STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, West Virginia, on the 30th day of January 2009, the following order was made and entered:

State ex rel. Central West Virginia Energy
Company, Petitioner

vs.) No. 082333

The Honorable Ronald E. Wilson and
Mountain State Carbon, LLC., Respondents

This day came the Honorable Brent D. Benjamin, Justice of the Supreme Court of Appeals of West Virginia, pursuant to Rule 29(f) of the Rules of Appellate Procedure, and notified the Clerk of his voluntary temporary recusal from participating in the above-captioned proceeding.

A True Copy

Attest: _____
Clerk of Court

MEMORANDUM

TO: Rory Perry, Clerk

FROM: Brent Benjamin, C.J.

DATE: January 30, 2009

CASE: *Central West Virginia Energy Company v. Wilson*, No. 082333

RE: Ruling on Pending Motion for Disqualification

Currently pending is the Motion for Disqualification of myself by Respondent and Plaintiff below, Mountain State Carbon, LLC ["Mountain State"]. In support of its motion, Mountain State raises issues related to the purported perception of some individuals and/or groups related to lawful, independent acts during the 2004 campaign for Justice of the Supreme Court of Appeals of West Virginia by Donald Blankenship, a private individual, whom Mountain State asserts is associated with Petitioner and Defendant below, Central West Virginia Energy Company ("CWVEC"), through that company being owned by or otherwise affiliated with Massey Energy Company, for which Mr. Blankenship is the Chief Executive Officer.

Mountain State does not assert that Mr. Blankenship's actions were unlawful or that they were at the direction of or in coordination with either myself, my campaign or his employer. Mountain State likewise does not contend that I currently have, will have, or have ever had a personal interest in this litigation; that I currently have, will have, or have ever had a relationship with either the Respondent-Defendant below, Mr. Blankenship, or Massey Energy; that I have an actual bias for or against any party to this action; or that I have engaged in any improper acts or any

acts which may constitute appearances of impropriety. Mountain State does not support its motion with objective, verifiable information or data; nor does it reference my actual record of more than four years on this Court.

Mountain State also does not reference this Court's May 22, 2008 vote in *Wheeling Pittsburgh Steel Corporation and Mountain State Carbon, LLC v. Central West Virginia Energy Company and Massey Energy Company*, Nos. 080182 and 080183, in which I presided as Chief Justice over this Court's unanimous refusal to grant the petitions of Massey Energy Company and Central West Virginia Energy Company seeking appeals from an adverse jury verdict in favor of Mountain State and Wheeling Pittsburgh Steel Corporation in an amount in excess of $200 million. In support of its motion, Mountain State references media articles and related publications.

On January 26, 2009, Petitioner-Defendant Below, Central West Virginia Energy Company ("CWVEC"), filed its response to the said disqualification motion. In support of its response, CWVEC cites my concurring opinion filed on July 28, 2008, in *Caperton, et al. v. A.T. Massey Coal Company, Inc.*, No. 33350, Supreme Court of Appeals of West Virginia. CWVEC also alleges that the matters before this Court ". . . will not, contrary to the allegation in paragraph 6 of the Disqualification Motion, center around the actions and directives of Mr. Donald Blankenship."

The motion raises timely issues related not only to West Virginia recusal rules, but also more broadly to policy issues related to the election of judicial officials. The issue implicated in the said motion may be summarized as follows:

When, if at all, should a litigant's subjective perceptions about how a judge might rule supercede the objective, factual record of how the judge actually has ruled where such subjective perceptions derive not from any act on the judge's part, but instead from another person's or group's lawful, independent actions in a political campaign?

This question in turn may be considered in its constituent parts:

1. Should justice be determined by subjective perceptions and appearances or should justice be determined by the rule of law and objective facts?

2. In a state such as West Virginia which requires popularly elected judges to hear cases assigned to them (*i.e.*, "duty to sit"), may a judicial officer recuse himself without a valid reason?

3. May the lawful independent acts of a person or group during a political campaign in which the judge was a candidate for office be imputed to the judge as acts of the judge in determining whether such acts constitute impropriety or the appearance of impropriety?

4. May the lawful independent acts of a person during a political campaign in which the judge was a candidate for office be imputed to his or her employer who may thereafter be a party to an action pending before the judge for purposes of disqualification?

5. In the absence of actual bias, an act by a judicial officer being or appearing to be improper, or any other basis under applicable court rules for disqualification of a judicial officer in a specific case, may the lawful independent acts of a party, or an individual or group who has a relationship to a party, nevertheless require a judicial officer to recuse himself to protect the federal due process rights of another party to the litigation?

As referenced in the response of CWVEC, the matters raised by Mountain State have previously been considered in *Caperton, et al. v. A.T. Massey Coal Company, Inc.*, No. 33350,

Supreme Court of Appeals of West Virginia.[1] Because the issues raised herein are essentially the same as raised in *Caperton*, I am attaching my concurring opinion in *Caperton* to this memorandum, and, in doing so, incorporating herein by reference my conclusions and the law cited therein.

Canon 3E(1) provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might *reasonably* be questioned. . ." (Emphasis added.) The use of the qualifier, "reasonably," presupposes a knowledge of all facts material to an impartiality determination. It implies a thoughtful, impartial and well-informed observer. Furthermore, this qualifier helps to ensure that illegitimate attempts to remove an elected judge are unsuccessful. As an initial matter, it is difficult to accept the premise of Mountain State's motion seeking disqualification that my impartiality might reasonably be questioned when I presided over the appellate panel which, by its unanimous vote, refused to accept for further review CWVEC's petition seeking appeal of Mountain State's and Wheeling Pittsburgh Steel's $200+ million judgment over CWVEC and Massey Energy Company. Respectfully, I do not believe any thoughtful, impartial and well-informed observer could possibly, much less reasonably, believe that I could vote against CWVEC's and Massey Energy Company's interests in a $200+ million matter and not also be impartial in this injunction matter.

As stated in my *Caperton* concurrence: "In a judiciary founded on the rule of law

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[1] It is observed that David B. Fawcett, Esq., an attorney herein for Mountain State, was also counsel of record in the *Caperton* case, as well as was counsel of record in *Wheeling Pittsburgh Steel Corporation and Mountain State Carbon, LLC v. Central West Virginia Energy Company and Massey Energy Company*, Nos. 080182 and 080183. Similar motions to this motion were filed and responded to in both cases.

rather than political artifice, it is an extraordinary and unprecedented argument which contends that 'apparent conflicts' alone can have such an effect on the outcome of a case that due process considerations are implicated. While appearances should be considered in a discussion of public confidence in the judiciary, appearances alone, subject as they are to manipulation by partisan elements (including litigants), should never alone serve as the basis for a due process challenge to an otherwise well-founded legal opinion of a court of law. Public confidence is enhanced by a system founded on actualities and the rule of law. Appearance-based criteria for judicial disqualification emphasizes the importance of 'public confidence' in the judiciary as its most important value, not judicial independence, the accuracy of justice, or stability and predictability in our judicial system. Public confidence is a legitimate concern for our judicial system – but not in a vacuum. Concerns within the judicial system must be balanced. In the long run, I believe that judicial independence, the accuracy of justice and the stability and predictability of our judicial system are far more important to the public's long-term confidence in our judicial system."

Should justice be defined by subjective perceptions and appearances? I do not believe so. The shifting sands of subjective perceptions and the potential for manipulations of appearances for a system aimed at disqualifications of judges based on "apparent conflicts" should not, I believe, replace our current system in which justice is based on legal certainty, not political correctness. Politics is about perception. Justice is about the rule of law and objective facts. Here, Mountain State relies only on purported perceptions and appearances. Mountain State fails to set forth law and objective facts necessary to support its motion.

As further stated in my *Caperton* concurrence: "West Virginia's judicial officers have a duty to hear such matters as are assigned to them except those in which disqualification is required. Canon 3B(1).[2] This 'duty to sit' is not optional. As Judge John Sirica eloquently stated:

> [T]he Court cannot overlook the fact that it has an obligation to deny insufficient recusal motions. There is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is. . . . After such study as I could give the matter, I reached the conclusion that whether a judge should recuse himself in a particular case depends not so much on his personal preferences or individual views as it does the law. I have no choice in this case . . . In the absence of a valid legal reason, I have no right to disqualify myself and must sit.

U.S. v Mitchell, 377 F.Supp. 1312, 1325-26, (D.C. Cir. 1974) (internal citations omitted), *aff'd sub nom. Mitchell v. Sirica*, 502 F.2d 375 (D.C. Cir. 1974) (*en banc*), *cert denied*, 418 U.S. 955, 94 S.Ct. 3232, 41 L.Ed.2d 1177 (1974)." Although the federal system and some states no longer have a "duty to sit", West Virginia does.

The essence of the instant motion relates to lawful, independent acts of Donald

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[2] "Canons 3A and 3B(1) of the W. Va. Code of Judicial Conduct require that "[a] judge shall hear and decide matters assigned to the judge except those in which disqualification is required" and that the "judicial duties of a judge take precedence over all the judge's other activities." Canon 3E(1) provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might *reasonably* be questioned. . ." (Emphasis added.) The use of the qualifier, "reasonably," presupposes a knowledge of all facts material to an impartiality determination. It implies a thoughtful, impartial and well-informed observer. Furthermore, this qualifier helps to ensure that illegitimate attempts to remove an elected judge are unsuccessful. . . . Although some specific examples are given of situations in which a judge should recuse himself or herself, the standard itself is indefinite in recognition of the balancing of interests which must occur when a judge considers recusal. Extreme cases are clear under any standard. The key consideration appears to be that a judicial officer should not judge a case where his or her own personal interests could be preferred over the rule of law. The rule is certainly not an invitation for litigants to attempt to manipulate the system for strategic reasons, nor is it a means by which judges may avoid difficult cases."

Blankenship, a senior management employee of Massey Energy Company. Again, my concurrence in *Caperton* analyzes what constitutes acts which may have the appearance of impropriety for disqualification purposes. Initially, it is noted that the instant motion makes no allegation or assertion that I have engaged or been guilty of any actual conduct or activity which could be termed "improper." As set forth therein: "Canon 2A, of the W. Va. Code of Judicial Conduct, prohibits judges from engaging in activities which are improper or which give the appearance of impropriety. Often, this term is taken out of context by omitting reference to the term 'activities.' That some form of action by a judge is necessary in context with the term 'appearance of impropriety,' is evident from the Commentary to Canon 2A which focuses on 'irresponsible or improper *conduct* by judges.' (Emphasis added.) Furthermore, Canon 2A specifically applies to activities or conduct of the judge, himself or herself, not activities or conduct of third-parties or litigants which are outside the judge's control. While challenges to a judge because of the independent activities of a third-party may be an acceptable practice in a system focused on 'political or appearance-based justice,' it finds no basis in Canon 2A. Unless the dissenters or Appellees herein contend that the act of lawfully running for elective office or the required duty of judging a case is an activity within the purview of Canon 2A, the dissenters and Appellees must necessarily contend that appearances caused by the past activities of third-parties over which a judge or a judicial candidate exercises no control, from which he or she seeks no benefit, and for which he or she will obtain no current or future benefit may nevertheless serve as a basis for disqualification. *See* Footnote [2], *infra* (West Virginia is a "duty to judge" judicial system). *See also State ex rel. Billings v. City of Point Pleasant*, 194 W. Va. 301, 460 S.E.2d 436 (1995) (running for office is a fundamental right). Such a scenario, particularly where the supposed conflict occurred in the past with no potential for current or future benefit to the judge

based upon his or her decision, would serve to open the judicial system to easy manipulation by external forces and would lead to a destruction of public confidence in our judiciary." While I aware that many would attempt to define the term, "appearance of impropriety", in a political or end-determinative manner, I conclude that a completely independent act by a completely independent person may not be attributed to a judge for purposes of considering whether that judge has engaged in an act constituting an "appearance of impropriety."

From a federal due process standpoint, I do not believe that the instant motion raises issues sufficient to implicate a disqualification. As stated in my *Caperton* concurrence: "Matters related to a state's method for selection and disqualification of its judicial officers belong appropriately to the individual states. '[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level.' *FTC v. Cement Inst.*, 333 U.S. 683, 702, 68 S.Ct. 793, 804, 92 L.Ed. 1010 (1948). *See Turney v. Ohio*, 273 U.S. 510, 523, 47 S.Ct. 437, 411, 71 L.Ed. 749 (1927) ('[M]atters of kinship, personal bias, state policy, [and] remoteness of interest, would seem generally to be matters merely of legislative discretion.'); *Bracy v. Gramley*, 520 U.S. 899, 904-05, 117 S.Ct. 1793, 1797, 138 L.Ed.2d 97 (1997) ('[M]ost questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard.'). *See also Wheeling v. Black*, 25 W. Va. 266, 270 (1884) (disqualification of judicial officer from duty to judge because of an actual interest in a cause of action deemed to be a matter of legislative discretion). The focus is on what actually affects a judge's decision-making.

"The Due Process Clause simply does not establish a 'uniform standard,' such as the Appellees and the Dissenting opinion seek to portray herein. It establishes a 'constitutional floor.' *Bracy,* 520 U.S. at 904-05, 117 S.Ct. at 1797. This due process 'floor' is "a 'fair trial in a fair tribunal,' before a judge with no *actual* bias against the defendant *or interest in the outcome of* his particular case.' *Id.*, at 904-05 (quoting *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975) (citations omitted) (emphasis added).[3]

"It has long been recognized that there is 'a presumption of honesty and integrity in those serving as adjudicators.' *Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464. Due process therefore requires recusal only in those rare cases wherein a judge or justice has a 'direct, personal, substantial [or] pecuniary interest' in the outcome of the case. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-22, 106 S.Ct. 1580, 1585, 89 L. Ed. 2d 823 (1986) (quoting *Tumey*, 273 U.S. at 523, 47 S.Ct. at 441).

"Under the self-serving due process standard of disqualification proposed by the Appellees, the actual purpose of due process would be frustrated by litigants who would hold a near-veto power over the composition of a publicly-elected court, by those who could wage public

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[3] "'Due process is flexible and calls for such procedural protections as the particular situation demands.' *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 494 (1972). It is 'not a technical conception with a fixed content unrelated to time, place and circumstances.' *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). Thus, its 'very nature . . . negates any concept of inflexible procedures universally applicable to every imaginable situation.' *Id.* Here, the Appellees and the Dissenting opinion would render all relevant facts and policies related to an individual judge's recusal consideration and a state's balancing of interests in election laws and judicial ethics immaterial in favor of a static rule of disqualification determined by appearances which are themselves subject to ready manipulation by litigants and third persons with an interest in the outcome of a given case."

relations campaigns designed to malign judicial officers in order to manufacture 'apparent conflicts,' and by those who would challenge a decision not by its legal correctness, but by its political correctness. The long-lasting negative effect on public confidence in our courts caused by an appearance-driven due process standard for disqualification of a judicial officer would be incalculable.

"The instant motion fails to support its contention that there are due process implications herein based simply on subjective perceptions of 'appearances.' *See Aetna*, 475 U.S. at 822-24, 106 S.Ct. 1585-87 (due process required disqualification of state supreme court justice because he had a 'direct, personal, substantial, [and] pecuniary interest' in deciding a case in such a manner as to 'enhanc[e] both the legal status and the settlement value of' the judge's own similar pending lawsuits); *In re Murchison*, 349 U.S. at 133-39, 75 S.Ct. at 624-27 (due process required disqualification of judge who served as a 'one-man grand jury' and then presided over the criminal trial of the man whom he had prosecuted). *See also, Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954) (due process implicated where a judge who harbored actual bias against an attorney nevertheless sat in judgment of the attorney in a contempt proceeding); *Tumey*, 273 U.S. at 523, 535, 47 S.Ct. at 441, 445 (due process violated where mayor who presided over mayor's court had a direct financial interest in convicting defendants and in imposing fines).

"Neither Appellees nor the Dissenting opinion have presented any evidence consistent with the *Aetna* standard for implication of the Due Process Clause of the Fourteenth Amendment. Rather, they rely on subjective, after-the-fact speculations and assumptions. 'The decision whether

a judge's impartiality can "reasonably be questioned" is to be made in light of the facts as they existed, and not as they were surmised or reported.' *Cheney v. United States District Court*, 541 U.S. 913, 914, 124 S.Ct. 1391, 1392, 158 L.Ed. 225 (2004) (Scalia, J.) (Memorandum on Motion for Disqualification) (quoting *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302, 121 S.Ct. 25, 147 L.Ed.2d 1048 (2000) (Rehnquist, C.J.) (Memorandum regarding recusal). Unlike the judges in *Aetna and Tumey*, I have no pecuniary interest in the outcome of this matter. Unlike the prosecutor/judge in *In re Murchison*, or the judge/mayor in *Tumey,* I have no conflicting dual role in this matter. Unlike the judge in *Offutt*, I have no personal involvement with nor harbor any personal antipathy toward any party or counsel herein.

"Nor do the due process contentions of the Appellees and the Dissenting opinion find support in other venues. Although federal judges arguably no longer have a 'duty to sit,'[4] the federal recusal statute at 28 U.S.C. § 455(a) (1990) does reference 'appearances of impropriety.' . . . Federal courts have consistently rejected the contention that appearance-driven conflicts, without more, raise due process implications. As recently recognized by the Third Circuit, no decision 'has held or clearly established that an appearance of bias on the part of a judge, without more, violates the Due Process Clause.' *Johnson v. Carroll*, 369 F.3d 253, 262 (3d Cir. 2004), *cert. denied*, 544 U.S. 924, 125 S.Ct. 1639 (2005); *accord Callahan v. Campbell*, 427 F.3d 897, 928-29 (11th Cir. 2005); *Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1371-82 (7th Cir. 1994) (*en banc*). In

[4] "Although it has been asserted that changes in 1974 to the federal recusal statute, 28 U.S.C. § 455 (1990), were designed to eliminate a judge's "duty to sit" (*See Baker v. City of Detroit*, 458 F.Supp. 374 (E.D. Mich. 1978), federal judges continue to have a duty not to disqualify themselves without a reasonable basis. *See, e.g., Hall v. Small Business Admin.*, 695 F.2d 175 (5th Cir. 1983)."

Johnson, the Third Circuit concluded that, absent some other disqualifying conflict, appearances alone do not implicate due process considerations. In *Del Vecchio*, the Seventh Circuit similarly held that 'bad appearances alone do not require disqualification" pursuant to the due process clause because "only a strong, direct interest in the outcome of a case is sufficient to overcome [the] presumption of [the judge's] evenhandedness.' *Del Vecchio*, 31 F.3d at 1372-74. '[T]he United States Supreme Court has never rested due process on appearance.' *Id.* at 1372 n. 2. As pointed out in a concurrence in *Del Vecchio*, disqualification based upon appearance-based conflicts 'is a subject for statutes, codes of ethics, and common law, rather than a constitutional command.' *Id.* at 1391 (J. Easterbrook, concurring).[5]"

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[5] "The 'apparent conflict' standard advanced by the Appellees and the Dissenting opinion would also lead to the rather bizarre situation in which a judge with an actual bias or interest in the outcome of a case would nevertheless sit in the case, while a judge with absolutely no bias, prejudice or interest in the outcome of a case could be forced off of the case by the manipulation of appearances outside of the judge's control. For example, if a judge develops an actual animosity toward a litigant or to counsel during a case, recusal is not required. *Liteky v. United States*, 510 U.S. 540, 550-51, 114 S.Ct. 1147, 1155, 127 L.Ed. 2d 474 (1994). Therefore, under the standard set forth by the Dissenting opinion, a judge without any bias whatsoever could be disqualified so long as it could be claimed that there was an "apparent conflict", but a judge who had an actual bias could remain on a case so long as that bias developed during the pendency of the case. The same scenario is presented by the Rule of Necessity, in which justices with actual interests in the outcome of a case may nevertheless be required to hear the case. *See* (Syl. pt. 7), *State ex rel. Brown v. Dietrick*, 191 W. Va. 169, 444 S.E.2d 47 (1994)('The rule of necessity is an exception to the disqualification of a judge. It allows a judge who is otherwise disqualified to handle the case to preside if there is no provision that allows another judge to hear the matter.') Such inconsistencies highlight the fundamental flaws of the "apparent conflict" standard posed by the Dissenting opinion.

Furthermore, the only limitation to recusal motions based upon an appearance standard would be the imagination of a party. Would judges who are former legislators be subject to disqualification motions when reviewing legislation passed while they were members of the legislature? Would judges who are church members be subject to disqualification in cases involving issues such as abortion or 'church and state'? Would former prosecutors be subject to disqualification in criminal cases because they were "law and order" prosecutors?"

I do not believe that disqualification is warranted based upon the motion as presented, the facts and record of this case, these parties' previous actual record before me, and the current law of West Virginia and the United States. However, the *Caperton* matter is presently pending as a matter before the United States Supreme Court, and my decisions and rationales as set forth in my concurring opinion in *Caperton* are under appellate review. It would be personally and judicially disrespectful to the United States Supreme Court and its Justices for me to proceed in this or any other matter involving Massey Energy Company while the *Caperton* matter is pending. It would likewise be improper for this Court to delay matters involving Massey Energy Company, particularly matters such as this involving injunctions, while the *Caperton* matter is pending before that Court. I therefore voluntary temporarily recuse myself from all matters which may come before this Court for decision while the *Caperton* matter is pending before the United States Supreme Court. This temporary recusal is in keeping with precedent of this Court. *See John C. Yoder v. UMLIC-2 Funding Corp.*, No. 010100 (temporary recusal of Justice Davis during pendency of a related action in federal court).[6]

[6] I have, by separate communication, advised Acting Chief Justice Robin Jean Davis of this temporary recusal and asked that she appoint an appropriate replacement for me on matters involving Massey Energy Company which come before this Court during the pendency of the *Caperton* matter before the United States Supreme Court.