

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN CHARLESTON, WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

VS.

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

JESSE LEE HEATER,

Petitioner.

APPEAL FROM THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

REPLY BRIEF

Brian W. Bailey, Esq.
25 West Main Street
Buckhannon, WV 26201
Phone: (304) 473-7460
Fax: (304) 472-0881
W.Va. State Bar ID #9816

G. Phillip Davis, Esq.
P.O. Box 203
Arthurdale, WV 26520
Phone: (304) 290-7708
Fax: (888) 885-1252
W.Va. State Bar ID #7972

PETITIONER'S ARGUMENT IN RESPONSE TO RESPONDENT'S BRIEF

The Assistant Attorney General argues that the all of Petitioner's claims fail, and that the Petitioner, who has been sentenced to the maximum punishment of incarceration for life without mercy, should not even be given the benefit of an oral argument before the Honorable Justices. Therefore, the Petitioner thus seeks to refute his claims as set forth in this reply brief.

Counter-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 this 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.**

The Assistant Attorney General underestimates the grave constitutional error which was committed when the State of West Virginia forced the hand of Mr. Heater's counsel to withdraw from this case. Assuming arguendo that the Assistant Attorney General is correct in

that the standard of review on this issue is one of abuse of discretion, as opposed to de novo review, it is still plainly evident that the Court abused its discretion under the serious circumstances of this case.

In this particular case, as in other murder cases heard before the Upshur County Circuit Court (in particular, in *State v. Clarence Jenner*, which is also pending to be heard by the Justices upon appeal), the State of West Virginia filed a motion to recuse a particular attorney, James E. Hawkins, from doing his duty of diligently representing the Defendant to the best of his legal ability. There was a *pattern* with the State and this attorney; this was not simply a one-off situation as was the case in the *Hatcher* case. This is evident from counsel's obvious frustration with the facts, as was set forth clearly on the record (Appendix pages 581-582.)

The error is further magnified by the fact that the Defendant wrote to the Court and requested the appointment of new counsel in place of Mr. Thomas G. Dyer and Mr. Zachary S. Dyer, in a letter he submitted to the Court, well before, and in advance, of when his actual trial began in this case. As is set forth in the record in this case, Mr. Heater wrote to Judge Kurt Hall back on or about April 29, 2014, requesting new counsel; in which Mr. Heater essentially begs the Judge to appoint him new counsel so that he would be able to answer the question on a polygraph examination as to whether or not he shot Mr. Oberg, in particular. This was following the approval of a private investigator by the Court for the benefit of Mr. Heater, which had previously been obtained by Mr. Hawkins (Appendix, pages 987-988.) This request, which would have automatically have been forwarded to trial counsel under common practice in this circuit, was evidently ignored as well. The trial did not occur until June 16-18, 2014. It was plainly clear *before* the time of the trial that Mr. Heater was dissatisfied by the performance of both Mr. Dyers' in this case. Nevertheless, the Court evidently ignored this request from Mr. Heater; unlike the one previously made by the State in this case.

It is self-evident from the timeline set forth in this sequence of events that Mr. Heater was extremely frustrated with his counsel's representation, well before the trial even began. And this is all in spite of the fact that he set forth on the record that he did NOT want new counsel,

before the State forced Mr. Hawkins' hand, by listing dozens of witnesses, including some jailhouse informants, with whom Mr. Hawkins was bound to have previously represented, just accounting for the size of our local bar association, and the local population.

Mr. Heater would seek to reiterate that the State incurs a heavy burden when it seeks to eliminate counsel of choice for the Defendant in a situation such as this one. *State ex. rel. Blake v. Hatcher*, 624 S.E. 2d 844, 218 W.Va. 407 (W.Va. 2005); relied upon in both the Appellant's brief as well as the Respondent's response, is the seminal case in West Virginia, and sets forth this lengthy balancing test the Court must consider when the State seeks to remove counsel from a case.

Mr. Hawkins set forth at length his reasons why he was forced to reluctantly withdraw as counsel representing Mr. Heater in this case, at the hearing held nearly a year prior to trial, on June 21, 2013.

MR. HAWKINS: Thank you, Your Honor, may it please the Court and counsel, since the last time we were here, I looked into and investigated further the issue of whether or not there is a conflict of interest, so I went to Mr. Reger's office and reviewed the statement of the alleged witness, and also listened to the audio recorded statement as well. There is no question in my mind, after doing that, that this is the individual that Mr. Reger identified, and I will disclose to the Court that I have represented, I know, on at least five occasions and am still involved in a case, not representing him, but representing his ex-wife, with whom he still maintains contact, so I still have contact through him, potentially as a witness in that case, assisting her.

In addition, looking at the written statement, there is another potential witness by the name of Brandon Shreve, who is indicated, who was supposed to be present during the time that Mr. Roy overheard these statements purported to Jesse Heater. The State has advised me that they intend to follow up on that as well, and so he may become a witness, potentially. The State has also indicated to me that Mr. Roy---they do intend to try to use him as a witness in this case.

So, I have tried to do everything possible to avoid being conflicted out of this case. As the Court's aware, I have a really good rapport with Mr. Heater. I have represented him in the past and we had good results in that case, so the long and short of it is,

Your Honor, is I'd really like to stay on this case. Mr. Heater would really like to keep me in this case. I'm invested in it as far as being prepared and working on it, and trying to go forward. However, when I take it and consider it in conjunction with the ethical rules of professional conduct, I don't see how I can avoid this conflict, and have gone every which way around the block trying to find a way and I just don't see how I can do that.

So, unfortunately, at this point in time, I feel that I have no other recourse other than, after this conflict is brought to the Court's attention, to respectfully, although reluctantly, ask the Court to be permitted to withdraw as counsel in the case and to seek the Court to find, as quickly and practically as possible, substitute counsel for Mr. Heater, so the case can go forward."

(Appendix, pages 594-595).

For Mr. Hawkins' explanation to be characterized as a "voluntary" withdraw as counsel under the circumstances as set forth in his lengthy explanation to the Court utterly defies logic in this case.

Furthermore, it should be noted that the Court quickly granted the so-called "Motion to Withdraw" after Mr. Hawkins set forth on the record his utmost reluctance to do exactly that; and he simply would not have done so, but for the fact that the State left him no choice in the matter. This is despite the fact that the Court did not put forth any of the factors as set forth in *Hatcher* on the record; there was not even an attempt by the State to justify its actions short of its witness list, nor a detailed explanation by the Court as to why this was even required. Mr. Heater would argue that failure to even set forth the factors outlined in the *Hatcher* balancing test is a prima facie abuse of discretion by the Court; especially with the reluctance of Mr. Hawkins to withdraw being so elegantly set forth on the record.

Such a course of action, if allowed to go unchecked by the Justices of the Court, effectively grants a veto power to the State of West Virginia over the Defendant and his counsel of choice! In other words, the bigger the case; the bigger the stakes of the case, the State simply has to list as many potential "witnesses" as it can (including, but not limited to, jailhouse informants, who are typically willing to testify to whatever they believe will result in some kind of favor for their

own situations); therefore causing the greater the likelihood that the preferred attorney will inevitably run into a conflict of interest; therefore, allowing the State to justify a *Hatcher* motion in order to see to it that the Defendant is saddled with an attorney with whom he or she is ultimately dissatisfied with; all to the already built-in advantage of the State. The possibility for abuse is literally limitless if this type of power is allowed to go unchecked.

By following this logic to its natural conclusion, it becomes self-evident that all notions of fundamental fairness and Due Process as firmly solidified in the Sixth and Fourteenth Amendments to the West Virginia and United States Constitutions' are clearly violated when the State of West Virginia effectively has a veto power over counsel of choice for the Defendant. This case is the classic example of the dangers that accrue to principals of fundamental fairness when this veto power is effectively exercised by the State to the disadvantage of a fair trial to the Defendant.

Such a course of action being allowed to go unchecked by Prosecuting Attorneys in clear contravention of Due Process could hardly have been what the founding fathers and drafters of the Fourteenth Amendment envisioned with the drafting of the Bill of Rights and the post-Civil War Constitutional Amendments. The results in this case, even though they are very well-documented in the record, are plain for all to see. Mr. Heater has had to pay with his life for it, without even looking forward someday to the possibility of the balm of mercy by a future parole board. And now, the Assistant Attorney General would even deny him the possibility of an oral argument to plead his case to the justices of the Supreme Court of Appeals.

- 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.

The State underestimates the grave prejudicial error which was presented when the trial court refused to poll the jury regarding Ms. Stout's display. The respondent's brief contends that "Ms. Stout's missing son was not the victim in this matter and it is unclear if the jury would have attributed any significance to the button." (Reply Brief page 20). At the time of this trial, Upshur County had been shaken by the circumstances surrounding Josh Oberg and the missing Luke Stout. For a small county in North Central West Virginia missing persons and the accompanying media attention they receive are top news stories and dominate social media. Therefore the disappearance of Mr. Stout and the death of Josh Oberg were intertwined in minds of the citizenry and the significance of prominent button with the word "missing" would be very significant to this group of jurors. This significance is shown in the trial record and was demonstrated in the jury selection process and even from the statements made by the prosecuting attorney regarding Ms. Stout's influence.

The mention of Luke Stout played prominently in the jury selection of the Petitioner's case as can be demonstrated by the following line of questioning where a potential juror clearly equates the trial for the murder of Mr. Oberg with the disappearance of Luke Stout.

BY THE COURT: Okay. All Right. Any- who else had their hand up in the front row there? Anybody else in the front row? Okay, the side row here? You are Ms. – let's – let me get –

CLERK: Katrina Thorne.

BY THE COURT: Thorne, Katrina Thorne. Okay, Ms. Thorne. Same questions.

JUROR THORNE: Yeah, I just kind of felt the same way, I kind of formed an opinion and I am on Facebook and saw some comments on there that made me kind of think one way or the other, but –

BY THE COURT: Okay, so you think you have come in here with an opinion about the guilt or innocence of the Defendant in this case?

JUROR THORNE: Yeah.

BY THE COURT: Is that something you can set aside?

JUROR THORNE: I'm not sure.

BY THE COURT: Okay. Why don't we see counsel up her at the Bench, and Ms. Thorne, why don't you come up, too?

(AT THE BENCH)

BY THE COURT: Okay, Ms. Thorne, when you say you're not sure, again, there is not right or wrong answer, but we need to know for sure, I mean and I don't know what you heard, seen or heard in the news, but you understand the Defendant starts the trial, he's presumed to be innocent, do you understand that?

JUROR THORNE: Yeah.

BY THE COURT: And that stays with him until the State proves otherwise, do you understand that? Could you set aside this opinion that you have-or this – I don't even know to what degree you have formed an opinion. Can you tell me to what degree you have formed an opinion?

JUROR THORNE: - like at the time that it happened, there was just a lot of comments –

BY THE COURT: Sure.

JUROR THORNE: - cannot tell you – (inaudible) – it kind of made me think yeah, he – (inaudible) –

BY THE COURT: Mr. Dyer might. To the Court it really, you know, matters less that – you know, it matters more that you – you know, to know whether you can set it aside.

JUROR THORNE: (inaudible)

JUROR THORNE: - **Luke Stout, my mom had him in first grade and I –** (inaudible) _

BY THE COURT: So you have a pretty good knowledge about what all – you know, some of the allegations and some of the side stories are –

JUROR THORNE: Yeah. (Appendix 2 pages 698-700).

It is clear that the murder of Josh Oberg and the disappearance of Luke Stout were inextricably intertwined to members of the community when a potential juror mentions Luke Stout by name without prompting.

The trial court expressed concerns with allowing evidence of the Stout disappearance into Mr. Heater's trial (Appendix 1 Page 37). The concern over the Stout/Oberg nexus and Ms. Stout was further echoed by the Prosecuting Attorney Mr. Reger.

MR. REGER: I'm Kind of concerned about her, because, I don't know what she might do. (Appendix 1 Page 46.)

And furthermore, Mr. Reger set forth on the record his concerns with the emotionally charged nature of this case very clearly, in relation to this very issue:

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) -. (Appendix 1 Page 47).

The Prosecutor's concerns and the Juror's testimony serve as concrete evidence that the Oberg and Stout matters were related in the minds of the local community.

Deputy Miller testified that he saw the sign and that it was "possible" the jury had seen the button. (Appendix 1 Page 45). The trial court failed to poll the jury, offer a curative instruction, or declare a mistrial regarding the sign. In addition, Ms. Stout was permitted to remain in the courtroom. The Court's actions left the jury uninsulated from pressure and prejudice. The level of prejudice that infected the jury in Mr. Heater's first degree murder trial remains unknown.

The fearful thing for the Petitioner in this life-without-mercy 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 even 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.” *State v. Moss*, 376 S.E.2d 569, 180 W.Va. 363 (W.Va. 1988).

- 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 in 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.**

The Assistant Attorney General seeks to saddle the Defendant with a “plain error” standard of review on the issue as to his counsel’s failure to request a bifurcated trial, by setting forth its four (4) elements in his brief:

“To trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.”

Syl. Pt. 7, *State v. Miller*, 194 W.Va. 3, 7, 459 S.E. 2d 114, 118 (W.Va. 1995).

No doubt this is a strategic ploy by the Assistant Attorney General to elevate the level of the mistake that must be made by the Court in order for the Petitioner to obtain any sort of relief upon appeal. As a matter of fact, the argument that counsel should have made this request while at trial, and should have lodged a proper objection at the trial, in fact strengthens the argument as set forth above that Mr. Heater should not have been denied counsel of his

choice; i.e., all subsequent errors stemmed from this fundamental error made by the Court in the first place.

At any rate, the Petitioner would not concede that a plain error standard of review is the applicable standard in this scenario, simply because a blanket statement is made outlining what that standard is. Mr. Heater would pray that the Honorable Justices take a look at this issue from a de novo standpoint, as a grave issue of Constitutional import, considering that a Defendant's future is literally at stake on these issues.

For the Assistant Attorney General to point to Justice Cleckley's statement in the *LaRock* case that "[o]n the other hand, when enormous savings of expense and gains of efficiency can be accomplished without sacrificing justice, courts must adopt the procedure that produces the great efficiency;" is, as perhaps it would characterize a statement it disagrees with, a red herring. *State v. LaRock*, 196 W.Va. 294, 314, 470 S.E. 2d 613, 633 (W.Va. 1996).

The exact point that Mr. Heater is attempting to make on this appeal is that justice was sacrificed on so many levels. It can hardly be argued that "savings of expense" and "gains of efficiency" are such bedrock precepts in a case wherein a man's very life is at stake, as that they should be controlling and override what would effectively constitute a further mini-trial, at most.

Furthermore, the Assistant Attorney General points to Mr. Heater's trial counsels' failure to request a mercy phase as a "strategic decision." While it may very well have been the case that the State could introduce otherwise impermissible character evidence at such a trial, it is of course also the case that the Defendant could argue mitigating factors as well which fall squarely outside the constraints necessarily imposed by the West Virginia Rules of Evidence in a highly contentious trial such as this one. For the Assistant Attorney General to now pose on this issue as the chief defender of counsel who represented Mr. Heater at the trial stage is certainly an opportunistic approach, particularly when they seek to defeat the other legal arguments advanced by that same counsel's representation.

As the *McGlaughlin* Court pointed out, when setting forth what is to be considered by the Court in a bifurcation proceeding:

“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 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).

Mr. Heater would strongly urge the Court to adopt a rule in line with Justice Cleckley’s phrase that the judiciary should change with the times with respect to such a serious proceeding as a first degree murder trial’s required bifurcation. The standard set forth by *McGlaughlin* is a brief one as applied to West Virginia.

Much more in-depth and instructive on this issue, on the other hand, is the United States Code, which sets forth a detailed list of both mitigating and aggravating factors to be considered when the Court is determining whether a death sentence is to be imposed. The United States Code lists as mitigating factors to be considered as follows: (1) impaired capacity; (2) duress; (3) minor participation; (4) equally culpable defendants; (5) no prior criminal record; (6) disturbance; (7) victim’s consent; and (8) other factors. 18 U.S.C. §3592(a) (2015).

On the other hand, the United States Code also sets forth in detail the aggravating factors to be considered in imposing a death sentence for homicide as well: (1) death during the commission of another crime; (2) previous conviction of violent felony involving firearm; (3) previous conviction of offense for which a sentence of death or life imprisonment was

authorized; (4) previous conviction of other serious offenses; (5) grave risk of death to additional persons; (6) heinous, cruel, or depraved manner of committing offense; (7) procurement of offense by payment; (8) pecuniary gain; (9) substantial planning and premeditation; (10) conviction for two felony drug offenses; (11) vulnerability of victim; (12) conviction for serious federal drug offenses; (13) continuing criminal enterprise involving drug sales to minors; (14) high public officials; (15) prior conviction of sexual assault or child molestation; and (16) multiple killings or attempted killings. 18 U.S.C. §3592(c) (2015).

In short, Mr. Heater urges the Court to adopt this standard for West Virginia courts. Not only does it set forth in great detail how to weigh this balancing test; it also provides clear instruction for Courts, Prosecutors, defense attorneys, and the jury as to exactly what factors to weigh when deciding on whether to grant mercy or not in a first degree murder trial. The further costs and efficiencies that would be accrued by the State would be relatively insignificant, in comparison to the cost of a defendant forever losing his or her liberty. After all, the same parties who were involved in the case would presumably be the same parties who carry forth this mini-trial that would follow the trial.

At this point in time, West Virginia's standard is rather nebulous and subjective. As applied to Mr. Heater, of course, the argument here is that no mercy factors were even seriously considered by this jury; whether this was a strategic decision of defense counsel, or a simple failure by defense counsel to contemplate the possibility of conviction is of course not set forth on the available record. The only thing the record sets forth is that once the jury received its clarification between First and Second Degree Murder, it quickly returned with an all-encompassing verdict of First Degree Murder without the possibility of mercy for Mr. Heater. In other words, it hardly seems that the jury even considered the issue.

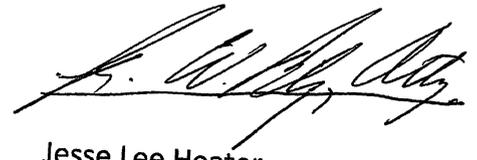
It may be argued by the Assistant Attorney General, should they deign it necessary to address this argument; that these factors are distinguishable from this case, because the U.S. Code factors as set forth contemplate capital punishment, as opposed to life imprisonment without mercy, such as is imposed on Mr. Heater in this case. However, this line of reasoning is

contrary to wisdom set forth by no less of an authority than the Pope. Pope Francis has called a life sentence without the possibility of parole “sort of a covert death penalty;” since it “deprives detainees not only of their freedom, but also of hope.” Jay Akbar, *Pope Francis condemns the Death Penalty ‘No Matter How Serious the Crime’ and Slams Life Imprisonment as a ‘Covert Execution That Deprives Inmates of Hope.’* Daily Mail Online (March 21, 2015). When a leader with the moral authority of the Pope points out the injustice involved in a life imprisonment sentence without the possibility of parole, “enormous savings of expense and gains of efficiency” should hardly be the determinative factor the Court looks to, as urged by the State in this case.

For all of the foregoing reasons, Mr. Heater strongly contends that the Court erred under the circumstances of this case by not requiring the jury to examine the mercy/no mercy factors in depth; rather, they gave them at best a cursory glance, and as a result of this, Mr. Heater’s fundamental rights to Due Process under both the West Virginia and United States Constitutions has been abridged. Again, the results are plain for the Court to see.

Conclusion

Mr. Heater prays that the Court find that his Constitutional rights were violated by allowing the State to get its way in removing his counsel, and therefore obtaining more malleable counsel that benefited the State’s ends of getting counsel on the case that the Defendant was dissatisfied with, which ultimately resulted in the State obtaining a conviction; that the Court erred by not interjecting in any shape or form once the protest sign referencing the missing status of Luke Stout was put in view of the jurors, despite the fact that the two cases were evidently linked in the minds of the community at large; and finally, by not even blinking an eye when it became evident that the jury quickly returned a verdict of First Degree Murder without mercy, shortly after inquiring about the differences between First and Second Degree Murder, as it was evident that the jury did not even consider the repercussions of a mercy versus no mercy discussion under the facts of this case; plainly in violation of Mr. Heater’s Due Process rights under both the West Virginia and United States Constitutions.

A handwritten signature in black ink, appearing to read "J. Lee Heater", written in a cursive style.

Jesse Lee Heater,
BY COUNSEL

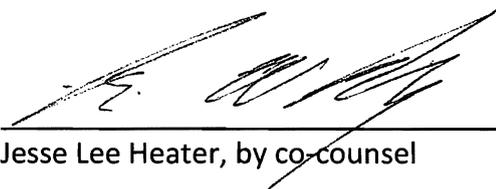
BY COUNSEL

Brian W. Bailey, Esq.
25 West Main Street
Buckhannon, WV 26201
Phone: (304) 473-7460
Fax: (304) 472-0881
W.Va. State Bar ID #9816

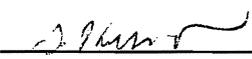
G. Phillip Davis, Esq.
P.O. Box 203
Arthurdale, WV 26520
Phone: (304) 290-7708
Fax: (888) 885-1252
W.Va. State Bar ID #7972

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 30th day of September, 2015, service of the foregoing "Petitioner's Argument in Response to Respondent's Brief" was upon David A. Stackpole, Esq., Assistant Attorney General, State of West Virginia, Office of the Attorney General, Appellate Division, 812 Quarrier Street, 6th Floor, Charleston, WV 25301, via hand-delivery.



Jesse Lee Heater, by co-counsel



Jesse Lee Heater, by co-counsel