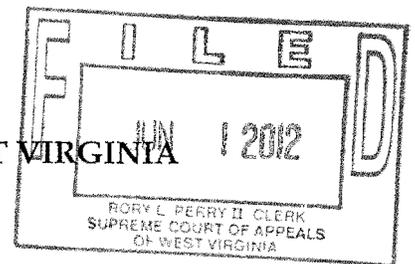


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE EX REL. JAMES DAVIS,  
West Virginia, Prosecuting Attorney  
of Hancock County

v.

Case No. 12-0603

THE HONORABLE FRED L. FOX, II,  
Judge of the First Judicial Circuit,  
and JAMES MICHAEL SANDS

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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## RESPONSE TO PETITION FOR WRIT OF PROHIBITION

Now comes, Respondent, James Michael Sands, by his attorneys, Martin P. Sheehan, Esq., and SHEEHAN & NUGENT, P.L.L.C., and Amanda M. Messler, and MESSLER LAW OFFICES, and file this RESPONSE TO THE PETITION FOR A WRIT OF PROHIBITION.

### I. PROCEEDINGS AND NATURE OF RULINGS

James Michael Sands, a high school senior, was arrested on December 12, 2011 and charged in a complaint filed with the Magistrate Court of Hancock County, West Virginia with burglary. A preliminary hearing was held, and Mr. Sands was bound over for action by the Grand Jury. Similar proceedings occurred with respect to Chelsea L. Metz, also a high school senior.

At the January Term of the Hancock County Grand Jury, Mr. Sands, and Ms. Metz, were charged with felony murder,<sup>1</sup> attempted nighttime burglary and conspiracy.

The defendants were arraigned. Both defendants filed motions to dismiss. Some discovery has been exchanged. Before oral argument on the motions to dismiss, Ms. Metz resolved the case against her by pleading guilty to the misdemeanor offense of obstructing a police officer. She was sentenced, in accordance with the plea agreement to a fine of \$ 50.00.

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<sup>1</sup> Rather than follow the form for a short form indictment in W.Va. Code § 2-9-3, the Grand Jury alleged *inter alia* that "James D. Sands, and Chelsea L. Metz, and each of them, committed the offense of 'First Degree Murder,' by unlawfully and feloniously committing and attempting to commit the felony offense of nighttime burglary . . . ." The allegation is only an allegation of felony murder.

Mr. Sands proceeded to oral argument on the motion to dismiss. The Circuit Court, Hon. Fred L. Fox, II, presiding, took the matter under advisement. On April, 19, 2012, the felony murder charges against Mr. Sands were dismissed by written order and opinion.

Mr. Sands waived the right to be tried in the January term of Court, and that term has expired. Mr. Sands is scheduled for trial on the remaining charges, burglary and conspiracy, later in the May term.

The State of West Virginia did not appeal the ruling made by Judge Fox. Instead, the Prosecuting Attorney for Hancock County, West Virginia has initiated this proceeding.

## **II. STATEMENT OF THE FACTS**

The issue involved is an issue of law determined from the pleadings. There were no proceedings held to resolve any disputed facts. To the extent the pleadings were augmented by agreed facts, said materials were placed of record before Judge Fox at the March 19, 2012 oral argument.

It is not disputed for purposes of the motion decided that Dakota Givens is deceased, having been shot and having died from a gunshot wound on December 12, 2011. Mr. Givens was shot outside of a convenient store by Maher A. Alwishah. Mr. Alwishah is an employee of a company owned by his father that operates a convenient store. In the back room of the convenient store, Mr. Alwishah has a double bed where he apparently sleeps at night.

In the early morning hours of December 12, 2011, Mr. Givens, in the apparent company of James Michael Sands, his first cousin, and Chelsea L. Metz, who dated Mr. Givens, were outside of the convenient store. A security camera depicts Mr. Givens outside the store where he peers through a window. Some minutes later, Mr. Givens reorients the camera so that it does not record anything useful.

A brick breaks the window. Security cameras inside the store, depict Mr. Alwishah approach the area of the store where the window is located, and discharge a handgun. Mr. Givens is shot. He dies of injuries sustained by him.

Mr. Sands and Ms. Metz were arrested at the scene.

### **III. STATEMENT OF THE ISSUE**

When a felon is killed by a potential victim who is resisting the felony being perpetrated is a co-participant liable under the felony murder rule for the death of the felon?

Circuit Judge Fred L. Fox, II, sitting by designation in Hancock County West Virginia answered this question, no, and granted the motion of defendant James Michael Sands to dismiss a charge of murder based on such an allegation against him.

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## V. STANDARD OF REVIEW

In State ex rel. Gessler v. Mazzone, 212 W.Va. 368, 572 S.E. 891 (2002) the Court articulated the standard of review applicable to a petition for a writ of prohibition. It defined a writ as available not for "a simple abuse of discretion" but only where a trial court acts without jurisdiction, or where a trial court with jurisdiction acts in excess of its legitimate powers.

Where a trial court has jurisdiction a five factor test is employed. It calls for evaluation of a. whether the party seeking the writ has no other adequate means, such as direct appeal to obtain the desired relief; b. whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; c. whether the lower court's order is clearly erroneous as a matter of law; d. whether the lower court's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and, e. whether the lower court's order raises

new and important problems or issues of law of first impression. The third factor, the clearly erroneous test, actually provides for de novo review of issues of law.

## VI. SUMMARY OF THE ARGUMENT

Respondent believes that this matter is not suitable for review by writ of prohibition. The Prosecuting Attorney is not the proper party to such a petition. The State of West Virginia is the only proper party. The State cannot pursue a writ of prohibition because the State had a right to appeal.

West Virginia law defines murder to a significant degree by reference to the common law. When considering the common law properly, the Petitioner's effort to use the "plain meaning rule" of statutory interpretation is of limited usefulness.

"When a felon is killed by a potential victim who resists a felony being perpetrated is a co-participant liable under the felony murder rule for the death of the felon?" is essentially a question under the common law in West Virginia. In the States which have reached this question, the clear majority rule is that, in the specific circumstances identified, felony murder does not exist. This is the rule in Virginia whose laws are significantly analogous to the language and legal traditions of West Virginia. Finally, this Court has ruled in a very similar circumstance, suicide during an escape, that the felony murder rule did not apply. Respondent believes, the writ should be refused, or if heard on the merits, that the request for relief should be denied.

## VII. ARGUMENT

### A. This Matter Is Not Suited to Resolution by a Writ of Prohibition.

An essential condition for granting a writ of prohibition, the lack of an alternate remedy, is non-existent in this circumstance. The State of West Virginia had a right to appeal the dismissal of Count One pursuant to W.Va. Code § 58-5-30.<sup>2</sup> It has not, however, done so. Where an appeal lies, a writ is an improper remedy.<sup>3</sup>

Because the State of West Virginia had a right to appeal, it cannot be argued that the State of West Virginia has been prejudiced in a way that is not correctable on appeal.

The issue raised below by Mr. Sands asked if felony murder is appropriate in a particular, unusual, although recurring situation. Specifically, does felony murder liability exist when a victim of an underlying felony, in resisting the felony, kills a co-participant in the felony, are the co-participants liable under a felony murder theory.

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**<sup>2</sup> W.Va. Code § 58-5-30 Appeal by state of judgment quashing indictment**

Whenever in any criminal case an indictment is held bad or insufficient by the judgment of a circuit court, the state, on the application of the attorney general or the prosecuting attorney, may appeal such judgment to the supreme court of appeals. No such appeal shall be allowed unless the state presents its petition therefor to the supreme court of appeals within thirty days after the entry of such judgment. No such judgment shall finally discharge, or have the effect of finally discharging, the accused from further proceedings on the indictment unless the state fails, within such period of thirty days, to file a petition for appeal with the clerk of the court in which judgment was entered; but after the entry of such judgment or order the accused shall not be kept in custody or required to give bail pending the hearing and determination of the case by the supreme court of appeals.

Except as herein otherwise provided, all the provisions of the other sections of this article shall, so far as appropriate, be applicable to a petition for an appeal under this section, and to all subsequent proceedings thereon in the supreme court of appeals in case such appeal is granted.

<sup>3</sup> In State ex rel. Rusen v. Hill, 193 W.Va. 133, 454 S.E.2d 427 (1995)(Cleckley, J.), the Court held that a writ of prohibition could be used to correct a clear legal error not within the State's authority to appeal. The converse, that a writ cannot be used where there is a right to appeal, would seem a proper inference.

The issue is undoubtedly one of law which is normally reviewed under the de novo standard.

No aspect of this petition for a writ of prohibition asserts that the actions of Judge Fox amount to committing "an oft repeated error."

The final factor for consideration of a writ of prohibition is whether the issue involves a new and important issue. The issue involved has not been definitively addressed by this Court, although in a very similar case, State ex rel. Painter v. Zakaib, 186 W.Va. 82, 411 S.E.2d 25 (1991) the Court has addressed a very similar issue. In the Painter case, the Court held that the suicide of a co-participant in a felony while trying to escape apprehension would not provide a basis for a felony murder charge. The need to invoke this rule appears to be rare. But since the charge does involve murder, a reasonable argument that this factor weighs in favor of granting the petition can be made.

**B. Considering the Common Law Is Crucial to Understanding  
the Offense of Murder, including Felony-Murder**

"The primary object in construing a statute is determining the intent of the Legislature." State v. Zain, 528 S.E.2d 748, 207 W. Va. 54 (W.Va., 1999); Syl. Pt. 1, Smith v. State Workmen's Compensation Com'r., 159 W.Va. 108, 219 S.E.2d 361 (1975); Syl. Pt. 2, State ex rel. Fetters v. Hott, 173 W.Va. 502, 318 S.E.2d 446 (1984); Syllabus point 2, Lee v. West Virginia Teachers Retirement Board, 186 W.Va. 441, 413 S.E.2d 96 (1991); Syl. pt. 2, Francis O. Day Co., Inc. v. Director, Division of Environmental Protection, 191 W.Va. 134, 443 S.E.2d 602 (1994); Syllabus point 4, Hosaflook v. Consolidation Coal Co., 201

W.Va. 325, 497 S.E.2d 174 (1997);Syl. pt. 3, West Virginia Dep't of Military Affairs and Pub. Safety, Div. of Juvenile Servs. v. Berger, 203 W.Va. 468, 508 S.E.2d 628 (1998).

Normally, the intent of the Legislature is best evidenced by the plain meaning of the language of a statute. After all, it is the language chosen by, and adopted as the official act of a Legislature which provides the dominant evidence of actual legislative intent. Consequently, invocation of the "plain meaning" standard is an oft repeated refrain.

The Petitioner here attempts to argue that Judge Fox failed to honor the "plain meaning" of the definition of felony murder in W.Va. Code § 61-2-1. It is asserted that Judge Fox so deviated from the proper interpretation of that statute that he has frustrated legislative intent.

The principle problem with this assertion is that W.Va. Code § 61-2-1 does not contain a definition of murder. "While the statutes distinguish the degrees of murder, they do not define murder itself." State v. Abbott, 8 W.Va. 741, 746-47 (1875); 9B Michie's Jurisprudence of Virginia and West Virginia, *Homicide* § 9. Murder continues to be defined in West Virginia by the common law, although that definition has been modified to some degree by statute.

This is clear from examination of the statute. If the statute defined murder the essential elements of that definition would have been set forth. The essential elements of murder are nowhere to be found in W.Va. Code § 61-2-1.

The statute reads:

**First and second degree murder defined,<sup>4</sup> allegations in indictment for homicide**

Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing, or in the commission of, or attempt to commit, arson, kidnaping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivering a controlled substance as defined in article four, chapter sixty-a of this code, is murder of the first degree. All other murder is murder of the second degree.

In an indictment for murder and manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, but it shall be sufficient in every such indictment to charge that the defendant did feloniously, willfully, maliciously, deliberately and unlawfully slay, kill and murder the deceased.

This statute is clearly not a definition of murder, in the first instance. It is, as has been noted, a modification of the common law definition of murder in some particulars. To be sure of this, one need only recount the common law definition of murder.

Under the common law, "Whoever kills a human being with malice aforethought is guilty of murder." 9B Michie's Jurisprudence of Virginia and West Virginia, *Homicide*, § 9. "[T]he elements which the State is required to prove to obtain a conviction of felony murder are: (1) the commission of, or attempt to commit, one or more of the enumerated felonies; (2) the defendant's participation in such commission or attempt; and (3) the death of the victim as a result of injuries received during the course of such commission or attempt." State v. Williams, 172 W.Va. 295, 305 S.E.2d 251 (1983).

These remain the essential elements of murder in West Virginia. Obviously,

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<sup>4</sup> The heading of the statute suggests that murder is defined in this provision. However, the heading is not part of the statute. W.Va. Code § 2-2-10(z). Examination of the statute establishes that murder is not defined therein.

W.Va. Code § 61-2-1 does not attempt to define the elements of murder, but is instead a statute that distinguishes between degrees of murder. In this legal environment, the Petitioner's effort to claim that Judge Fox was not guided by the "plain meaning" of W.Va. Code § 61-2-1 in deciding the motion filed by the Defendant below is a misguided effort to encourage an erroneous evaluation of the law of the State of West Virginia..

The common law remains a part of West Virginia law. W.Va. Code § 2-1-1. The common law is a vital and essential component in the definition of the elements of murder in West Virginia.. Judge Fox took a multi-layered approach to resolving the issue raised by Mr. Sands. Judge Fox carefully sifted the common law as part of his decision-making. That was not error. That is what a good judge was required to do.

**C. Judge Fox's Correctly Determined that the Death of a Co-Participant Caused by a Potential Victim of a Felony Does Not Constitute Felony Murder**

Although not expressly the topic of a reported West Virginia case, Judge Fox had several excellent reasons to conclude that West Virginia does not consider the death of a co-felon at the hands of a potential victim a basis for felony-murder. These are set forth below.

Allegations that felony murder occurs when a person who resists being a victim, or a police officer who attempts to stop the commission of a crime, takes action which results in the fatality of a co-actor in the criminal act, have been considered in many, but not all of the States. The majority rule, established in those cases, is that there is no liability for felony murder by the co-actors in felony conduct when a person who in

resisting the criminal activity kills a co-actor.

This rule appears to have had its origin in Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958). There the Court reasoned that the act of the victim that resulted in the death of the co-felon was an act properly characterized as a justifiable homicide. Potential victims of violent crime are entitled to resist being victimized. The law recognizes that lawful resistance does, in some circumstances, include the right to kill an assailant. Such notions are obviously part of the doctrines of self-defense, and defense of another. See e.g., State v. Whittaker, 221 W.Va. 117, 650 S.E.2d 216 (2007) Law enforcement officers are privileged to use such force as is necessary to effect a lawful arrest, and when resistance is offered to use such force as is necessary to overcome that resistance. This can also include the use of deadly force. Such acts are also defined as justifiable homicides.

This being the well understood rule, the Redline court asked if the victim (or law enforcement officer) had committed a justifiable homicide by resisting the commission of a felony, how could associates of the decedent be charged with a crime related to the death? Focusing on the notion that co-felons were partners-in-crime, and that each actor was responsible for the acts of his co-felons, the Court still recognized that the death was not the result of the acts of any of the persons engaged in a criminal activity, but the result of an act lawfully taken by the potential victim of the original felony. Consequently, the Redline Court found that the felony murder doctrine was not applicable in these circumstances.

While this particular fact pattern is unusual, it has arisen from time to time in various states since the decision in Redline in 1958. The Redline decision has been widely followed, and it is safe to characterize that rule as the majority rule today.

- f. People v. Washington, 62 Cal.2d 777, 781-82, 44 Cal.Rptr. 442, 445-46, 402 P.2d 130, 133-34 (1965) (Traynor, C.J.) ("[t]o invoke the felony-murder doctrine when the killing is not committed by the defendant or by his accomplice could lead to absurd results," describing fact situation almost identical to that here);
- g. Alvarez, Jr. v. Dist. Ct., 186 Colo. 37, 525 P.2d 1131 (1974) (no felony murder liability under statute where robbery victim is mistakenly killed by police officer);
- h. Weick v. State, 420 A.2d 159, 162-63 (Del.Supr.1980) (no felony murder liability under statute when accomplice is killed by robbery victim);
- i. State v. Crane, 247 Ga. 779, 780, 279 S.E.2d 695, 696 (1981) (no felony murder under statute when accomplice is killed by burglarized homeowner);
- j. Commonwealth v. Moore, 121 Ky. 97, 100-02, 88 S.W. 1085, 1086-87 (1905) (no felony murder liability when robbery victim kills bystander while opposing robbery; contrary result "would be carrying the rule of criminal responsibility for the acts of others beyond all reason");
- k. Commonwealth v. Balliro, 349 Mass. 505, 515, 209 N.E.2d 308, 314 (1965) (felon cannot be held liable for death of any person killed by someone resisting commission of the felony);

- l. State v. Meyers, 760 So.2d 310 (La. 2000)(sustaining homicide conviction for shooting of police officer by co-actor, but vacating conviction for death of co-felon killed by police officers in shoot out.) ;
- m. People v. Austin, 370 Mich. 12, 32-33, 120 N.W.2d 766, 775 (1963) (no felony murder liability when accomplice killed by robbery victim);
- n. Sheriff Clark County v. Hicks, 89 Nev. 78, 506 P.2d 766 (1973) (no felony murder liability when victim of attempted murder kills accomplice);
- o. State v. Canola, 73 N.J. 206, 226, 374 A.2d 20, 30 (1977) (no felony murder liability when robbery victim kills accomplice);
- p. State v. Bonner, 330 N.C. 536, 411 S.E.2d 598 (1992)(vacating conviction for felony murder where security guard kills co-felon engaged in robbery);
- q. State v. Severs, 759 S.W.2d 935, 938 (Tenn.Crim.App.1988) (no felony murder liability when larceny victim kills accomplice);
- r. State v. Hansen, 734 P.2d 421, 427 (Utah 1986) (felony murder statute limited to death of a person "other than a party"; no felony murder when accomplice killed by opponent of felony);
- s. Wooden v. Commonwealth, 222 Va. 758, 761-65, 284 S.E.2d 811, 814-16 (1981) (no felony murder liability when robbery victim shoots accomplice).

This last case is a decision from West Virginia's closest sister State, Virginia. Our common law and Virginia's common law have an identical origin. The common law of Virginia, prior to June 20, 1863 is identical. W.Va. Code § 2-1-1. A precedent from

Virginia is very significant for these reasons. In giving credit to this opinion, Judge Fox determined that

[b]y comparing the felony-murder statutes of Virginia and West Virginia, it appears that West Virginia adopted the Virginia felony murder statute. While additional offenses have been included to the requisite felony offenses, the basis for the enactment of this statute in both states continues to be the same. As our felony-murder statute has its origins from the Virginia felony-murder statute and as both statutes are currently analogous to one another, the conclusion drawn by the Supreme Court of Virginia is appropriate for consideration.

Order of Judge Fox at page 6..In the Wooden case, the Court observed, as Mr. Sands has, that while

. . . felony-murder is a statutory offense, it includes the elements of common-law murder. When the legislature enacted § 18.2-32 it defined the conduct it sought to punish as nothing more than "[m]urder" in the commission of one of certain other enumerated felonies. Since murder is not elsewhere defined in the Code, murder for purposes of the felony-murder statute is common-law murder coupled with the contemporaneous commission or attempted commission of one of the listed felonies.

Id. at 761, 284 S.E.2d at 813 (footnote omitted.) Thereafter, the Virginia Court examined the evolution of the common law crime of felony-murder. It found that the doctrine did not encompass the killing of a co-felon by a person who was resisting the underlying felony in reliance on the analysis of the Redline Court. The Court particularly focused on the basis for a contrary rule in Florida. The Wooden Court found that specific statute defining murder in Florida had departed from the common law definition still combined into the law of Virginia. Given the choice to follow the common law tradition of Pennsylvania, or the statutory regime of Florida jurisprudence, the Wooden Court found Pennsylvania law more analogous.

The West Virginia Supreme Court of Appeals commented favorably on the Redline decision in State ex rel. Painter v. Zakaib, 186 W.Va. 82, 411 S.E.2d 25 (1991). There the co-participant in a felony died, not at the hands of his co-participants, nor at the hands of a potential victim of a felony, but by an act of suicide. Finding that the death, and the underlying felonies that were being attempted were not sufficiently linked to warrant a finding that the co-participant had participated in the death, a writ of prohibition issued. While Zakaib is not absolutely controlling authority, its reliance on Redline and the limitation imposed on felony murder is suggestive, as Judge Fox noted, that this is the right answer at West Virginia law.

Judge Fox was aware that there is a minority rule. Under the minority rule liability can exist for felony murder where the co-felon is killed by a victim. That position is exemplified by State v. Lowery, 178 Ill.2d 462, 227 Ill.Dec. 491, 687 N.E.2d 973 (1997) and People v. Hernandez, 82 N.Y.2d 309, 604 N.Y.S.2d 524, 624 N.E.2d 661(1993)(statutory revision overruled People v. Wood, 8 N.Y.2d 48, 201 N.Y.S.2d 328, 167 N.E. 2d 736 (1960) that there was no liability when robbery victim shoots accomplice.) The Petitioner here cites several additional decision from Florida, Missouri, Montana and New Jersey, as well. See State v. Wright, 379 So.2d 96 (Fla. 1979); State v. Baker, 607 S.W.2d 153 (Mo. 1980); State v. Morran, 306 P.2d 679 (Mont. 1957); and, State v. Martin, 573 A.2d 1359 (N.J.1990). Despite the existence of these additional precedents, this view remains a minority position.

The principle difference in the two outcomes depends on how felony murder is

conceived. Where it is viewed as a partnership in a criminal venture, with each defendant liable for the acts of his partners, there is no liability for felony murder where the fatal shot that kills a co-participant is fired by a person resisting the felony. Victims of the underlying felon are not, of course, persons acting as partners in crime. The homicide caused by a victim will always be a justifiable homicide as death occurred while the victim was acting in self-defense.

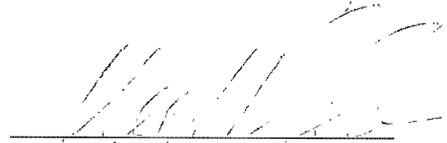
The more expansive view depends on a theory of proximate cause. Once a criminal scheme is begun, every event that might supply proximate cause for a death is considered to be rooted in criminal behavior.

Judge Fox understood the choice. He specifically adopted the majority position. Judge Fox was concerned that victim resistance could introduce enhanced levels of violence. In People v. Washington, 62 Cal.2d 777, 781-82, 44 Cal.Rptr. 442, 445-46, 402 P.2d 130, 133-34 (1965) (Traynor, C.J.), Justice Traynor explained that the proximate cause theory might permit a store owner to chase one robber while another fled in a different direction. If the store owner killed the robber he was pursuing even after the other robber had been arrested, the arrested robber could be responsible for a death that actually occurred while he was in custody. Justice Traynor found that foolish. Judge Fox agreed. He found holding Mr. Sands, who exhibited no potential for violence - neither the decedent or the individuals charged were armed in any way - potentially culpable on these peculiar facts illogical and wrong.

All that can be added is that when the application of criminal law is less than

analogous to the language and legal traditions of West Virginia. Finally, the Supreme Court of Appeals of West Virginia has ruled in a very similar circumstance, suicide during an escape, that the felony murder rule did not apply. The writ should be refused, or if heard on the merits, the request for relief should be denied.

RESPECTFULLY SUBMITTED,



Of counsel

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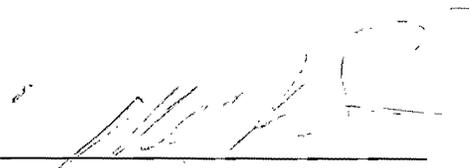
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**CERTIFICATE OF SERVICE**

I, Martin P. Sheehan, hereby certify that on May 30, 2012, I caused a true and correct copy of the foregoing RESPONSE TO PETITION FOR A WRIT OF PROHIBITION to be mailed, first class mail, postage pre-paid and addressed to

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Temporary Chambers of the Hon. Fred L. Fox, II  
c/o Chambers of the Hon. Martin J. Gaughn  
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