g., the recent Boston Bomber trial.) While West Virginia has long ago abolished capital punishment, Mr. Heater would note that a First Degree Murder verdict without the possibility of parole is in effect the same thing as capital punishment in its terminal consequences. Utterly ignoring this process, and in fact simply leaving his ultimate fate in the hands of a jury that was having difficulty distinguishing between First and Second Degree Murder, is the height of irresponsibility under these circumstances.

As the Court further noted in the *McGlaughlin* case, a bifurcated mercy phase encompasses a much broader view than does the issue of the defendant’s guilt or innocence.

“The type of evidence that is admissible in the mercy phase of a bifurcated first degree murder proceeding is much broader than the evidence admissible for purposes of determining a defendant’s guilt or innocence. Admissible evidence necessarily encompasses evidence of the defendant’s character, including evidence concerning the defendant’s past, present and future, as well as the evidence surrounding the nature of the crime committed by the defendant that warranted a jury finding the defendant guilty of first degree murder, so long as that evidence is found by the trial court to be relevant under Rule 401 of the West Virginia Rules of Evidence and not unduly prejudicial pursuant to Rule 403 of the West Virginia Rules of Evidence.”

Syl. Pt. 7, *State v. McGlaughlin*, 226 W.Va. 229, 700 S.E. 2d 289 (W.Va. 2010).

The Court further held that a jury verdict in a bifurcated mercy phase must also be unanimous. “Accordingly, we hold that consistent with the provisions of West Virginia Rule of Criminal Procedure 31, a jury verdict in a bifurcated mercy phase of a first degree murder trial must be unanimous.” *Id* at page 295.

In the case at hand, the utter failure of defense counsel to raise the issue of a bifurcated mercy phase was extremely costly to Mr. Heater. The jurors quickly came back with a First Degree Murder verdict with no possibility of mercy, as noted previously. Such a grave violation of the Due Process Rights of the Defendant need not be left with no remedy by this Court. Even in the event the Court were to otherwise uphold the Defendant’s conviction, the Court has clearly on other occasions allowed remand for retrial of the penalty phase. “Consequently, this Court has on three occasions allowed for the sole retrial of the penalty phase where there is no reason to reverse the conviction.” *State ex rel. Shelton v. Painter*, 221 W.Va. 578, at 586, 655 S.E. 2d 794, at 802 (W.Va. 2007). As the Court has noted, “The provisions of West Virginia Code §62-3-15 (2005) do not require that the jury that decides the guilt phase of a first degree murder case must also be the same jury that decides the mercy phase of the case.” Syl. Pt. 6, *McGlaughlin*, at page 290. Even if the Court were to otherwise uphold the verdict of the jury in view of all of the Constitutional violations as set forth, remand on the issue of the mercy phase

would at least provide the Defendant with adequate procedural and substantive Due Process in deciding his fate.

Conclusion

Because the Court below erred in allowing the State to impermissibly remove Mr. Hawkins as counsel for Mr. Heater, in clear contravention of Mr. Heater's desires, and on a pre-textual basis so as to obtain less diligent counsel for him, which ultimately proved extremely costly in violation of Mr. Heater's Constitutional Rights; because the Court erred in not stepping in to require that the jury be polled, issuing a curative instruction, or granting a mistrial once the bailiff noted that the jurors could have seen the 'protest' sign about the missing person Luke Stout, as the prejudice inherent in seeing the sign meant that bell could not be 'unrung'; and because the Court allowed the Defendant's conviction of First Degree Murder without the possibility of mercy to stand, even though the jury had expressed concern over the difference between First and Second Degree Murder shortly before that point in time, and due to the utter failure of counsel to raise a request for a bifurcated mercy proceeding, which should be Constitutionally mandated when a Defendant faces what is effectively the ultimate penalty under West Virginia law; the Court should reverse and remand the verdict entered against the Defendant during the Trial below, and grant him the relief requested as set forth in this brief; and grant such further relief as it deems to be just or necessary under the circumstances of this case.

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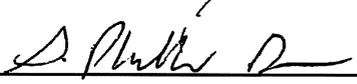
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Certificate of Service

Comes now the Defendant, Jesse Lee Heater, by and through his co-counsel, Brian W. Bailey, Esq., and G. Phillip Davis, Esq., and hereby certifies that on this 24th day of July, 2015, service of the foregoing "Petition for Appeal" was upon David A. Stackpole, Assistant Attorney General, State of West Virginia, Office of the Attorney General, Appellate Division, 812 Quarrier Street, 6th Floor, Charleston, West Virginia 25301, via hand-delivery.



Jesse Lee Heater, by co-counsel



Jesse Lee Heater, by co-counsel