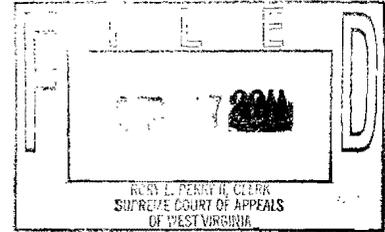


In the Supreme Court of Appeals

of

West Virginia

DOCKET No. 11-0478



STATE OF WEST VIRGINIA, Plaintiff Below,
Respondent,

vs.

Appeal from a final order of
Case No. 07-F-38
Boone County Circuit Court

JASON GILLISPIE, Defendant Below,
Petitioner

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... i

I. APPELLANT’S REPLY TO THE JUROR MISCONDUCT ISSUE RESPONSE..... 1

 A. The jury foreman signed a petition prior to trial requesting that Appellant be denied bond but did not respond in the affirmative when asked by the lower court at least three times concerning signing such a petition 1

 B. The State’s Response Brief does not contest the two key legal issues in the appeal pertaining to juror misconduct..... 2

 C. The State’s Response Brief commits a fundamental error in its analysis of case law in that it confuses juror bias issues that are known and dealt with during *voir dire* with the juror bias issues that are unknown and hidden during *voir dire* 3

 D. The State’s Response Brief is wrong in its suggestion that error is harmless 6

II. APPELLANT’S REPLY TO THE POOL STICK RESPONSE..... 8

 A. Appellant argues that the State’s Response Brief improperly attempts to change the facts to enhance its argument concerning the foundation for the admission of the pool stick 8

 B. State’s Response Brief argues two diametrically opposed points with regard to harmless error..... 10

CONCLUSION..... 11

TABLE OF AUTHORITIES

Cases

<i>Flesher v. Hale</i> , 22 W.Va. 44 (1883).....	6
<i>Ladd v. State</i> , 3 S.W.3d 547 (Tex. Crim. App. (1999)	5
<i>O'Dell v. Miller</i> , 211 W.Va. 285, 656 S.E.2d 535 (1996).....	4
<i>Proudfoot v. Dan's Marine Serv.</i> , 210 W.Va. 498, 558 S.E.2d 298, 305 (2001).....	6
<i>State ex rel. Farmer v. McBride</i> , 224 W.Va. 469, 686 S.E. 609 (2009).....	6, 7
<i>State ex rel. Quinones v. Rubenstein</i> , 218 W.Va. 388, 624 S.E.2d 825 (2005).....	6, 7
<i>State v. Ashcraft</i> , 172 W.Va. 640, 309 S.E.2d 600 (1983).....	4
<i>State v. Audia</i> , 171 W.Va. 568, 301 S.E.2d 199 (1983).....	5
<i>State v. Dellinger</i> , 225 W.Va. 736, 696 W.E.2d 38 (2010).....	2, 3
<i>State v. Finley</i> , 177 W.Va. 554, 355 S.E.2d 47 (1987).....	4
<i>State v. Gilman</i> , 266 W.Va. 453, 702 S.E.2d 276 (2010).....	5
<i>State v. Hatcher</i> , 211 W. Va. 738, 568 S.E.2d 45 (2002).....	3
<i>State v. Hughes</i> , 225 W.Va. 218, 691 S.E.2d 813 (2010)	4, 5
<i>State v. Kopa</i> , 173 W.Va. 43, 311 S.E.2d 412 (1983).....	9, 10
<i>State v. Miller</i> , 197 W.Va. 588, 476 S.E.2d 535 (1996).....	4
<i>State v. Mills</i> , 221 W.Va. 283, 654 S.E.2d 603 (2007)	5
<i>State v. Phillips</i> , 194 W.Va. 569, 461 S.E. 2d 75 (1995)	6, 7
<i>State v. Preacher</i> , 167 W.Va. 540, 280 S.E.2d 559 (1981).....	4
<i>State v. White</i> , 227 W.Va. 231, 707 S.E.2d 841 (2011)	5
<i>State v. Wilson</i> , 157 W.Va. 1036, 207 S.E.2d 174 (1974)	5

Introduction. The State's "BRIEF IN RESPONSE TO THE PETITIONER'S BRIEF" (hereinafter referred to as "State's Response Brief" and for citation purposes "SRB"), admits key issues on the issue of juror misconduct, which require that Appellant's conviction be reversed and a new trial granted. Appellant reverses the order of argument addressing first the important admitted issues:

I. APPELLANT'S REPLY TO THE JUROR MISCONDUCT ISSUE RESPONSE.

A. The jury foreman signed a petition prior to trial requesting that Appellant be denied bond but did not respond in the affirmative when asked by the lower court at least three times concerning signing such a petition.

1. State's Response Brief admits and states: "In the instant case, Juror Burke, who is over 70 years old, did apparently sign a petition against Petitioner receiving bond prior to trial." SRB at 21. "In the instant case, Juror Burke apparently signed a pretrial petition asking the trial court to deny Petitioner bond..." SRB at 24. "It was later discovered after the trial that a jury pool member, Robert L. Burke, had signed one such pretrial petition, which was a petition asking the court to deny Petitioner bond." SRB at 4.

2. State's Response Brief admits by failing to deny that the petition signed by Juror Burke states in pertinent part: "...We the undersigned citizens of Boone County respectively request that Jason Gillispie not be granted a bond in the case of the death of Walter Paul 'BUBBY' McDerment." (Emphasis in original.) (Vol. 1, AR 6).

3. State's Response Brief admits that Juror Burke along with other jury pool members was asked under oath by the trial court the following questions: "...Were any of you ever approached by anybody asking you to sign a petition regarding this case at all?" The lower court then remarked: "Nobody was?" The lower court then followed up further: "Nobody even approached you and said, 'Hey, I'm doing this?'" Then finally the lower court asked: "So did any of you sign a petition?" And comments: "That seems to follow logically, but I thought I would ask." SRB at 3 to 4.

4. State's Response Brief admits: "...Robert L. Burke, had signed one such pretrial petition, asking the court to deny Petitioner bond." SRB at 4. "...Juror Burke did not respond to questions about the petition." SRB at 24.

B. The State's Response Brief does not contest the two key legal issues in the appeal pertaining to juror misconduct: First, that Appellant was entitled to a meaningful *voir dire* and to intelligently gauge the impartiality of the jury and exercise challenges. And second, that Appellant did not waive or forfeit the juror misconduct issue by a failure of due diligence or waiver by delay in presenting the matter to the lower court.

1. The State's Response Brief correctly recognizes that: "The purpose behind *voir dire* is to allow parties to intelligently gauge the impartiality of the jury and exercise challenges." SRB at 24, citing Syl. Pt. 3, *State v. Dellinger*, 225 W.Va. 736, 696 W.E.2d 38 (2010).

2. The State's Response Brief concedes: "Petitioner correctly analyzes much of the West Virginia law on diligence in the discover (sic) of potential juror issues." SRB at 28. The State's Response Brief makes no argument that Appellant waived or forfeited the juror misconduct issue by a failure of due diligence or waiver by delay in presenting the matter to the lower court. Instead, the State argues that the lower court made no such finding of waiver or lack of due diligence. SRB at 28.

C. The State's Response Brief commits a fundamental error in its analysis of case law in that it confuses juror bias issues that are known and dealt with during *voir dire* with the juror bias issues that are unknown and hidden during *voir dire*. This confusion conflicts with the uncontested legal point set forth in this Reply Brief in B.1. This is because *voir dire* not only pertains to challenges for cause but also intelligently exercising peremptory challenges. The several cases cited in State's Response Brief can be clarified and placed in the following categories:

1. Juror bias issues that are unknown and hidden during *voir dire*: *State v. Dellinger*, 225 W.Va. 736, 696 W.E.2d 38 (2010). (The purpose of *voir dire* is to elicit information which will establish a basis for challenges for cause and to acquire information that will afford the parties an intelligent exercise of peremptory challenges.) (Reversed.) *State v. Hatcher*, 211 W. Va. 738, 568 S.E.2d 45 (2002). (A juror who did not disclose material and potentially disqualifying evidence in response to direct inquiries during *voir dire* required reversal of the appellant's conviction.) (Reversed.)

2. Juror bias issues are known but not fully dealt with during voir dire: *State v. Preacher*, 167 W.Va. 540, 280 S.E.2d 559 (1981). (Where a trial court's restriction of the scope of *voir dire* undermines the rights sought to be protected by the voir dire process it will be held to be an abuse of discretion and reversible error.) (Reversed.) *State v. Ashcraft*, 172 W.Va. 640, 309 S.E.2d 600 (1983). (Abuse of discretion and reversible error for the trial court to preclude individual *voir dire* of the jury panel after counsel requested individual *voir dire* to determine if the admitted relationships created impermissible bias or prejudice.) (Reversed.) *State v. Finley*, 177 W.Va. 554, 355 S.E.2d 47 (1987). (When a trial court determines that prospective jurors have been exposed to information which may be prejudicial, the trial court, upon its own motion or motion of counsel, shall question or permit the questioning of the prospective jurors individually, out of the presence of the other prospective jurors, to ascertain whether the prospective jurors remain free of bias or prejudice.) (Reversed.) *O'Dell v. Miller*, 211 W.Va. 285, 656 S.E.2d 535 (1996). (A trial court is required to consider the totality of the circumstances and grounds relating to potential request to excuse a prospective juror and to make a full inquiry to examine those circumstances and resolve any doubts in favor of excusing the juror.) (Civil case reversed.)

3. Juror bias issues that are known and fully dealt with during voir dire: *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996). (No reversible error because trial judge asked the circuit clerk to ask the prospective jurors some general *voir dire* questions before proceeding to allow questions from counsel.) (Affirmed.) *State v. Hughes*, 225

W.Va. 218, 691 S.E.2d 813 (2010). (No abuse of discretion of trial court where jurors are rehabilitated and state they can follow the law or when no objection was made at trial.) (Affirmed.) *Ladd v. State*, 3 S.W.3d 547 (Tex. Crim. App. (1999)). (No abuse of discretion of trial court where juror is rehabilitated.) (Cited in *State v. Hughes*, 691 S.E.2d at 824, *supra*.) (Affirmed.) *State v. White*, 227 W.Va. 231, 707 S.E.2d 841 (2011). (No indication that challenged prospective jurors would have been unable faithfully and impartially to apply the law, therefore trial court did not abuse its discretion in refusing to disqualify them.) (Affirmed.) *State v. Mills*, 221 W.Va. 283, 654 S.E.2d 603 (2007). (No abuse of discretion where juror comes into contact with police officers during his employment or worked with a witness as a firefighter.) (Affirmed.) *State v. Gilman*, 266 W.Va. 453, 702 S.E.2d 276 (2010). (Minister who presided over funeral of victim, instructed not to discuss case with fellow jurors and replaced by alternate juror prior to deliberation not prejudicial to defendant.) (Affirmed.) *State v. Audia*, 171 W.Va. 568, 301 S.E.2d 199 (1983). (Where a prospective juror is one of a class of persons represented by the prosecuting attorney at the time of trial, but there has been no actual contact between that juror and the prosecutor, the existence of the attorney-client relationship alone is not *prima facie* grounds for disqualification of that juror.) (Affirmed.) *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974). (Trial court did not abuse discretion where questions already covered, covered by instructions or were not crucial to the defense of the case.) (Affirmed.) (Note. Justice Neely dissented in *State v. Wilson*, 207 S.E.2d at 183. He would have reversed on the *voir dire* issue indicating the lower court was too

restrictive. Thus, this case could arguably be placed in Section C. 2. of this Reply Brief.)

4. Where lower court's error, if any, concerning striking jurors was not shown to be violation of constitutional right because no showing of prejudice: *State ex rel. Farmer v. McBride*, 224 W.Va. 469, 686 S.E. 609 (2009). (*Habeas corpus* case. Loss of a peremptory challenge because of a trial court's improper failure to grant a challenge for cause does not amount to a violation of a constitutional right without a showing of prejudice.) (Conviction affirmed.) *State ex rel. Quinones v. Rubenstein*, 218 W.Va. 388, 624 S.E.2d 825 (2005). (*Habeas Corpus* case. Loss of a peremptory challenge because of a trial court's improper failure to grant a challenge for cause does not amount to a violation of a constitutional right without a showing of prejudice.) (Conviction affirmed.) *State v. Phillips*, 194 W.Va. 569, 461 S.E. 2d 75 (1995). (Loss of a peremptory challenge because of a trial court's improper failure to grant a challenge for cause does not amount to a violation of a constitutional right without a showing of prejudice.) (Reversed on other grounds.)

D. The State's Response Brief is wrong in its suggestion that error is harmless. There are two arguments on this point.

1. As noted in Appellant's Brief at page 24, Syl. Pt. 3, *Proudfoot v. Dan's Marine Serv.*, 210 W.Va. 498, 558 S.E.2d 298, 305 (2001), the former requirement of *Flesher v. Hale*, 22 W.Va. 44 (1883), that a defendant must show injustice when a disqualified juror participated in returning a verdict was expressly overruled. Appellant argues that the juror in question in the instant case, Mr. Robert L. Burke, stated an opinion adverse to

Appellant directly relating to the case. In addition, although State's Response Brief argues that the lower court's comments were hypothetical, the lower court in its ruling stated: "I will say for the record, for what it's worth, if I would have known, if it were brought to my attention by Defense Counsel that he signed the petition, I would have probably struck Mr. Burke." (Vol. II, M-8). It is not stated in the record why Mr. Burke was not called upon to explain his failure to answer. However, Mr. Burke departed this life on June 23, 2010, several months prior to the hearing on the matter. (See, death certificate attached.)

2. The cases cited in State's Response Brief pertaining to harmless error each concern a defendant having to use peremptory strikes in cases where juror bias was known, fully dealt with but the lower court may have been in error in not striking the juror for cause. *See, Phillips, State ex rel. Farmer, and State ex rel. Quinones*. Fully cited in section C.4. of this Reply. This is not the situation in the present case. The present case pertains to the situation where Appellant did not have the opportunity to intelligently exercise his peremptory challenge because the questions pertaining to the signing of the petition were not answered by Mr. Burke. Mr. Burke not only served on the jury, but also acted in directing the deliberations as foreman. Deliberations that not only dealt with guilt or innocence, but also the degree of the offense.

II. APPELLANT'S REPLY TO THE POOL STICK RESPONSE

A. Appellant argues that the State's Response Brief improperly attempts to change the facts to enhance its argument concerning the foundation for the admission of the pool stick.

1. The State's Response Brief states: "At a pretrial hearing prior to executing the cut, the prosecutor asked the court's permission and asked whether the *defendant objected* to cutting *one of the seven pool cues* in that way and for that purpose." SRB at 3. (Emphasis added.) State's Response Brief goes on to state: "Defense counsel responded, '*I don't care,*' and the court instructed the prosecutor, "[f]air enough. Use one of the nine [*sic*]. I think it's a demonstrative aid.'" SRB at 3. (Emphasis added relating to misrepresentations.)

2. Appellant's Brief correctly stated this exchange and there was no misstatement on the lower court's part:

Mr. Bazzle: I didn't want to go destroy or alter one of the sticks and then them say, heck, this might have been the murder weapon that you cut in half. Use one of the nine?

Mr. Curnutte: I don't care.

The Court: Fair enough. Use one of the nine. I think it's a demonstrative aid.

(Vol. I, AR 47), Appellant's Brief, at 9 to 10.

Specifically, the State's Attorney earlier stated to the lower court: "So we have, I believe nine -I think nine different sticks." (Vol. I, AR 45).

3. There are three misrepresentations in the State's Response Brief on this point:

- a. Changing the number from nine to seven.

b. Incorrectly quoting Defense Counsel as waiving an objection, when he in fact was saying he didn't care which of the nine were tested.

c. Implying the lower court misunderstood and misstated the number.

4. The misrepresentation is important to State's Response Brief on the pool stick argument. The State emphasized that it tested the lightest of the seven sticks seized. This is stated thirteen (13) times in the brief. SRB at 3 (twice), 6, 7, 8 (three times), 11 (twice), 12, 15 (twice). Two sticks were ignored. (Note. The two ignored sticks are referred to in Appellant's Brief at 11.) The state called the bar owner, Carolyn Weaver as a witness but made no attempt to lay any foundation concerning what happened with the pool stick used by Appellant in the offense. In fact, her testimony appears to suggest that the situation in the bar was chaotic after the incident and she made no mention of seeing any pool stick. (Vol. II, T-4, 131 to 133). As noted in Appellant's Brief, Defense Counsel objected to the lack of foundation on this point. Appellant's Brief at 12.

5. It is interesting to note the manner in which State's Response Brief treats *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983). *Kopa*, according to the State, supports the contention that: "Proof that the pool cue was the exact murder weapon *was unnecessary.*" SRB at 9. (Emphasis added.) In *Kopa* the State was provisionally allowed to introduce a knife "upon the assurance of the prosecution that it would be connected to the murder." 311 S.E.2d at 425. Apparently proof in *Kopa* of the exact murder weapon *was necessary* as revealed by the following discussion:

The record indicates that scientific analysis revealed no blood on the knife. At the trial, the medical examiner testified that the knife could have been the murder weapon, however, on cross-examination the appellant established through the testimony of the medical examiner that five knives from the courthouse kitchen could also have inflicted the deadly wounds of the victim. *Upon motion of the prosecution to admit the knife into evidence the appellant objected and the knife was excluded from the trial.* The trial court later denied the appellant's motion for a mistrial based upon the prosecution's use of the knife.

311 S.E.2d at 425. (Emphasis added.)

B. State's Response Brief argues two diametrically opposed points with regard to harmless error.

1. State's Response Brief states: "In order to show the jury the pool cue's deadliness as a weapon and not merely a brittle piece of wood that would break on impact, which was of consequence to the inference of malice, willfulness, and deliberation for first-degree murder derived from the use of a deadly weapon, the prosecution instructed the police to cut the lightest pool cue in half to reveal its metal interior." SRB at 8.

2. State's Response Brief later states: "It is true that real evidence has an emphasis and impact on juries due to its tangibility, but Petitioner did not object to the admission of the pool cues generally. Instead, Petitioner objected to the cut pool cue revealing a metal interior, which would have no more emphasis and impact as real evidence on the jury than that of the uncut pool cues." SRB at 15.

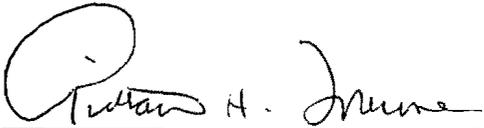
As to all other points, Appellant relies on the Appellant's Brief, previously submitted.

CONCLUSION

The Appellant's conviction should be reversed and this matter should be remanded for a new trial.

Respectfully submitted,

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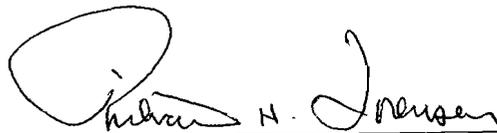
CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2011, true and accurate copies of the foregoing **Appellant's Reply Brief** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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EXHIBITS

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