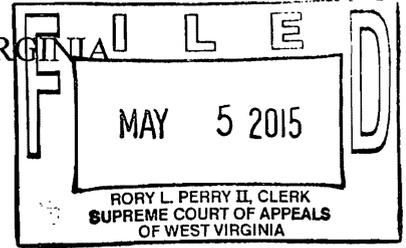


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,**

vs.

No. 14-0876

**HOWARD CLARENCE JENNER.
Defendant Below, Petitioner.**

FROM THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

REPLY BRIEF OF PETITIONER HOWARD CLARENCE JENNER

HOWARD CLARENCE JENNER
Petitioner

By Counsel

A handwritten signature in black ink, appearing to read "H. A. Smith, III".

HARRY A. SMITH, III
WV State Bar #3466
Counsel for Defendant Below, Petitioner
McNeer, Highland, McMunn and Varner, L.C.
One Randolph Avenue
Elkins, WV 26241
Telephone: (304) 636-3553
Facsimile: (304) 636-3607
hasmith@wvlawyers.com

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ARGUMENT

The Court erred in denying “Defendant’s Motion for New Trial Based upon Jury Misconduct”, Petitioner having presented evidence: (a) of extra-judicial communications, during trial, between a juror and the State’s chief prosecution witness; and (b) of prohibited extra-judicial discussions during trial, between a juror and an alternate juror

Petitioner, in his Reply Brief, will address only the jury misconduct issue (pp. 8-19 of Petitioner’s opening Brief), with emphasis on the extra-judicial communications between juror Crites and Sherman Truax. The remaining issues have been adequately addressed by the parties in the respective briefs.

Respondent, in its Brief, has not presented an argument sufficient to rebut Petitioner’s claim that he is entitled to a new trial based upon jury misconduct. In addition to citing *State v. Sutphin*, 195 W.Va. 551, 466 S.E.2d 402 (1995), and *State v. Daughtery*, 221 W.Va. 15, 650 S.E.2d 114 (2006) (both of which have been analyzed in Petitioner’s Brief as being either supportive of Petitioner’s position or distinguishable factually), Respondent cites only *State v. Daniels*, 182 W.Va. 643, 391 S.E.2d 90 (1990) and *State ex rel. Trump v. Hott*, 187 W.Va. 749, 421 S.E.2d 500 (1992) as supporting authority. However, neither *Daniel* nor *Trump* undermine Petitioner’s argument.

Daniel involves contact between a defense witness and a juror in a case in which a defendant, after conviction, sought a mistrial because of that contact. The trial court found no prejudice in the case when it was the defendant “who moved for a mistrial based upon jury tampering, yet any tampering was done in his favor and the result clearly shows the

effort to be ineffective.” *Daniel*, moreover, differs dramatically from the case at bar where the improper contact was between a juror and the chief prosecution witness against Petitioner - - a witness whose wife was murdered and who, himself, was the victim of a malicious assault. Based upon the specific *Daniel* facts, proof of “opportunity to influence the jury” was not sufficient for a mistrial.

In *State ex rel. Trump v. Hott*, 187 W.Va. 749, 421 S.E.2d 500 (1992), a case involving the consideration by the jury of improper evidence, this Court denied the State’s request for a writ prohibiting the trial court’s consideration of a new trial motion. This Court could not “say that the juror’s statements regarding the defendant’s prior misconduct were, sufficiently innocuous not to be prejudicial to the defendant.” Respondent, in its Brief, citing *Trump*, refers to the concept that reversible error “may not exist” if evidence of a defendant’s guilt is “overwhelming.” Respondent, however, fails to note that *Trump*’s reference to the overwhelming guilt concept applies “where extraneous information adverse to the Defendant has been revealed during jury deliberations” - - a factual scenario vastly different from the ongoing juror-victim/grieving spouse contact between juror Crites and Sherman Truax in the instant case.

The evidence of contact between juror Crites and Sherman Truax was more than adequate to justify an evidentiary hearing pursuant to *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L. Ed 654 (1954) (endorsed by the *Sutphin* Court), “with all interested parties permitted to participate”, *Remmer*, at 229-30, 74 S.Ct. at 451, 98 L.Ed at 656. The

trial court's refusal to permit Petitioner's counsel to examine jurors Crites, Ryan and Zickefoose was erroneous. Even without a *Remmer* hearing, however, the evidence adduced at the post-trial bearing was sufficient to prove Petitioner's claim of jury misconduct under *Sutphin*.

The trial court stated that Petitioner was unable to present specific evidence about what juror Crites and victim Truax discussed during the multiple smoke breaks that were observed, and that, consequently Petitioner's claim of misconduct must fall. Petitioner contends, however, that the questioned behavior, as it was proven, was so egregious that prejudice has to be presumed; at a minimum, Petitioner should nonetheless have been able to question the jurors who had been subpoenaed to, and who were present for, the post-trial hearing. If jurors and victims are permitted to fraternize freely, with impunity and without challenge, during the course of a capital murder trial, it is difficult to envision a scenario where jury misconduct can ever be invoked to successfully challenge a tainted verdict. To require a defendant, as the trial court does in this case, to produce witnesses who are privy to the specific words exchanged between the juror and the victim imposes, as Petitioner's counsel argued in the trial court, a burden that is realistically insurmountable. The fact that the socializing that took place, no matter what the content or context, is simply unacceptable if a defendant is to receive a fair trial with an impartial jury. In this regard, the evidence that the Crites - Truax conversations took place has not been rebutted; the State's only witness as to this issue was Laura Queen, who was forced to admit that Mr. Truax was present at the

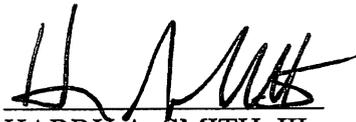
Upshur County Courthouse on each and every day of the four-day trial (App. I, 198), a fact that Respondent has not denied in its Brief herein (Respondent's Brief, pp 21-22).

CONCLUSION

For the reasons stated, and in the record as a whole, Defendant (Petitioner herein) prays that this Court: (1) reverse the judgments of the Circuit Court of Upshur County, denying Defendant's post-trial motions for new trial; and (2) remand this case to the Circuit Court of Upshur County for a new trial.

HOWARD CLARENCE JENNER

By Counsel



HARRY A. SMITH, III
Counsel for Defendant Below, Petitioner
W.Va. State Bar I.D. No. 3466
McNeer, Highland, McMunn and Varner, L.C.
P. O. Box 1909
Elkins, WV 26241
304-636-3553 - Phone
304-636-3607 - Fax

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a true copy of the **REPLY**
BRIEF OF PETITIONER HOWARD CLARENCE JENNER upon all other parties to this
action by:

_____ Hand delivering a copy hereof to the parties listed below:

or by

X Depositing a copy hereof via fax and in the United States Mail,
first class postage prepaid, properly addressed to the parties
listed below.

Dated at Elkins, West Virginia, this 4th day of May, 2015.



HARRY A. SMITH, III
McNeer, Highland, McMunn and Varner, L.C.
P. O. Box 1909
Elkins, WV 26241
304-636-3553 - Phone
304-636-3607 - Fax

ADDRESSEE(S)

Benjamin F. Yancey, III
Assistant Attorney General
Office of the Attorney General
of West Virginia
State Capitol
Building 1, Room W-435
Charleston, WV 25305
Fax: 304-558-2525