

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

No. 34768

**THE ASSOCIATED PRESS,**

Petitioner,

v.

**STEVEN D. CANTERBURY,**

Administrative Director of the  
West Virginia Supreme Court of Appeals,

Respondent.

**PETITION FOR REHEARING**

Rudolph L. DiTrapano, Esq. (WV Bar No. 1024)  
Sean P. McGinley, Esq. (WV Bar No. 5836)  
**DITRAPANO BARRETT & DIPIERO, PLLC**  
604 Virginia Street East  
Charleston, WV 25301  
304-342-0133

Patrick C. McGinley, Esq. (WV Bar No. 5620)  
737 South Hills Drive  
Morgantown, WV 26505

*Counsel for Petitioner The Associated Press*

Petitioner, The Associated Press (“AP”), by undersigned counsel, petitions this Honorable Court pursuant to Rule 24 of the West Virginia Rules of Appellate Procedure to grant rehearing in order to correct significant outcome determinative errors of law and fact.

## INTRODUCTION

Because this Court’s opinion stands for the perverse proposition that questions concerning a judge’s impartiality are none of the public’s business, the AP seeks a rehearing. In reaching its conclusions, this Court misapprehended the facts of this case and the applicable law when it stated: “. . . [i]n view of . . . the foregoing authorities, we conclude that none of the thirteen e-mails at issue herein constituted a public record under FOIA. None of the e-mail's contents involved the official duties, responsibilities or obligations of Justice Maynard as a duly-elected member of this Court.” *Associated Press v. Canterbury*, \_\_ S.E.2d. \_\_, 2009 WL 3805646 (W.Va.). To the contrary, the record shows clearly that the e-mails do relate to the responsibilities of Justice Maynard to recuse himself where his partiality reasonably is in question. Indeed, in one e-mail the Court erroneously characterized as being nothing more than a link to a news story, Justice Maynard made a direct statement of his disbelief in Don Blankenship’s personal liability for a coal mine fire. This e-mail statement was made at a time when his friend as well as a Massey subsidiary were defendants in a *pending* wrongful death action brought by widows of miners who perished in that fire.<sup>1</sup> The Court’s opinion concludes such an email is wholly unrelated to the public’s business, apparently on the basis that questions raised about Justice Maynard’s partiality by such statements concerning a pending case are none

---

<sup>1</sup> Because that pending case could reach the Supreme Court, the email clearly related to the Justice’s official duties, responsibilities, and obligations. That email should be ordered disclosed even under the pure content based standard articulated by the Court.

of the public's business. That conclusion is dead wrong, and must be reversed.

Moreover, the stark distinction between a document's content and its context set forth in this Court's November 12, 2009 opinion is unworkable in application, and would wreak havoc with the liberal disclosure goal of the WVFOIA, and if applied generally to all FOIA requests, as suggested by the Court's holding, would allow hundreds of thousands of records previously disclosed under the Act to be concealed from the public.

### ARGUMENT

**A THE DISTINCTION BETWEEN A DOCUMENT'S CONTENT AND IT'S CONTEXT IS UNWORKABLE IN APPLICATION, WILL WREAK HAVOC WITH THE LIBERAL DISCLOSURE GOAL OF THE WVFOIA, AND COULD ALLOW LITERALLY HUNDREDS OF THOUSANDS OF RECORDS PREVIOUSLY DISCLOSED UNDER THE ACT TO BE CONCEALED FROM THE PUBLIC**

This Court's November 12, 2009 opinion tries to distinguish between the content and the context of information "prepared, owned, and retained by a public body" in a manner that narrow's the scope of information available to the public under the WVFOIA. This Court held that "[a] trial court's determination of whether personal e-mail communication by a public official . . . is a public record . . . is restricted to an analysis of the content of the e-mail and does not extend to a context-driven analysis because of public interest in the record." *Syl.* Pt. 4. This narrow interpretation of the WVFOIA significantly undermines the *liberal* disclosure goal of the Act. Such a narrow interpretation will prove unworkable in application and would allow public bodies to conceal literally hundreds of thousands of documents including phone numbers, photographs and any other information whose relationship to "the conduct of the public's business" is not apparent from the "content" of the document.

The Court narrowly construes the definition of “public record” by ignoring FOIA’s mandate of “liberal construction.” A trial court “is restricted to an analysis of the content” of a document and is barred from analyzing its context to determine if it “relates to the conduct of the public’s business.” This narrow “content”-only based holding, while purporting to apply WVFOIA’s broad public disclosure mandate, instead allows public officials to secret potentially hundreds of thousands of documents including photographs, mathematical calculations, phone numbers called by public officials and employees as well as all other documents where the content alone does not clearly indicate how it relates to the conduct of the public’s business. Although this Court’s opinion purportedly seeks to honor the liberal disclosure mandate of the Act, in fact, it could narrow the scope of WVFOIA disclosure dramatically.

The AP submits this Court misapprehended and overlooked the dramatic, devastating impact of its holding and the extent to which it could eviscerate the legislative policy underlying WVFOIA.<sup>2</sup> It therefore is incumbent upon this Court to reexamine and withdraw its’ November 12, 2009, opinion, and rehear the matter to address the otherwise catastrophic impact of its initial holding.

**B THE COURT MISAPPREHENDED COMPLETELY THE ISSUE PRESENTED**

This Court’s opinion misapprehends and thus misstates the issue presented to the Court in this case: “the issue at hand [is] whether a *personal* e-mail communication by a public official or

---

<sup>2</sup> See W.V. Code §29B-1-1 (“... all persons are... entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people... do not give their public servants the right to decide what is good for the people to know and what is not good for them to know... To that end, the provisions of this article shall be liberally construed with the view of carrying out the above declaration of public policy”).

employee constitutes a public record as defined under FOIA.” (emphasis added). Rather, the issue is whether the e-mails sent by a judge to the Chairman/CEO of a litigant is a public record because it “relates to the conduct of the public’s business.” The fact that Donald Blankenship and Justice Maynard were long-time friends does not transform the e-mails involved in this case into “personal” e-mails. The e-mails are personal *if and only if* they do not relate to the conduct of the public’s business. This Court’s fundamental misapprehension of the issue presented led the Court to state:

... if we adopted the AP's position that these e-mails constituted public records, then “a grocery list written by a government employee while at work, a communication to schedule a family dinner, or a child's report card stored in a desk drawer in a government employee's office would be subject to disclosure . . . .”<sup>3</sup>

This statement is extraordinary in its complete misapprehension of the narrow issue the AP brought before this Court. The AP consistently has asserted that the issue “. . . is very narrow. It concerns e-mails between a statewide elected government official (who is a Judge) and a corporate executive who is the CEO of a litigant appearing before the Judge's Court.”

Associated Press Reply Brief, at 13.

The Court further overlooks the fact that the primary issue in this case relating to the public’s business was the “appearance of impropriety” that arose from Justice Maynard’s

---

<sup>3</sup> One can only speculate why the Court’s opinion found the AP’s position would lead to disclosure of “a grocery list written by a government employee while at work, a communication to schedule a family dinner, or a child’s report card stored in a desk drawer in a government employee’s office . . . .” It is impossible to divine how such documents even conceivably could be held to, “relate to the conduct of the public’s business,” because they are purely personal in character, unlike Justice Maynard’s pre-recusal e-mails to the CEO of a litigant. Not only are such items not implicated at all by the AP’s position, the putative comparison of a child’s report card to a Justice’s communication with the CEO of a party litigant on the evening following oral argument in the Court, and specifically stating the Justice’s belief or disbelief in his friend’s culpability in another matter, simply does not ring true.

relationship with the CEO of a litigant. It overlooked also that the Justice's recusal from all Massey cases was the reason the AP used the FOIA in seeking information narrowly limited to Justice Maynard's recusal – an act that, except for the holding in this case, would appear obviously “relates to the conduct of the public's business.” Indeed, Justice Maynard himself recognized his friendship with a litigant's CEO was a matter that involved his official responsibilities and thus related to “the conduct of the public's business.” Justice Maynard would not have recused himself *but for* the fact of his relationship with the Chairman/CEO of a party litigant:

Without question, the Judicial Branch of state government should always be held in the highest public confidence and trust. The mere appearance of impropriety, regardless of whether it is supported by fact, can compromise the public confidence in the courts. For that reason --and that reason alone I will recuse myself from this case.

Recusal Statement of Justice Elliott Maynard, January 18, 2007.

**C THIS COURT'S FINDING THAT NONE OF THE THIRTEEN E-MAILS RELATED IN ANY MANNER TO EITHER THE CONDUCT OF THE PUBLIC BUSINESS, OR TO THE OFFICIAL DUTIES, RESPONSIBILITIES OR OBLIGATIONS OF JUSTICE MAYNARD MISAPPREHENDS AND IS CLEARLY CONTRADICTED BY THE RECORD**

**1 JUSTICE MAYNARD'S RELATIONSHIP WITH THE CHAIRMAN/CEO OF A PARTY LITIGANT WAS RELATED TO THE JUSTICE'S DUTIES AS A MEMBER OF THE JUDICIARY AND THUS TO THE CONDUCT OF THE PUBLIC'S BUSINESS AS WELL**

In its opinion, this Court stated that “[n]one of the e-mail's contents *involved the official duties, responsibilities or obligations of Justice Maynard as a duly-elected member of this Court.*” *Associated Press v. Canterbury*, 2009 WL 3805646 (November 12, 2009) (emphasis added). This Court's unequivocal statement of material “fact” is unsupported by, and indeed is directly contradicted by the record.

The facts of record show the Justice had a close relationship with a litigant. That relationship ultimately caused Justice Maynard to recuse himself from all Massey cases. This Court's opinion either misapprehended or overlooked the law and facts of record that clearly show that "official duties, responsibilities [and] obligations of . . . Justice Maynard" included the Justice's observance of the West Virginia Code of Judicial Conduct. It can not be gainsaid that the Code of Judicial Conduct relates to the public's business. That Code governs every member of the West Virginia Judiciary, including the Supreme Court of Appeals, and therefore specifically relates to Justice Maynard's decision, or non-decision, concerning his participation or recusal in all Massey cases. The question of whether an appearance of impropriety existed concerning the Maynard/Blankenship relationship is not just a matter of "public interest," it is a matter that clearly relates to the public's business.

In *Caperton v. AT Massey Coal Co., Inc.*, the U.S. Supreme Court underscored a judge's responsibility to "disqualify him or herself in a proceeding in which the judge's impartiality might reasonably be questioned." \_\_ U.S. \_\_, 129 S.Ct. 2252, at 2266 (2009). The Court emphasized:

Almost every State—West Virginia included—has adopted the American Bar Association's objective standard: "*A judge shall avoid impropriety and the appearance of impropriety.*" ABA Annotated Model Code of Judicial Conduct, Canon 2 (2004) . . . The ABA Model Code's test for appearance of impropriety is "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." Canon 2A, Commentary; see also W. Va. Code of Judicial Conduct, Canon 2A, and Commentary (2009) (same).

The West Virginia Code of Judicial Conduct also requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Canon 3E(1) . . . Under Canon 3E(1), "[t]he question of disqualification focuses on whether an objective assessment of the judge's

conduct produces a reasonable question about impartiality, not on the judge's subjective perception of the ability to act fairly.'" *State ex rel. Brown v. Dietrick*, 191 W. Va. 169, 174, n. 9, 444 S. E. 2d 47, 52, n. 9 (1994)[.]

*Id.*

Justice Maynard, himself, recognized – after photographs emerged showing him and Mr. Blankenship vacationing on the French Riviera --- that it was his *duty and responsibility as a Justice of this Court* to recuse himself from all Massey cases because of *the appearance of impropriety* arising from his friendship with Mr. Blankenship:

It is not enough to do Justice--*Justice also must satisfy the appearance of Justice.* I have decided to voluntarily recuse myself from this case . . . because of the controversy surrounding this case . . . it has now become an issue of public perception and public confidence in the courts. Above all else I am very concerned about how the public views this court. \* \* \* Without question, the Judicial Branch of state government should always be held in the highest public confidence and trust. *The mere appearance of impropriety*, regardless of whether it is supported by fact, can compromise the public confidence in the courts. For that reason -- and that reason alone -- I will recuse myself from this case.

Recusal Statement of Justice Elliott Maynard, January 18, 2007. (emphasis added). Justice Maynard thus acknowledged his relationship with Donald Blankenship so related to his judicial duties, responsibilities and obligations that he recused himself from all Massey cases.

This Court's decision, by contrast, insofar as it states as a matter of fact and of law that "*not one of the thirteen e-mails was related in any manner . . . to the official duties, responsibilities or obligations of . . . Justice Maynard,*" is an erroneous and serious misapprehension of both the facts and applicable law. When the personal relationship between a judge and a friend who is the Chairman/CEO of a party litigant affects "public confidence" in the judiciary to the degree that it forces the judge to recuse himself from all cases involving that friend's company, communications between the two men during the period when the cases are

pending, such communications clearly are “related to the conduct of the public’s business.”

**2 THE CONTENT OF AT LEAST ONE OF THE FIVE E-MAILS ORDERED RELEASED BY THE CIRCUIT COURT CLEARLY RELATED TO THE JUDICIAL DUTIES RESPONSIBILITIES AND OBLIGATIONS OF JUSTICE MAYNARD**

Justice Maynard’s relationship with Mr. Blankenship was not simply a creation of the media. That relationship had been the subject of prior recusal motions in this Court. In 2004 the Justice refused to recuse himself from a case in which Mr. Blankenship’s company was a party. Justice Maynard took official action by issuing an Order that minimized his relationship with Mr. Blankenship in response to the recusal motion filed in a case wherein Massey affiliates were defendants:

The fact that *I know Mr. Blankenship socially* is insufficient to disqualify me . . . or to cause my partiality to reasonably be questioned.

*In Re Flood Litigation* (W.Va. Sup.Ct. Docket No. 31688). (emphasis added). This was official action that was itself based on the extent of Justice Maynard’s relationship, and clearly related to the public’s business. It shows that the extent of Justice Maynard’s relationship with Mr. Blankenship, and his partiality in matters concerning Mr. Blankenship and his companies, has been related to the public’s business for a number of years.

This Court misapprehended the facts when it stated one of the e-mails at issue contained only a link to a *news story*.<sup>4</sup> Curiously, this Court’s opinion also states that the Maynard-Blankenship e-mails contain nothing but links to news stories. That conclusion ignores the

---

<sup>4</sup> This Court overlooked *the content* of the October 11, 2007 e-mail, characterizing it as one of “[t]welve . . . e-mails [that] simply provided URL links to privately-operated internet websites that carried news articles Justice Maynard believed Mr. Blankenship would be interested in reading.” *Associated Press v. Canterbury*, 2009 WL 3805646.

October 11, 2007 e-mail, sent in the wee hours of the morning. The date is significant because the previous day Justice Maynard heard oral arguments in *Caperton v. AT Massey Coal Co. Inc.* Hardly a simple link to a news story, in that October 11, 2007 email, Justice Maynard directly commented on Mr. Blankenship's responsibility for Massey's Aracoma mine fire, ridiculing the idea his friend was responsible in any way for what had occurred:

**"THIS ONE YOU GOTTA SEE --- ARACOMA IS MENTIONED --- YOU  
COULD HAVE PREVENTED IT IF YOU HAD ONLY OPERATED THE  
MINE PROPERLY ACCORDING TO MENIS"**

(E-mail dated October 11, 2007) (Capitalization in original).<sup>5</sup> The Court's opinion somehow misapprehend this email to be a link to a news article (it's not), and further states as fact that the reason Justice Maynard sent the non-existent "news article" was he "believed Mr. Blankenship would be interested in reading" it. How the Court came to this understanding of Justice Maynard's supposed intent is unknown, as no evidence ever was offered why he sent that email.

Justice Maynard used this Court's Internet server to send this astonishing e-mail even though echoes of the previous afternoon's oral argument in *Caperton v. AT Massey* had barely faded from the courtroom. Contrary to this Court's opinion, the October 11, 2007 Aracoma e-mail demonstrates an extraordinarily close relationship not revealed to parties litigating against Massey in pending cases.<sup>6</sup> Under Canon 3E of the Code of Judicial Conduct the Justice should

---

<sup>5</sup> Justice Maynard attached to the October 11, 2007 e-mail, a link to the Greene Ketchum law firm website; at that time Justice Ketchum was a partner in that firm and an announced primary election candidate for a seat on the West Virginia Supreme Court of Appeals. The webpage to which Justice Maynard referred in the e-mail is in the record. The Aracoma Mine fire received significant state-wide and national public attention, following, as it did, the Sago Mine disaster by only two weeks.

<sup>6</sup> The public and parties adverse to Massey did not learn about the true closeness of that relationship until the disclosure of the Monaco photographs in January, 2008.

have fully disclosed that relationship. That e-mail and its timing, having been sent the night after oral argument in a case involving Mr. Blankenship's company, clearly relates to Justice Maynard's responsibilities as a judge, and thus to the public's business.<sup>7</sup>

Justice Maynard's ridicule of the notion of liability by Mr. Blankenship or his companies for the Aracoma deaths, while a lawsuit against his friend personally, as well as against Mr. Blankenship's companies, was then *pending* before the Logan County Circuit Court,<sup>8</sup> would seem to have an obvious relationship to the public's business.<sup>9</sup> So obvious is this relationship, in

---

<sup>7</sup> ABA Model Code of Judicial Conduct Canon 3E (1)(a) of the ABA Model Code of Judicial Conduct requires that "[a] judge shall disqualify himself . . . in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge has a personal bias or prejudice concerning a party . . ." Commentary to Canon 3E states "[u]nder this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned . . . [and] . . . [a] judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification. (emphasis added). Canon 3F allows the parties to waive the disqualification of a judge. Federal judges and justices must comply with the same rule. See, 28 U.S.C. §455.

<sup>8</sup> The Aracoma widows' wrongful death complaint named both a Massey Subsidiary as well as Justice Maynard's friend as defendants and set forth serious charges against the latter:

Blankenship's actions did in fact cause severe emotional distress and suffering to Don Bragg and Elvis Hatfield prior to their deaths in the Aracoma Mine. Because of Blankenship's personal actions, Mr. Bragg and Mr. Hatfield suffered severe emotional distress as they fought for their lives, attempting to escape their work area and passage ways which had filled with smoke due to the atrocious safety standards in Aracoma Mine, becoming lost in the thick, choking, nauseating, and blinding smoke, and ultimately suffocating and dying.

See Complaint paragraphs 56-58. While these allegations of the widow's wrongful death complaint were merely unproven allegations, they were made in a case that could eventually have come before Justice Maynard in an interlocutory or a discretionary appeal.

<sup>9</sup> On December 1, 2006 the widows of Donald Bragg and Ellery Hatfield, the two Massey subsidiary miners who died in the fire, filed a wrongful death action in Logan County Circuit Court. *Delorice Bragg, et al. v. Aracoma Coal Co., Inc.*, (Civil Action No. 06-C-372-P). This wrongful death litigation was filed on December 1, 2006 and was pending prior and after Justice Maynard's January

fact, that one may conclude that the Court's erroneous statement in the opinion that the emails were only mere links to news stories may explain how the Court came to overlook this email's obvious relationship to the public's business.

In seeking rehearing in this matter, the Associated Press asks this Court to re-examine the obvious misapprehension of fact regarding the October 11, 2007, e-mail. The content of that e-mail openly and obviously relates to the "to the official duties, responsibilities or obligations of . . . Justice Maynard." There can be no doubt the public was entitled to know the extent of Justice Maynard's relationship with Mr. Blankenship as reflected in the October 11, 2007 Aracoma e-mail. The Court's November 12, 2009 opinion will be construed to mean a judge may conceal from litigating parties and from the public a personal belief that a litigant friend is incapable of unlawful and tortious acts. Certainly, should a Justice choose to simply ignore the requirements of the Code of Judicial Conduct regarding mandatory disclosure, the majority opinion assures the WVFOIA will not serve as an alternate route to uncovering such conduct. The opinion should be withdrawn and rehearing granted.

**D NONE OF THE CASES RELIED UPON BY THE COURT ARE APPOSITE TO THE CASE AT BAR**

In its opinion, this Court cited 16 cases as the "majority" position standing for the proposition that "personal e-mail communications by a public official or employee does not constitute a public record for purpose of disclosure under FOIA or its equivalent." The problem with this rationale, of course, is that there is no uniform public records law, and most state's laws are more narrow than the WVFOIA. Thus, while the AP may agree those cases represent the

---

18, 2008 recusal.

general application of certain states' public records laws that personal e-mails of public employees need not be disclosed, calling such the "majority" view is inappropriate. Comparisons of differing statutory language is like comparing apples and oranges.

The opinion ignores this Court's prior holding in *Daily Gazette Co. Inc. v. Withrow*, where the court emphasized that "*W.Va.Code*, 29B-1-2(4) constitutes a liberal definition of a 'public record' in that it applies to any record which contains information "relating to the conduct of the public's business,' without the additional requirement that the record is kept "as required by law" or "pursuant to law," as provided by the more restrictive freedom of information statutes in some of the other states. 177 W.Va. at 115, 350 S.E.2d at 742, *citing*, Braverman and Heppler, *A Practical Review of State Open Records Laws*, 49 Geo.Wash.L.Rev. 720, 733-35 (1981).<sup>10</sup>

The opinion here overlooks the fact that *none* of those cases from other states involved

---

<sup>10</sup> Importantly, as the *Withrow* Court noted, the WVFOIA definition of "public record" is much broader than that of most other states — including those of Colorado, Florida, Ohio and Arizona. This Court's reliance on those court decisions that construed significantly narrower statutory language reveals a fatal flaw in the reasoning that the subject e-mails are not public records under the WVFOIA. Those cases are entirely inapposite for the obvious reason that the WVFOIA uses much broader language that must be liberally construed by this Court.

An obvious example of the caution that must be used in relying on other statutes to interpret West Virginia FOIA law is the majority's citation to *Gallant v. N.L.R.B.*, 26 F.3d 168 (D.C. Cir. 1994), a case the Court asserts erroneously in a page long quotation, is "on point." In fact, conspicuously omitted from the Court's lengthy quotation is a discussion pointedly showing why *Gallant* can not be used to interpret the WVFOIA: "Nor does the statute 'sweep into FOIA's reach personal papers that may "relate to" an employee's work ... but which the individual does not rely upon to perform his or her duties....'" *Id.*, at 171-172. Thus, far from being "on point", it is impossible to square the holding in *Gallant* with the WVFOIA, where the statute mandates that all documents that **relate to** the public's business must be disclosed. This is just one obvious example of how the Court's holding misapprehends West Virginia law in an effort to squeeze the statute into a majority paradigm that simply does not exist.

judges who acknowledged their own friendship with a litigant was so intimately related to the conduct of the public's business that recusal was required. In focusing on inapposite cases interpreting inapposite, more narrow statutes, this Court's opinion overlooked and misapprehended the fact that the communications between Justice Maynard and his good friend clearly related to the conduct of the public's business pursuant to the WVFOIA.

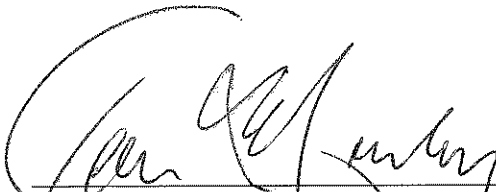
### CONCLUSION

This Court's November 12, 2009, opinion ignores both the Legislative policy of the broadest possible disclosure as well as its mandate that the statute's provisions be liberally construed. W.Va. Code §29B-1-1. The statute does not distinguish between the context or content of public records – its criteria is a relationship to the public's business, and that term must be applied liberally. The policy behind the statutory liberal construction mandated by the Legislature is to provide all persons with “full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.” This Court's opinion misapprehends that clear and unambiguous statutory mandate by imposing a content limitation the WVFOIA that contradicts this statutory policy.

The Associated Press submits this Court misapprehended both the law and the facts in holding that the Aracoma e-mail does not relate *in any manner to Justice Maynard's judicial duties, responsibilities and obligations*. As the Supreme Court of the United States recently instructed “[t]he West Virginia Code of Judicial Conduct . . . requires a judge to “disqualify him or herself in a proceeding in which the judge's impartiality might reasonably be questioned.” Canon 3E(1) . . . .” \_\_\_ U.S. \_\_\_, 129 S.Ct. 2252, at 2266, 173 L.Ed.2d \_\_\_ (2009). Moreover, as this Court itself has recognized, under Canon 3E (1) “[t]he question of disqualification focuses

on whether an objective assessment of the judge's conduct produces a reasonable question about impartiality, not on the judge's subjective perception of the ability to act fairly." *State ex rel. Brown v. Dietrick*, 191 W. Va. 169, 174, n. 9, 444 S. E. 2d 47, 52, n. 9 (1994). The dreadful message sent by this Court's opinion is that questions about a judge's impartiality are none of the public's business. To suggest that such records are none of the public's business is not just wrong factually and legally, it is bad public policy.

For all of the foregoing reasons, the Petition for Rehearing should be granted.



---

Rudolph L. DiTrapano, Esq. (WV Bar No. 1024)  
Joshua I. Barrett, Esq. (WV Bar No. 252)  
Sean P. McGinley, Esq. (WV Bar No. 5836)

**DITRAPANO BARRETT & DIPIERO, PLLC**  
604 Virginia Street East  
Charleston, WV 25301  
Phone: 304-342-0133  
Fax: 304-342-4605

Patrick C. McGinley, Esq. (WV Bar No. 5620)  
7373 South Hills Drive  
Morgantown, WV 26501

**THE ASSOCIATED PRESS,**

-----Appellant-----

By Counsel,

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

No. 34768

**THE ASSOCIATED PRESS,**

Petitioner,

v.

**STEVEN D. CANTERBURY,**

Administrative Director of the  
West Virginia Supreme Court of Appeals,

Respondent.

**CERTIFICATE OF SERVICE**

I, Sean P. McGinley, hereby certify on December 14, 2009, I served the foregoing **PETITION FOR REHEARING** on counsel for Respondent by fax on the following:

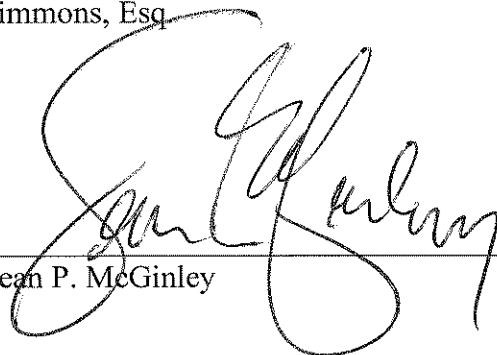
Ancil G. Ramey, Esq.  
Steptoe & Johnson, PLLC  
PO Box 1588  
Charleston, WV 25326-1588

William D. Wilmoth, Esq.  
Steptoe & Johnson, PLLC  
P.O. Box 751  
Wheeling, WV 26003-0751

Daniel J. Guida, Esq.  
3374 Main St.  
Weirton, WV 26062

Robert P. Fitzsimmons, Esq. & Robert J. Fitzsimmons, Esq.  
1609 Warwood Ave.  
Wheeling, WV 26003

Sean P. McGinley

A handwritten signature in black ink, appearing to read "Sean P. McGinley", is written over a horizontal line. The signature is stylized and cursive.