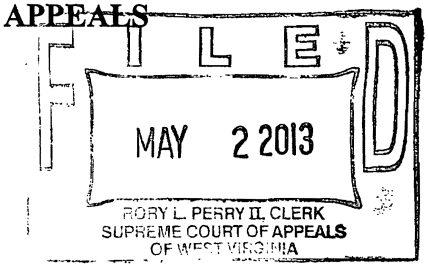
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



NO. 13-0458

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

Petitioner,

v.

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

Respondent.

VERIFIED PETITION FOR WRIT OF PROHIBITION

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v.

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

Respondent.

VERIFIED PETITION FOR WRIT OF PROHIBITION

Comes now Scott Ash, Prosecuting Attorney in and for Mercer County, (hereinafter "petitioner"), by and through undersigned counsel, Laura Young, Assistant Attorney General, and hereby submits the instant Petition for Writ of Prohibition pursuant to the Revised Rules of Appellate Procedure, specifically Rule 16, for the reasons that follow. This petitioner seeks to prohibit the Circuit Court of Mercer County from quashing a subpoena and barring the use of video evidence in a criminal prosecution. (The circuit court order is Exhibit 1 in the Appendix. The video recording of certain proceedings in the Family Court of Mercer County is Exhibit 2. A transcript of those proceedings is Exhibit 3. The transcript is provided for ease of reference in this petition.)

I.

QUESTIONS PRESENTED

Did the Circuit Court of Mercer County exceed its legitimate authority by quashing a subpoena seeking the testimony of a guardian *ad litem* for an incarcerate on the grounds that such

would violate the rules of confidentiality in the attorney-client relationship? Further, did the Circuit Court of Mercer County exceed its legitimate authority by suppressing the video recorded family court proceedings in this matter where the guardian *ad litem* told the court that Hoston directed him to tell the "court and everybody in this room that . . . I am going to go to her place of employment and kill her"?

II.

STATEMENT OF THE CASE

"He's got a dark soul . . . He will kill me. And he wants me dead." (Exhibit 3 at 2 and 3.) That was the reaction of Lisa M. to the message that Chubby Hoston ordered the guardian *ad litem* appointed to represent him in family court to deliver. Acting appropriately, the guardian *ad litem* followed the express direction of Hoston, and stated "Mr. Hoston has directed me in no uncertain terms to tell the court and everybody in this room that intends if, what he said was, if she doesn't leave me alone I am going to go to her place of employment and kill her. And he said I am not afraid of the state police or anyone." The judge questioned "And he told you to tell me that?" "He told me three times that I am to tell the judge that. So I do not . . . I was directed by him to do that . . . But I was told by my client to say this . . ." (*Id.* at 1.)

Based upon the unmistakable and clear threatening message that Hoston ordered the guardian *ad litem* to deliver to everybody in a quasi-public judicial proceeding, Hoston was ultimately indicted for a violation of West Virginia Code § 61-5-27(b)(4)(c)(3), intimidation of and retaliation against a witness. (Exhibit 1 at 2.) (Exhibit 4.)

The guardian *ad litem* from the civil family court matter was subpoenaed to testify in the criminal court proceedings. (Exhibit 5.) Petitioner's trial counsel moved to quash the subpoena

arguing that the threats were covered by the attorney-client privilege and were a confidential communication. Following a hearing, the circuit court determined that Mr. Cline could not be required to testify, finding that the threat made in family court was confidential. Judge Swope determined that there was an attorney-client relationship between the guardian *ad litem* and the incarcerate. (Exhibit 1 at 2-3.) He further determined the disclosure was necessary to prevent a criminal act, but that there should be no disclosure of privileged communications beyond what is necessary to serve the purpose in question. (*Id.* at 3-4). Additionally, the video was ruled inadmissible both on the issue of privileged communications, and that the prejudicial impact of the video would be greater than its probative value. (*Id.* at 4.)[1] The ultimate effect of those rulings will result in the dismissal of the indictment, as recognized by Judge Swope by staying his order for ten days after entry to permit the State to seek a writ of prohibition. (*Id.* at 5.)

III.

SUMMARY OF THE ARGUMENT

The State seeks the extraordinary remedy of prohibition because the circuit court exceeded its jurisdiction and committed harmful and flagrant error against the State, which denied it its right to prosecute this case. The court erred in determining that the communication which was clearly intended by Hoston to be publicly disseminated was a confidential communication. The court erred in quashing the subpoena issued to the guardian *ad litem* because the threat was not confidential.

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[1]Apparently, Judge Swope's concern was that by playing the tape without Mr. Cline's presence, Mr. Hoston would not be able to cross-examine Mr. Cline. Judge Swope's use of the prejudicial/probative language which is a Rule of Evidence 403 ruling was not really the basis of Judge Swope's holding. Judge Swope basically ruled that unless Mr. Cline was present to testify about the recording, the recording was inadmissible. The judge was concerned with a double hearsay issue. Since Mr. Cline can testify, however, there is no double hearsay issue if the tape is played.

Further, the court erred in suppressing the video recording of the family court proceedings.[2] The statement at issue is the petitioner's own statement, which is admissible as a statement against interest.

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner submits that review of the record should allow this Court to dispose of the pending case with either issuance of a Rule or oral argument. However, if this matter is selected for oral argument, the Petitioner submits that it is appropriate for Rule 19 oral argument.

V.

ARGUMENT

A. Prohibition is the only remedy to correct this clear legal error.

This Court has held that

> The State may seek a writ of prohibition in this Court in a criminal case where the trial court has exceeded or acted outside of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction. In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the defendant's right to a speedy trial. Furthermore, the application for a writ of prohibition must be promptly presented.

Syl. Pt. 5, *State v. Lewis*, 188 W. Va. 85, 422 S.E.2d 807 (1992).

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's

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[2]*See, supra,* n.1.

> order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

Here, it is evident that the State is deprived erroneously of its right to prosecute since the core of its case is the evidence the circuit court has found inadmissible. Further, the State has no right of appeal from either the circuit court's order or from any acquittal, if it pursues the case to trial. And, most importantly, the circuit court's order is clearly erroneous as a matter of well established law.

B. It is an open question as to whether a guardian *ad litem* for an incarcerate is, in fact or law an attorney representing the incarcerate.

There was confusion exhibited, even by Judge Swope, as to the precise relationship between the incarcerate, and the attorney appointed as the guardian *ad litem*. "He's a guardian *ad litem*, he's not this guy's lawyer, he's been told to do something as an officer of the Court." (Exhibit 6 at 5.) However, Judge Swope then analyzed the statements in the context of Rule 1.6 of the Rules of Professional Conduct which deals with the confidentiality of information between a lawyer and a client whom he represents.

There is a paucity of law in West Virginia regarding the exact status of a guardian *ad litem*. *In re Christina W., Sissy W., and Lisa W.*, 219 W. Va. 678, 639 S.E.2d 770, (2006) examined the status of a guardian *ad litem* in a child abuse and neglect proceeding and determined that the Rules of Procedure for Child Abuse and Neglect Proceedings defined the guardian *ad litem* as the "attorney

appointed to *represent* the child." *Id.* at 682, 639 S.E. 2d at 774. The court concluded that the responsibilities of the guardian are "similar to that of a lawyer representing a client." (*Id.*) Therefore, the Rules of Professional Conduct apply to a guardian *ad litem* in a child abuse and neglect proceeding. *Id.* at 683, 639 S.E.2d at 775. However, the duties and responsibilities of an attorney appointed as guardian *ad litem* for an abused child "extend much farther than those anticipated by the typical lawyer/client relationship." (*Id.*) Thus, there is no duty of absolute confidentiality. If honoring the desire for confidentiality would expose the child to a high risk of probable harm, the guardian must make a dislosure. *Id.* at 686, 639 S.E.2d at 778.

Obviously, there are crucial distinctions between a guardian *ad litem* in an abuse and neglect proceeding and a guardian ad litem for an incarcerate. There is no requirement that a guardian ad litem be an attorney, *see, e.g.*, W. Va. Code § 50-5-3, and the simple appointment of an attorney as guardian ad litem does not obligate "such person to function as the ward's attorney with that office's attendant powers and duties." *Wolfe v. Grey* 1979 WL 206831, *1 (Ohio Ct. App. 1979). Under court rules, "the duties of a lawyer for a party and a guardian *ad litem* for a party are different, and it is not the function of the guardian *ad litem* to serve as a lawyer." *McCaslin by McCaslin v. Radcliff,* 168 F.R.D. 249, 256 (D. Neb.1996). Indeed, West Virginia Trial Court Rule 21.03 directs the GAL to "make a full and independent investigation of the facts involved in the proceeding and make recommendations to the court by testimony or in writing, unless otherwise ordered by the court," indicating that a guardian has duties to the court as well as the ward undercutting an attorney-client relationship. Further, as noted in *Quesinberry v. Quesinberry,* 191 W. Va. 65, 443 S.E. 2d 222 (1994), in Syllabus Point. 2, in part, "the appointment of a guardian *ad litem* for an incarcerated convict in civil action is not mandatory if the court can reasonably order another appropriate remedy

while the convict remains under the legal disability of incarceration. There are several alternatives to appointment of a guardian *ad litem* for indigent incarcerated defendants."

However, the circuit court analyzed the relationship and the disclosure of Hoston's threats under the Rules of Professional Conduct regarding confidential communications, and without waiving any issue as to whether an attorney-client relationship actually existed, the petitioner asserts that there was no privileged communication, and if the communication is deemed privileged, the privilege was waived.

C. The privilege did not attach. If it attached, it was waived.

The assistant prosecuting attorney in the proceedings below noted that Hoston was not a wet behind the ears neophyte in dealing with the criminal justice system. As stated by Lisa M. in the July hearing:

> he has beat me, kicked me, choked me, punched me, broke out my windows, threaten my kids, my grandkids, and he is not afraid of the police. . . . I'm telling you I'm afraid for my life
>
> . . . .
>
> And this guy, he's dark, not complexion, but dark he's got a dark soul. He's shot his ex-wife, the girl that he's doing time for now he almost killed her. He broke her ribs. She had head trauma. He broke her ankle. He raped her anally. He is demented. Dark, mean vicious and he's a psycho path (sic). He has no conscience.

(Exhibit 3 at 2 and 3.) Hoston clearly is a veteran of the criminal justice system with knowledge of procedure, domestic violence, and yes, the duty of an attorney to his client. With full knowledge, Hoston did not only consent to his threats being disclosed, he never intended the statements to be confidential to start with.

1. The Privilege Did Not Attach

"The venerable attorney-client privilege 'has as its principal object the promotion of full and frank discourse between attorney and client so as to insure sound legal advice or advocacy.'" *State v. Rodoussakis*, 204 W. Va. 58, 68, 511 S.E.2d 469, 479 (1998) (quoting Syl. Pt. 11, in part, *Marano v. Holland*, 179 W. Va. 156, 366 S.E.2d 117 (1988)).

> The privilege forbidding the discovery of evidence relating to communications between an attorney and a client is intended to ensure that a client remains free from apprehension that consultations with a legal advisor will be disclosed. The privilege encourages a client to talk freely with his attorney so he may receive quality advice.

State ex rel. U.S. Fidelity and Guar. Co. v. Canady, 194 W. Va. 431, 438, 460 S.E.2d 677, 684 (1995) (citation omitted). Because the privilege impedes the search for the truth, the privilege "is to be strictly confined with the narrowest possible limits consistent with the logic of its principle. *United States v. Aramony,* 88 F.3d 1369, 1389 (4th Cir. 1996) (citation omitted)

> In order to assert an attorney-client privilege, three main elements must be present: (1) both parties must contemplate that the attorney-client relationship does or will exist; (2) **the advice must be sought by the client from the attorney in his capacity as a legal advisor**; (3) **the communication between the attorney and client must be intended to be confidential.**

Syl. Pt. 2, *State v. Burton*, 163 W. Va. 40, 254 S.E.2d 129 (1979)(emphasis added). Here, the threat did not further the legal representation which is fatal to the claim of privilege.

The statements made by Hoston, that the guardian *ad litem* was " directed . . . in no uncertain terms to tell the court and everybody in this room that he intends if, what he said was, if she doesn't leave me alone I am going to go to her place of employment and kill her. And he said I am not afraid of the state police or anyone." The judge questioned "And he told you to tell me that?". "He told me three times that I am to tell the judge that. So I do not . . . I was directed by him to do that . . . But I was told by my client to say this . . ." (Ex. 3 at 1.)

The guardian *ad litem* acted absolutely appropriately in an untenable position by seeking the court's permission to withdraw from any further action in the family court matter, and by notifying the victim of the threat toward her. Hoston never intended this communication (i.e., the threat) to be confidential–as evidenced by the direct orders of Hoston, not once, not twice, but three times to tell the judge and "everybody in this room" that he intended to kill Lisa M. (Clearly, the only reasonable inference for the direction to be given three times is that the specific threat arose in the midst of a conversation, was repeated either for clarity or emphasis, and the guardian had some response.) This was not a communication to further the attorney client relationship or the representation. The privilege "protects only those disclosures necessary to obtain legal advice which might not have been made absent the privilege." *Fisher v. United States,* 425 U.S. 391, 403 (1976). Hoston, unable to communicate directly with his terrified victim, used the guardian *ad litem* as a messenger, not as an attorney. To allow Hoston to now invoke the privilege would be to pervert its intent. "The attorney-client privilege . . . is 'intended as a shield, not a sword.'" *State ex rel. Med. Assurance v. Recht,* 213 W. Va 457, 480-81, 583 S.E.2d 80, 103-04 (2003) (Starcher, J., concurring) (citation omitted.)

Again, assuming that an attorney-client relationship existed, statements made by the client to an attorney are not within the privilege if the information is given with the intent that it be used and disseminated to third parties. *United States v. Martin,* 773 F.2d 579 (4th Cir. 1985). In order for the privilege to exist, the communication between the attorney and client must be intended to be confidential. *State ex rel. Westbrook v. Hill,* 209 W. Va. 668, 550 S.E.2d 646 (2001). An attorney is a competent witness against a client as to everything but confidential communications. Syl. Pt. 6, *Edminston v. Wilson*, 146 W. Va. 511, 120 S.E.2d 491 (1961). When the communication, as here,

was not for the purpose of furthering the representation, and in fact was explicitly meant to be communicated not only to Lisa M., but to the judge, and everyone else at the hearing, no privilege could attach.

However, if the privilege did attach, it was waived. A "disclosure inconsistent with [the] confidential nature of attorney-client relationship waives attorney client privilege." *Lawyer Disciplinary Bd. v. McGraw,* 194 W. Va. 788, 798, 461 S.E.2d 850, 860 (1995). Such a disclosure occurs when the client directs the lawyer to disclose communications to others. *Tisby v. Buff. Gen. Hosp.*, 15 F.R.D. 157, 168 (W.D. N.Y., 1994). "Once the attorney-client privilege has been waived, the privilege is generally lost for all purposes and in all forums." *Genentech, Inc. v. U.S. Int'l Trade Comm'n,* 122 F.3d 1409, 1416 (Fed. Cir. 1997)

> Professor Rice explains the scope of a waiver of the attorney-client privilege as follows:
>
> > When the attorney-client privilege has been waived, whatever the subject matter of the waiver, the privilege is gone. The client, therefore, may no longer use the privilege to prevent access to the communications in question by either the party who successfully challenged the privilege claim or by anyone else in the present or future litigation. Having had the opportunity to assert and address the privilege claim in a judicial proceeding, the privilege holder is thereafter barred, under the doctrine of res judicata and collateral estoppel, from relitigating the resolved claim.
>
> Rice, *Attorney-Client Privilege* § 9:85, at 9-295 (footnotes omitted); *see* 8 John H. Wigmore, *Evidence in Trials at Common Law* § 2328(1), at 639 (1961) ("[W]aiver at a first trial should suffice as a waiver for a later trial since there is no longer any reason for preserving secrecy."); see also Epstein & Martin, *Attorney-Client Privilege* at 76 ("Once an express or implicit waiver has occurred, the privilege is generally treated as relinquished for all purposes and in all circumstances thereafter.").

Id. at 1416 -17. And, "it has long been held that once waived, the attorney-client privilege cannot be reasserted." *United States v. Suarez,* 820 F.2d 1158, 1160 (11th Cir. 1987). While the circuit

court focused on Rule of Professional Conduct 1.6(a), the Rule requires an invocation of the attorney-client privilege, but such invocation is not permissible where no privilege exists (either in that it does not exist vel non [such as here where the communication was not in furtherance of obtaining legal advice] or it has been waived [such as here where the client orders the lawyer to disclose information in front of third-parties]). "If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable." *Id.* cmt. Here, no such privilege exists, or if it does, it is waived.

The facts of the instant case are remarkably similar to *State v. Johnson,* 178 P.3d 915 (Utah Ct. App., 2008.) The factual scenario in *Johnson* was that a husband in a contentious divorce was ultimately charged with two counts of retaliation by threatening to kill two separate judges on two separate days. The charges were based on statements made by Johnson to his divorce attorney in several conversations, including not only threats to murder the judges, but also opposing counsel. One such conversation was recorded by defendant's counsel without his client's knowledge. Counsel contacted the police. On a motion in limine invoking attorney client privilege and seeking to exclude the statements Johnson had made to his attorney, the court found that because Johnson did not make the threats for the purpose of facilitating the rendition of professional legal services, said statements were not covered by the attorney client privilege. Here, Hoston, having waived the privilege, if ever it attached, by ordering the guardian *ad litem* to act as a message boy to deliver not only to Lisa M. but also to the judge, and everyone else present, his threat to kill her, he can not revoke the waiver of the privilege to avoid prosecution. Once a waiver has occurred, it is relinquished for all circumstances and all purposes.

VI.

CONCLUSION

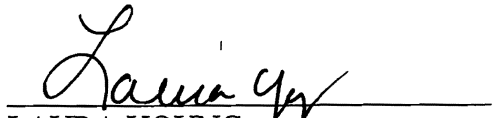
For the reasons listed above, the petitioner prays that this Court grant Petitioner's Verified Petition for Writ of Prohibition and overrule the Order entered by Judge Swope on April 26, 2013.

Respectfully submitted,

STATE OF WEST VIRGINIA ex rel.
SCOTT ASH, Prosecuting Attorney for
Mercer County, West Virginia
Petitioner

By counsel

PATRICK MORRISEY
ATTORNEY GENERAL



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VERIFICATION

LAURA YOUNG, being by me first duly sworn, upon her oath, deposes and says that she is counsel for the petitioner, State of West Virginia, ex. rel. Scott Ash, Prosecuting Attorney for Mercer County, West Virginia, in the foregoing verified *VERIFIED PETITION FOR WRIT OF PROHIBITION*; that the facts and allegations contained therein are true, except so far as they are therein stated to be upon information and belief; and that insofar as they are therein stated to be upon information and belief, she believes them to be true.

Laura Young

LAURA YOUNG

CERTIFICATE OF SERVICE

I, LAURA YOUNG, Assistant Attorney General and counsel for the petitioner, do hereby verify that I have served a true copy of the *VERIFIED PETITION FOR WRIT OF PROHIBITION* upon counsel for respondent by depositing said copy in the United States mail, with first-class postage prepaid, on this 2nd day of May, 2013, addressed as follows:

To: The Honorable Derek C. Swope
Judge of the Circuit Court of Mercer County
Mercer County Courthouse
1501 Main Street
Princeton, WV 24740

Joseph T. Harvey, Esquire
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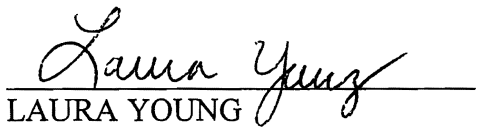

LAURA YOUNG