

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AUG 18 2011

NO. 11-0478

STATE OF WEST VIRGINIA,

Respondent,

v.

JASON GILLISPIE,

Petitioner,

BRIEF IN RESPONSE TO THE PETITIONER'S BRIEF

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Comes now the State of West Virginia, by counsel, Laura Young, Assistant Attorney General, and files the within Brief in Response to the Petitioner's Brief.

I.

STATEMENT OF THE CASE

On December 23, 2006, Jason Gillispie (hereinafter "Petitioner") killed Walter McDerment (hereinafter "the victim") in a bar in Boone County, West Virginia, by twice striking him in the back of the head with a pool cue. App. vol. II, T-3, at 32-35, 57, 100, 132; App. vol. II, T-4, at 18, 83-84, 102. Several witnesses, including David Jeffers, who knew none of the parties involved, Helen Barker, the bartender, and three of the victim's friends, Patricia Mooney, James Mooney, and Richard Arthur, testified that they had not seen Petitioner and the victim interact at all prior to Petitioner striking the victim with two "extremely hard" blows to the back of the head. App. vol.

II, T-3, at 33, 53, 99, 130, 138; App. vol. II, T-4, at 81, 123. David Jeffers testified that Petitioner struck the victim like he was “swinging for a home run.” App. vol. II, T-3, at 33. According to James Mooney, a witness seated with the victim at the moment of the incident, Petitioner struck the victim “all of a sudden, right out of the blue.” *Id.* at 132, 136. Petitioner and Petitioner’s brother, however, testified that the victim had kicked Petitioner’s barstool and had “slurred” and threatened him. *Id.* at 142; App. vol. II, T-6, at 29-30, 55-56, 60. Due to these alleged threats and Petitioner’s professed concern that the victim might hurt him, Petitioner testified that he “could have been angry” at the victim when he struck the victim with the pool cue. *Id.* at 69.

Immediately after striking the victim, Petitioner appeared “extremely agitated” and “angry.” App. vol. II, T-3, at 36. Petitioner threw the pool cue and exited the bar, screaming, according to one witness, “F you, Walt McDerment! I hope you die!” *Id.* at 36; vol II, T-4, at 64, 84; vol. II, T-3, at 67. The victim did die later that evening at CAMC hospital from complications related to blunt force trauma to the head, including bleeding, swelling, pressure on the brainstem, and cardiac activity. App. vol. II, T-5, at 62-64. The medical examiner pointed out during his testimony that the cardiac activity was not an independent cause of death. *Id.* at 58, 63-64.

The police were called immediately, and EMT and police arrived shortly thereafter. App. vol. II, T-4, at 17. While collecting evidence, the police were told by the owner of the bar that the pool cue used in the commission of the crime had been picked up and replaced on the pool cue rack. *Id.* at 45; App. vol. II, T-5, at 11. Two pool cues that were not in the rack were inspected but not collected due to the lack of evidence of use and the bar owner’s indication that the weapon had been replaced on the rack. *Id.* at 13-14. The police could not determine on scene which pool cue had been used, and therefore, the police collected all seven pool cues from the rack. *Id.* at 13. Despite

further testing and investigation, the police never determined which of the seven pool cues was used to commit the murder. *Id.* at 13-17. The prosecutor at trial moved the admission of all seven pool cues into evidence. *Id.* at 21.

To explain why the wooden pool cue did not break upon impact and to show the jury the weight and potential deadliness of even the lightest of the seven pool cues recovered, the prosecutor had the police cut the lightest pool cue in half in order to reveal its metal interior. App. vol. I, at AR 45-47. 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. App. vol. I, at AR 45-47. 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." *Id.* at AR 47. The prosecutor and police chose the lightest pool cue of the seven recovered (18-ounces). App. vol. II, T-5, at 20. At trial, the prosecutor moved for admission of the cut pool cue, but defense counsel objected. App. vol. II, T-5, at 18-19. The trial court overruled the objection and allowed the cut pool cue to be admitted and displayed to the jury. *Id.* at 19, 21-22.

During the court's general *voir dire* of the jury pool before trial, the court asked jury pool members about various pretrial petitions regarding the case circulated in the community that gathered a large number of signatures:

Now, a few months ago there was a couple different petitions going around regarding this case. There were some petitions, you know, asking for one thing, and some petitions asking for another thing. Were any of you ever approached by anybody asking you to sign a petition regarding this case at all?

Nobody was? Nobody even approached you and said, "Hey, I'm doing this"? Were any of you aware of any of these petitions?

So did any of you sign a petition? That seems to follow logically, but I thought I would ask.

App. vol. I, at AR 50-51. No members of the jury pool responded to the questions regarding petitions, implying a negative response. *Id.* 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.

When the potential jurors were asked whether they knew anyone in the sheriff's office, Juror Burke raised his hand. *Id.* at AR 55. During individual *voir dire* in chambers, Juror Burke openly admitted that he knew policemen in the community and that he had interacted with policemen to capture disruptive dogs in his neighborhood and report the theft of his lawn mower, but he expressed that it would not influence his opinion of the case. *Id.* at AR 55-58. Juror Burke specifically stated, in response to the whether he could fairly listen to the evidence, "I can listen to the evidence. . . . I don't judge anybody." *Id.* at 58. In response to another question concerning the location of the incident inside a bar, Juror Burke also responded with an attitude of fairness stating, "It all depends on the evidence and the situation." *Id.* at 59. Finally, Juror Burke was asked whether he knew the victim, Walter McDerment. *Id.* at AR 60. Juror Burke unequivocally replied, "I have no idea who he is." *Id.* Without objection, Juror Burke was empaneled on the Petitioner's jury.

At trial, five eye witnesses—David Jeffers, Patricia Mooney, James Mooney, Richard Arthur, and Jennifer Arthur—testified that Petitioner struck the victim with a pool cue on December 23, 2006. App. vol. II, T-3, at 32-35, 100, 131-132; App. vol. II, T-4, at 83-84, 102. Petitioner also willingly admitted in his testimony that he struck the victim in the head with a pool cue. App. vol. II, T-6, at 30-32. He testified that he could have been angry at the time of the incident and specifically aimed

for the victim's head. *Id.* at 64-65, 69. Petitioner was arrested and ultimately convicted by a jury of Second-Degree Murder. App. vol. I, at AR 9-11.

In 2009, after Petitioner had been convicted, Petitioner made a motion for a new trial based on information that Robert L. Burke, the foreperson on Petitioner's jury, had signed a pretrial petition against Petitioner. App. vol. I, at AR 17-20. On the petition, the signature appears with the initials "SHL" after the name and the address "1078 Railroad Avenue." *Id.* at AR 6. Juror Burke listed on his juror questionnaire that he was a member of the "Silver-Haired Legislature" and his address was "1078 Railroad Avenue." *Id.* at AR 22-23. The trial court denied the motion for a new trial. App. vol. I, at AR 25-27. At the motion hearing concerning the juror issue, no evidence was presented concerning Juror Burke's motivations for or knowledge of signing the petition and failing to respond to questions about it. *See generally* App. vol. II, M-8. Juror Burke did not submit an affidavit, never testified, nor was he deposed concerning this matter. The trial court and counsel briefly speculated as to Juror Burke's circumstances and motivations, suggesting he might have either simply forgotten or lied, but defense counsel pointed out that any such statement would be speculation. *Id.* at 9-10.

II.

SUMMARY OF ARGUMENT

Petitioner now appeals his conviction of Second-Degree Murder assigning two errors to the trial process. Petitioner asserts that: 1) the trial court abused its discretion in admitting the cut pool cue into evidence; and 2) the trial court abused its discretion in denying Petitioner's motion for a new trial based upon Juror Burke's signature on the pretrial petition against Petitioner. The State maintains that the trial court did not abuse its discretion on either issue. The cut pool cue was

admissible to allow the jury to understand the nature of the weapon used because, although the pool cue was not shown to be the exact pool cue used, it was the lightest of seven pool cues that were determined by police to be the only seven possible murder weapons. Moreover, error, if any, regarding the cut pool cue was harmless. The evidence against Petitioner was substantial, and no prejudice resulted from admission of the pool cue.

The State also maintains that the trial court did not abuse its discretion in ruling on the juror issue. Juror Burke's presence on Petitioner's jury did not violate Petitioner's rights. Juror Burke's signature appeared on a widely circulated pretrial petition against Petitioner, and Juror Burke did not respond to questions about that petition during *voir dire*. No evidence apart from the signature itself suggests Juror Burke, an older man, had any bias against Petitioner, had any ill motive against Petitioner, or even knew he was signing a petition against Petitioner. He might have simply forgotten he signed it or never knew what he was signing. Instead, Juror Burke expressed candor, fairness, and impartiality during *voir dire*. Moreover, even if the Court finds slight bias rising to the level of constitutional error, such error here is harmless.

Therefore, the trial court did not abuse its discretion as to either assignment of error. Petitioner was properly tried and convicted of Second-Degree Murder.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests Rule 19 oral argument in this matter. Although the legal aspects of this appeal are clear and the briefs properly and completely present the parties' contentions, the Court might benefit from a discussion of the factual issues underlying Petitioner's claims and the

legal application of those facts. In that vein, the State requests Rule 19 oral argument in this matter if the Court so deems Petitioner's request necessary.

IV.

ARGUMENT

A. The trial court did not abuse its discretion in admitting a pool cue cut in half by police to reveal its metal interior.

- 1. Cutting the lightest pool cue of seven pool cues recovered from the crime scene was relevant to show the jury the nature and deadliness of the seven possible murder weapons, and it was not reversible error that the prosecution did not establish which of the seven pool cues was the exact murder weapon.**

This Court "allocate[s] significant discretion to the trial court in making evidentiary and procedural rulings." Syllabus Point 1, *State v. Johnson*, 213 W. Va. 612, 584 S.E.2d 468 (2003). Therefore, the Court reviews evidentiary rulings and admissions under an abuse-of-discretion standard. *Id.* at Syl. Pt. 1 and Syl. Pt. 2.

The West Virginia Rules of Evidence 401 and 402 allow the admission of "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." This Court has also held that "[m]alice, wilfulness and deliberation, elements of the crime of first-degree murder, may be inferred from the intentional use of a deadly weapon." Syllabus point 2, *State v. Ferguson*, 165 W. Va. 529, 270 S.E.2d 166 (1980)." Syllabus Point 2, *State v. Daniel*, 182 W. Va. 643, 391 S.E.2d 90 (1990).

Petitioner was charged with first-degree murder. App. vol. I, at AR 7. 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, wilfulness, 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. App. vol. I, at AR 45-47; App. vol. II, T-7, at 67. The trial court did not abuse its discretion in admitting proof that the interior of even the lightest pool cue recovered as a possible murder weapon contained metal, not merely wood.

Moreover, the inability of the State to conclusively establish which pool cue among the seven was the exact murder weapon does not constitute reversible error. Petitioner argues that the State conducted a “test” or “experiment” on the pool cue, and tests must “be shown to have been conducted under similar conditions as those prevailing at the time and place of the occurrence.” Pet.’r’s Brief, 15. The State maintains that the act of cutting the lightest of seven pool cues recovered for the purpose of displaying its metal interior was not a “test” in the legal sense requiring recreation of exact conditions; cutting the pool cue was not the recreation of any condition. Instead, cutting the pool cue was simply a means to display the interior of the pool cue. It was similar to opening a closed bag.

A test in the legal sense requires the recreation “of original conditions sought to be recreated.” This Court has explained that:

The results of an out-of-court experiment will not be admitted into evidence unless the party seeking to introduce such evidence demonstrates that the conditions under which the experiment was conducted were substantially similar to *the original conditions sought to be recreated* and the question of whether to admit such evidence for consideration by the jury is within the sound discretion of the trial court.

Syllabus Point 5, *State v. Kopa*, 173 W. Va 43, 311 S.E.2d 412, 425 (1983) (emphasis added).

“Tests” require a parallel original event or happening, sought to be recreated. In *Kopa*, for example, the test was the recreation of a voice on a 911 police call made on the evening of the crime. *Id.* at

54, 311 S.E.2d at 424. In *Nardo*, the test was the recreation of possibly faulty brakes in a 1949 Ford automobile similar to those alleged in an accident. *Spurlin v. Nardo*, 145 W. Va. 408, 114 S.E.2d 913 (1960). In *Newman*, the test was the recreation of gunfire from a gun to prove that the shots were fired inside the house on the evening of the murder. *State v. Newman*, 101 W. Va. 356, 132 S.E. 728 (1926). Cutting a pool cue in half to reveal its metal interior is not the “recreation” of any event requiring exact conditions, but instead, it is merely the means to reveal the interior of physical evidence.

Proof that the pool cue was the exact murder weapon was unnecessary. This Court has held that displaying a similar, though not exact, piece of evidence to the jury is not reversible error. In *Kopa*, for example, a knife recovered from the car the defendant drove on the evening of the crime was displayed during his trial, and the medical examiner testified that the knife *could* have been the murder weapon. *Kopa* at 56, 311 S.E.2d at 425. On cross examination, the medical examiner admitted that several knives in the courthouse kitchen *could* also have been the murder weapon. *Id.* When the knife was later discovered not to have been the murder weapon, it was excluded from evidence, but the trial continued and the defendant convicted. *Id.* This Court held that the trial court did not abuse its discretion in allowing a similar, though not exact, knife to be displayed but later excluded. *Id.*

Similarly, courts have held that even a replica of real evidence may be allowed at trial. In *Acord*, the prosecution moved to admit the replica of a stolen ring into evidence, and the trial court allowed it. *State v. Acord*, 175 W. Va. 611, 336 S.E.2d 741 (1985). This Court held that “[w]hen an accurate physical replica of an unavailable object is helpful in clarifying a witness's testimony, that replica may, in the discretion of the trial court, be introduced into evidence.” *Id.* at Syl. Pt. 2.

In *United States v. Grandison*, the Fourth Circuit Court of Appeals also upheld the admission of the replica of a machine gun used in the commission of several murders. 780 F.2d 425 (4th Cir. 1985).

In this case, Petitioner does not argue that the admission of the seven pool cues was error. Instead, Petitioner argues that admitting the cut pool cue into evidence was error because it was not conclusively established that the one interior displayed was of the weapon actually used on the night of the murder. Pet'r's Br., at 13-17. However, the police determined at the crime scene that the murder weapon had been placed on the pool cue rack and that two pool cues outside the rack were not the murder weapon. App. vol. II, T-4, at 45; App. vol. II, T-5, at 11, 13-14. The police could not determine which pool cue on the rack was used in commission of the crime. *Id.* Due to this inability of police to determine which of the seven pool cues was used, the prosecutor introduced all seven pool cues at trial, one of which (the lightest of the seven) was cut to reveal its metal interior. App. vol. I, at AR 45-47; App. vol. II, T-5, at 19-20. Logically, if the lightest pool cue contained metal, the other heavier pool cues must have contained metal as well. The trial court, in its discretion, allowed the introduction of all seven pool cues, including the cut one. App. vol. II, T-5, at 19-22. The trial court found that the cut pool cue demonstrated something of aid for the jury. App. vol. I, at AR 45-47. Much like the weapons in *Kopa*, *Acord*, and *Grandison*, the cut pool cue might not have been the murder weapon. However, as with the similar knife in *Kopa* and the replicas in *Acord* and *Grandison*, even if the cut pool cue was not the exact weapon used, it was not reversible error to admit it as an aid to the jury in understanding the nature of the weapon used.

Therefore, the trial court did not abuse its discretion in allowing the cut pool cue into evidence. The pool cue was cut in order to allow the jury to understand the nature of the weapon

used, and even if the cut pool cue was not the exact weapon used, the pool cue was the lightest of the seven pool cues recovered. The trial court did not abuse its discretion.

2. An expert was unnecessary to explain the pool cue's metal interior.

Petitioner claims that because the prosecution could not prove which pool cue was the murder weapon, an expert was necessary to discuss how all pool cues are made. Pet'r's Br., at 14. Under the West Virginia Rules of Evidence, an expert is necessary only when scientific, technical, or specialized knowledge is necessary. W. Va. R. Evid. 702.

In this case, cutting the pool cue merely revealed its metal interior. No scientific, technical, or specialized knowledge was necessary to explain the presence of metal in the pool cue. The prosecution was only interested in displaying the physical state of the lightest of seven pool cues recovered from the crime scene, not explaining how all pool cues everywhere are made.

Therefore, an expert was unnecessary. The physical state of metal inside the lightest pool cue recovered from the crime scene did not require expert knowledge or explanation.

3. The trial court did not abuse its discretion in admitting the cut pool cue with regard to Rule 403.

Petitioner asserts that admission of the cut pool cue violated Rule 403 of the West Virginia Rules of Evidence because its probative value was outweighed by its misleading prejudicial effect. Pet'r's Br., at 15-17. In *State v. Knuckles*, this Court stated the rule that "the trial court *may* exclude relevant evidence if its probative value is substantially outweighed by the danger of misleading the jury." *State v. Knuckles*, 196 W. Va. 416, 242, 473 S.E.2d 131, 139 (1996) (emphasis added).

In this case, the trial court did not exclude the cut pool cue under Rule 403. The trial court stated its belief that the cut pool cue could aid the jury, and the trial court admitted the cut pool cue

into evidence. App. vol. I, at AR 47; App. vol. II, T-5, at 19, 21-22. Moreover, the lightest pool cue of the seven recovered was cut. App. vol. I, at AR 45-47. If the lightest pool cue had a metal interior, then logically the heavier pool cues would also have had such an interior. It was not misleading to the jury to reveal the lightest pool cue's metal interior.

Therefore, the trial court did not abuse its discretion. The cut pool cue did not mislead the jury because it was the lightest of the seven recovered.

B. Error, if any existed, concerning the admission of the cut pool cue was harmless.

If, *arguendo*, this Court finds error in the admission of the cut pool cue, the error was harmless. Quoting the United States Supreme Court, this Court noted in *Guthrie* that:

given "the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial." *U.S. v. Hastings*, 461 U.S. at 508-09, 103 S.Ct. at 1980, 76 L.Ed.2d at 106. Thus, the Supreme Court has held that an appellate court should not exercise its "[s]upervisory power to reverse a conviction . . . when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error." *Hastings*, 461 U.S. at 506, 103 S.Ct. at 1979, 76 L.Ed.2d at 104.

State v. Guthrie, 194 W. Va. 657, 684, 461 S.E.2d 163, 190 (1995). This Court examines two issues to determine whether error was harmless: 1) the sufficiency of the proper evidence and 2) the prejudicial effect of the improper evidence. Syllabus Point 2, *State v. Sharp*, 226 W. Va. 271, 700 S.E.2d 331 (2010). The Court explained in *Sharp*:

Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine

whether the error had any prejudicial effect on the jury. Syllabus Point 2, *State v. Atkins*, 163 W. Va. 502, 261 S.E.2d 55 (1979).

Id. Under this test, any error in the admission of the cut pool cue was harmless.

1. Removing the cut pool cue from the evidence presented at trial, the remaining evidence was sufficient to support the conviction for Second-Degree Murder.

First-degree murder requires a showing of the specific intent to kill by premeditation, deliberation, or one of the specified methods enumerated in W. Va. Code § 61-2-1. *State v. Guthrie*, 194 W. Va. 657, 675-676, 461 S.E.2d 163, 181-182. By statute and by rule of this Court, “any other intentional killing, by its spontaneous and nonreflexive nature, is second-degree murder.” *Id.*; see also W. Va. Code § 61-2-1. The intent required for second-degree murder is “malice,” which has been defined as “wicked or corrupt motive,” “malignant heart,” and “not only anger, hatred and revenge, but other unjustifiable motives [that] may be inferred from any deliberate and cruel act done by the defendant without any reasonable provocation or excuse.” *State v. Bongalis*, 180 W. Va. 584, 587-588, 378 S.E.2d 449, 452-453 (1989), quoting *State v. Douglass*, 28 W. Va. 297, 299 (1886) and *State v. Morris*, 142 W. Va. 303, 314-315, 95 S.E.2d 401, 408 (1956).

In this case, to find harmless error, the Court must determine that: 1) removing the cut pool cue from the evidence at trial, sufficient evidence remained to find Petitioner guilty of second-degree murder beyond a reasonable doubt and 2) the introduction of the cut pool cue was not impermissibly prejudicial. In this case, excluding the cut pool cue, substantial evidence existed to find Petitioner guilty of the malicious killing of the victim beyond a reasonable doubt. At trial, five eye witnesses—David Jeffers, Patricia Mooney, James Mooney, Richard Arthur, and Jennifer Arthur—testified that Petitioner struck the victim in the head with a pool cue on December 23, 2006. App.

vol. II, T-3, at 32-35, 100, 131-132; App. vol. II, T-4, at 83-84, 102. All five witnesses testified that Petitioner struck the victim twice. App. vol. II, T-3, at 34-35, 100, 131-132; App. vol. II, T-4, at 83-84, 102. Petitioner also admitted in his testimony that he struck the victim in the head with a pool cue. App. vol. II, T-6, at 30-32. He testified that he could have been angry at the time of the incident and specifically aimed for the victim's head. *Id.* at 64-65, 69. The medical examiner testified that the victim died from complication related to blunt force trauma to the head. App. vol. II, T-5, at 62-64.

Therefore, removing the cut pool cue from the evidence presented at trial, the remaining testimony against Petitioner is substantial. The testimony proves beyond a reasonable doubt that Petitioner maliciously and intentionally struck the victim twice in the head with a pool cue, killing him. Hitting the victim in the head, specifically aiming for the head, twice was “a deliberate and cruel act” that was “nonreflexive,” and according to Petitioner’s own testimony he could have struck the victim due to anger. Removing the cut pool cue from the evidence, Petitioner would still be guilty of malicious and intentional Second-Degree Murder to the satisfaction of any reasonable juror beyond a reasonable doubt.

2. The cut pool cue was not impermissibly prejudicial.

Introduction of the cut pool cue did not violate the prejudicial element of the harmless-error analysis. After finding that the properly admitted evidence is sufficient to support the conviction, the Court must analyze the prejudicial effect of the improperly admitted evidence. *State v. White*, 223 W. Va. 527, 532, 678 S.E.2d 33, 38 (2009). Relevant factors to consider concerning potential jury prejudice are the emphasis the evidence had in the State’s case and the “overall quality of the

State's proof." *Id.* at 534, 678 S.E.2d at 40, quoting *State v. Atkins*, 163 W. Va. 502, 514-515, 261 S.E.2d 55, 62 (1979).

In this case, the cut pool cue was not impermissibly prejudicial. Although the weapon used in the crime was relevant, especially relevant to the possible inference of First-Degree Murder which was not found by the jury, the State's emphasis in this case was placed on the eye-witness testimony, not the weapon at issue. 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.

Moreover, the overall quality of the State's other proof was very strong, including testimony of an array of eye witnesses, both close to the parties and disinterested, and the Petitioner himself. The testimony established Petitioner's act and culpability for Second-Degree Murder.

Finally, the cut pool cue was not otherwise prejudicial. Petitioner argues that the cut pool cue was prejudicial in that it might have misled the jury. Pet'r's Br., at 14-17. However, the lightest pool cue of the seven recovered was cut. If the lightest pool cue had a metal interior, then logically the heavier pool cues would also have had such an interior. The cut pool cue was not misleading to the jury. The cut pool cue was not bloody nor gruesome, and it is not an object that draws merely upon emotion.

Therefore, any error this Court might find in the admission of the cut pool cue was harmless. Excluding the evidence of the cut pool cue, substantial evidence remains from which guilt could have been established beyond a reasonable doubt. Moreover, no prejudice resulted from the introduction of the cut pool cue.

C. The trial court did not abuse its discretion in denying Petitioner’s motion for a new trial based upon alleged juror misconduct.

The Court reviews rulings on a motion for a new trial under a two-pronged deferential standard: rulings and conclusions concerning a new trial are reviewed under the abuse-of-discretion standard, and underlying factual findings are reviewed under the clearly erroneous standard. Questions of law are reviewed *de novo*. Syllabus Point 1, *State v. Dellinger*, 225 W. Va. 736, 696 S.E.2d 38 (2010).

Felony criminal defendants have a right to trial by impartial jury. Amendments VI and XIV, Constitution of the United States; Article III, Section 14, Constitution of the State of West Virginia; Syl. Pt. 4, *State v. Peacher*, 167 W. Va. 540, 280 S.E.2d 559 (1981); Syl. Pt. 2, *State v. Dellinger*, 225 W. Va. 736, 696 S.E.2d 38 (2010). An impartial jury is one “‘composed of persons who have no interest in the case, have neither formed nor expressed any opinion, who are free from bias or prejudice, and stand indifferent in the case.’ *State v. Ashcroft*, 172 W. Va. 640, 647, 309 S.E.2d 600, 607 (1983)(citations omitted).” *Dellinger*, 225 W. Va. at 741, 696 S.E.2d at 43. As this Court has stated many times, “‘the relevant test for determining whether a juror is biased is whether the juror had *such a fixed opinion that he or she could not judge impartially the guilt of the defendant.*’ Syllabus Point 4, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996).” Syllabus Point 3, *State v. Hughes*, 225 W. Va. 218, 691 S.E.2d 813 (2010) (emphasis added).

1. The trial court did not abuse its discretion because the evidence does not establish that Juror Burke had such a fixed opinion about Petitioner’s guilt/innocence that he was precluded from impartially rendered judgment.

As recently as this year, this Court held that the test to determine whether a juror is unconstitutionally partial is whether she has formed a fixed opinion about the case. A juror’s

connection to a case does not necessarily bar his impartial judgment. In *State v. White*, for example, two jurors were held to be constitutionally impartial despite connections to the trial. 227 W. Va. 231 707 S.E.2d 841 (2011). The first juror knew the name of a witness through the witness' mother. *Id.* The Court held that the juror did not have a personal relationship with the witness, did not have a “fixed opinion” about the case, and could “judge impartially the guilt of the defendant.” *Id.*, quoting Syl. Pt. 4, *Miller*. The second juror allegedly equivocated about how she would consider psychological testimony. *Id.* The Court determined that the party challenging the juror did not carry its burden to establish that the juror was unconstitutionally partial. *Id.* In conclusion, the Court stated that there was no indication that either juror would have been “unable faithfully and impartially to apply the law.” *Id.*

Moreover, ambiguous statements by a juror are not necessarily a violation of impartiality. In *State v. Hughes*, this Court held that a juror could remain on a jury if she remained impartial, despite an ambiguous statement concerning the likelihood of guilt of a defendant at the time of indictment. Syllabus Point 5, 225 W. Va. 218, 691 S.E.2d 813 (2010). In *Hughes*, the juror stated in *voir dire* that the State needed probable cause of guilt to charge a person with a crime, and this Court held that the juror was not subject to removal. *Id.* at Syl. Pt. 5. The Court concluded that a juror stating a fact does not establish whether the juror is bias. *Id.* at 228, 691 S.E.2d at 823, quoting *Ladd v. State*, 3 S.W.3d 547 (Tex. Crim. App. 1999) (A juror who gives an equivocal statement can remain on a jury if they “follow the law and afford [the accused] the presumption of innocence.”). The Court concluded that the juror in *Hughes* “did not articulate a bias or prejudice against Mr. Hughes.” *Id.* at 229, 691 S.E.2d 824.

In the instant case, Juror Burke was not shown to have expressed “such a fixed opinion” of the case that he would have been “unable faithfully and impartially to apply the law.” After the trial, Juror Burke was found to have signed a pretrial petition months before trial to refuse the Petitioner bond, and he failed to disclose that fact during *voir dire*. Many explanations could explain Juror Burke’s signature on the pretrial petition and silence during *voir dire*. Perhaps Juror Burke signed the petition months prior to trial and simply forgot he had done so. Juror Burke might never have known he signed the petition against Petitioner; perhaps the petition was on display in a convenience store, and Juror Burke thought it was an anti-bond petition, never realizing it concerned Petitioner. Perhaps a friend told him to sign it without telling him what it was, and a trustworthy Juror Burke signed without reading it. Perhaps Juror Burke did not hear the court’s *voir dire* questions regarding the petitions. Juror Burke’s signature on a pretrial petition without evidence as to the juror’s intent, knowledge, motive, or even time of signing does not by itself demonstrate that Juror Burke had such a fixed opinion about the case that he was precluded from judging the case fairly.

To the contrary, Juror Burke expressed honesty, candor, and fairness during *voir dire* when asked whether he knew any police officers in the community and whether that would affect his impartiality. He openly discussed his involvement with police, and he expressed that he would not let his involvement with police or the location of the incident color his evaluation of the evidence. Juror Burke had no apparent motive or specific interest in the outcome of Petitioner’s case, other than a signature on a piece of paper for which we have no evidence of the surrounding circumstances. No evidence suggests a motive or intent to remain on Petitioner’s jury for the purpose of changing the outcome of the case, and the little evidence available from Juror Burke demonstrates an expression of fairness in his evaluation of evidence prior to reaching a decision.

Furthermore, the petition at issue simply stated that the undersigned citizens ask the trial court to deny Petitioner bond. It did not expressly state any opinion as to the guilt or innocence of Petitioner. At most, it is an ambiguous statement. It could be possible that a person could have signed the petition because he believed that all charged defendants should always remain in jail until their guilt or innocence is determined at trial.

Therefore, the trial court did not abuse its discretion in denying the motion for a new trial based upon alleged juror misconduct. Petitioner was properly tried by an impartial jury.

2. The trial court did not abuse its discretion because Juror Burke was not shown to be actually biased.

The right to an impartial jury is violated if a juror demonstrates actual bias against a defendant. However, bias not rising to the level of actual bias or prejudice or a mere connection to the trial does not necessarily violate a defendant's rights. This Court has upheld verdicts where jurors had various connections to witnesses, victims, and parties. In *State v. Mills*, for example, this Court upheld a verdict where a juror worked with one of the State's witnesses. 221 W. Va. 283, 654 S.E.2d 603 (2007). Quoting a Louisiana appellate court, the *Mills* Court stated that “[d]isclosure during trial that a juror knows . . . a witness . . . is not sufficient to disqualify a juror unless it is shown that the relationship is sufficient to preclude the juror from arriving at a fair verdict.” *Id.* at 288, 654 S.E.2d at 610.

Similarly, in *State v. Gilman*, this Court stated that a preacher who gave the funeral service for a murder victim was not biased or prejudiced for the purpose of serving on the jury of the victim's alleged murderer. 266 W. Va. 453, 702 S.E.2d 276, 285 (2010). The *Gilman* juror was struck and did not deliberate on the defendant's case, but the Court noted that the preacher juror at

issue never “really even knew the victim . . . let alone harbored any prejudice or bias.” *Id.* at 453, 702 S.E.2d at 285.

This Court also upheld a verdict where a juror had an attorney-client relationship with the prosecuting attorney. In *State v. Audia*, a prosecuting attorney alerted the trial court during *voir dire* that he represented a prospective juror in a class partition suit. 171 W. Va. 568, 573, 301 S.E.2d 199, 205 (1983). The prosecutor stated that he had no actual contact with the juror in that suit, and there was no evidence that the juror was biased or prejudiced. *Id.* at 573-574, 301 S.E.2d at 205-206. The Court stated that “[t]he true test as to whether a juror is qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court.” Syllabus Point 1, *State v. Wilson*, 157 W. Va. 1036, 207 S.E.2d 174 (1974).” *Id.* The jurors in *Mills*, *Gilman*, and *Audia* were not deemed unconstitutionally biased despite their connections to the relative cases, so they were allowed to sit on the jury panel.

Again, not all juror bias is unconstitutional. In *Farmer*, this Court held that a biased juror empaneled on a jury does not *per se* violate a defendant's constitutional rights. The *Farmer* juror disclosed after *voir dire* that she worked at a bank that handled the victim's estate. *State ex rel. Farmer v. McBride*, 224 W. Va. 469, 482, 686 S.E.2d 609, 622 (2009). The trial judge decided she could remain on the jury panel. *Id.* Upon habeas review, this Court upheld the lower court's decision, stating in Syl. Pt. 6 of its opinion:

A trial court's failure to remove a biased juror from a jury panel does not violate a defendant's right to a trial by an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Section 14 of Article III of the West Virginia Constitution. In order to succeed in a claim that his or her constitutional right to an impartial jury was violated, a defendant must affirmatively show prejudice. Syl. Pt. 7, State v. Phillips, 194 W. Va. 569, 461 S.E.2d 75 (1995).

Syl. Pt. 6, *State ex rel. Quinones v. Rubenstein*, 218 W. Va. 388, 624 S.E.2d 825 (2005). (Emphasis added).¹ Neither the *Farmer* juror's connection to the trial nor her disclosure of that information after *voir dire* demanded habeas relief. The juror's bias and timing did not rise to the level of a constitutional violation.

However, unlike the lesser bias discussed above that might be considered bias without prejudice, actual juror bias apparently demands removal of the juror or reversal of the conviction. A court may find actual bias “by the juror's own admission of bias or by proof of specific facts which show the juror has *such prejudice or connection with the parties at trial that bias is presumed.*” Syllabus Point 5, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996).² Syllabus Point 1, *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002).³ Syllabus Point 4, *State v. Dellinger*, 225 W. Va. 736, 696 S.E.2d 38 (2010) (emphasis added).

In the instant case, Juror Burke, who is over 70 years old, did apparently sign a petition against Petitioner receiving bond prior to trial. Such a signature might evidence some bias, if Juror Burke in fact had knowledge of what he signed. However, Juror Burke was not shown to have actual bias against Petitioner. As stated in *Miller*, *O'Dell*, and *Dellinger*, actual bias is evidenced by “such prejudice or connection with the parties at trial” that bias must be presumed. A signature on a petition without a clearer understanding of the circumstances surrounding that signature does not evidence such prejudice or party connection that bias must be presumed. Even if it is assumed that Juror Burke knew and remembered what he signed, the signature on the petition only shows a

¹ Prejudice is discussed below.

sensibility against Petitioner receiving bond, not whether Petitioner was guilty or innocent or whether Juror Burke as a sitting juror would disregard the evidence to arrive at judgment.

Moreover, as stated above, many explanations could explain Juror Burke's signature on the pretrial petition and silence during *voir dire*. Juror Burke might never have known he signed the petition against Petitioner; perhaps the petition was on display in a convenience store, and Juror Burke thought it was something else, such as a petition against letting convicted prisoners out of prison early, not knowing it concerned Petitioner. Perhaps Juror Burke signed the petition months prior to trial and simply forgot he had done so. Perhaps a friend told him to sign it without telling him what it was, and Juror Burke signed without reading it. Perhaps Juror Burke did not hear the court's *voir dire* questions regarding the petitions. Juror Burke's signature on a pretrial petition without evidence of his intent, knowledge, motive, or even the date of signing does not by itself demonstrate Juror Burke had such a fixed opinion about the case that he was precluded from judging the case fairly.

To the contrary, Juror Burke expressed honesty, candor, and fairness during *voir dire* when asked whether he knew any police officers in the community and whether that would affect his impartiality. There is no reason to find actual bias or prejudice from a signature on a petition when no evidence exists to infer the juror's circumstances or motivations for signing and the only other evidence of the juror's mindset and conduct supports a finding of a fair and impartial juror. Juror Burke had no apparent motive or specific interest in the outcome of Petitioner's case, other than a signature on a piece of paper for which we have no evidence of the surrounding circumstances. No evidence suggests a motive or intent to remain on Petitioner's jury for the purpose of changing

the outcome of the case, and the little evidence available from Juror Burke demonstrates an expression of fairness in his evaluation of evidence prior to reaching a decision.

Furthermore, the petition itself simply asks that the judge not grant Petitioner bond. The petition did not expressly comment on the signers' thoughts concerning Petitioner's guilt or innocence so as to presume Juror Burke, as a signer of the petition, was actually biased against Petitioner. Instead, Juror Burke might have thought all charged criminal defendants should remain in jail until their guilt or innocence is decided in a court of law.

Therefore, without a clearer understanding of Juror Burke's intent, knowledge, and circumstances, a signature and failure to answer for that signature do not establish actual bias against Petitioner. Juror Burke stated that he did not know who the victim was, and he expressed an attitude of fairness during *voir dire*.

3. The trial court did not abuse its discretion because Petitioner did not show prejudice.

As stated above, not all juror bias is constitutionally impermissible. *See* Syl. Pt. 6, *Farmer* 224 W. Va. 469, 686 S.E.2d 609. Short of actual bias, this Court has held that a showing of juror bias will only be constitutional error if that bias results in prejudice to the defendant. *Id.* The defendant has the burden of showing prejudice. *Id.* In *Farmer*, a juror sitting on the defendant's jury informed the court on the first day of trial that she worked at the bank handling the victim's estate. The juror claimed she could remain impartial, and the trial court allowed her to remain on defendant's jury. On habeas appeal, the defendant argued that his right to trial by impartial jury was violated because the trial court did not excuse the biased juror. This Court held that the defendant failed to show prejudice from the juror remaining on his jury, stating in Syl. Pt. 6:

A trial court's failure to remove a biased juror from a jury panel does not violate a defendant's right to a trial by an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Section 14 of Article III of the West Virginia Constitution. *In order to succeed in a claim that his or her constitutional right to an impartial jury was violated, a defendant must affirmatively show prejudice.* Syl. Pt. 7, *State v. Phillips*, 194 W. Va. 569, 461 S.E.2d 75 (1995). Syllabus Point 6, *State ex rel. Quinones v. Rubenstein*, 218 W. Va. 388, 624 S.E.2d 825 (2005).

Id. (emphasis added).

In the instant case, Juror Burke apparently signed a pretrial petition asking the trial court to deny Petitioner bond, and during *voir dire*, Juror Burke did not respond to questions about the petition. Petitioner did not show that Juror Burke intentionally and knowingly signed the petition because he thought Petitioner was guilty of the underlying crime, nor did Petitioner show that Juror Burke knowingly and intentionally failed to disclose the signature. Juror Burke, who is over 70 years old, might have an innocent explanation for these events. During *voir dire*, Juror Burke openly admitted to knowing police officers in the community, and he expressed an attitude of fairness and impartiality. Petitioner has failed to show that Juror Burke's signature on the pretrial petition and subsequent presence on the jury prejudiced the outcome of his trial so as to deny his constitutional right to trial by impartial jury.

4. The trial court did not abuse its discretion because Petitioner's right to an impartial jury was not violated by the Juror Burke's failure to respond to questions about the petition during *voir dire*.

Inherent in the right to an impartial jury is a meaningful and effective *voir dire*. Syllabus Point 4, *Peacher*, 167 W. Va. 540, 280 S.E.2d 559; Syl. Pt. 2, *Dellinger*, 225 W. Va. 736, 696 S.E.2d 38. The purpose behind *voir dire* is to allow parties to intelligently gauge the impartiality of the jury and exercise challenges. Syllabus Point 3, *Dellinger*, 225 W. Va. 736, 696 S.E.2d 38. This Court

has stated, “[t]he purpose of *voir dire* is to obtain a panel of jurors free from bias or prejudice.” *State v. Finley*, 177 W. Va. 554, 556, 355 S.E.2d 47, 49 (1987).

Grave nondisclosures can belie the purpose of *voir dire*. In *State v. Hatcher*, for example, this Court held that a juror's nondisclosure during *voir dire* violated the defendant's right to an impartial jury because the juror failed to disclose a very close connection to both the subject matter of the trial and a witness. 211 W. Va. 738, 740-741, 568 S.E.2d 45, 47-48 (2002). The *Hatcher* juror was empaneled on a murder trial, but he failed to disclose that his mother had been violently murdered and that the state's testifying officer investigated his mother's murder, despite direct questioning on the matter during *voir dire*. *Id.* The Court noted that the juror might have misunderstood the questions or forgotten the police officer's role in his mother's murder, but the Court concluded that “the weight of the evidence in the record strongly suggests that the juror failed to honestly disclose” the issue. *Id.* at 740, 568 S.E.2d at 47. The Court determined that for whatever reason the juror “failed to disclose highly important and potentially disqualifying information despite direct inquiry.” *Id.*

In *State v. Dellinger*, a juror intentionally failed to disclose substantial personal connections to the defendant and two witnesses during *voir dire*, including direct contact with the defendant one week prior to trial, arguably for the purpose of sitting on that defendant's trial. 225 W. Va. 736, 742, 696 S.E.2d 38; 45 (2010). The *Dellinger* juror remained silent during *voir dire*. *Id.* at 738, 696 S.E.2d at 40. She failed to disclose that she was “friends” with the defendant on a social networking website, sent the defendant a message one week prior to trial giving him spiritual advice, ending the message with “talk soon,” lived in the same apartment complex as the defendant at one time, was related to one of the witnesses, and another witness employed the juror's brother-in-law. *Id.* at 738-

739, 696 S.E.2d at 40-41. Moreover, in her deposition after these significant connections were discovered, the juror stated that she should have disclosed her connections, but she “disobeyed” her own spiritual direction to reveal the information. *Id.* at 739, 696 S.E.2d at 41. The Court stated the rule for presumption of actual bias,² then decided that “the totality of Juror Hyre’s responses during the June 11, 2008 [hearing], coupled with her repeated silence during *voir dire*, leads this Court to conclude that she had such connection with [the defendant] that bias must be presumed.” *Id.* The Court held that “there is a fine line between being willing to serve and being anxious . . . [t]he individual who lies in order to improve his chances of service has too much of a stake in the matter to be considered indifferent.” *Id.* at 742, 696 S.E.2d at 44 (citations omitted). The *Dellinger* decision turned on the juror’s intentional withholding of significant information during *voir dire* necessary to form an opinion about that juror’s relationship with the defendant and witnesses due to that juror’s repeated failure to be forthcoming. *Id.*

In the instant case, the signed petition, which is the only evidence of alleged juror misconduct, does not suggest that Juror Burke intentionally failed to disclose during *voir dire* that he signed the petition for the purpose of remaining on Petitioner’s jury. Juror Burke might simply have forgotten signing the petition or never known what he was signing. Moreover, the limited evidence as to Juror Burke’s alleged misconduct does not expressly shed light on his intent and knowledge of signing the petition prior to *voir dire*. The petition itself does not expressly state an opinion as to Petitioner’s guilt or innocence. It simply asks the trial court to deny Petitioner bond. The juror in *Hatcher* had a very close and emotional connection to the subject matter and a witness at trial, and the Court found the *Hatcher* juror unconstitutionally partial “due to the weight of the

² The presumed bias this Court found in *Dellinger* was apparently actual bias.

evidence on the record.” *State v. Hatcher*, 211 W. Va. at 740, 568 S.E.2d at 47. In *Dellinger*, too, substantial evidence supported the conclusion that the *Dellinger* juror was unconstitutionally partial. The *Dellinger* juror lived in the defendant’s apartment complex, directly contacted the defendant, expressly stated an opinion concerning the defendant’s future, and stated during a post-trial hearing concerning her conduct that she should have disclosed these connections at trial, implying that she intentionally withheld her connections in order to remain on the defendant’s jury. *State v. Dellinger*, 225 W. Va. at 738-740, 696 S.E.2d at 40-42.

Here, the only evidence of juror misconduct is the pretrial petition that did not expressly state an opinion as to guilt or innocence. No other evidence elaborates on the circumstances of Juror Burke’s signing the petition. As discussed above, Juror Burke might not have known that he signed the petition, and therefore, he would not have been able to respond during *voir dire* that he had signed it. He might not have heard the general questions presented to the entire jury pool concerning the petitions. Juror Burke stated during *voir dire* that he had no idea who the victim was, which if taken as truth would indicate that he did not read the petition he signed.

Therefore, the trial court did not abuse its discretion in denying Petitioner’s motion for a new trial. The evidence does not support a finding that Juror Burke intentionally failed to disclose signing the petition. Juror Burke’s motives and circumstances cannot be drawn from such minimal evidence of his conduct. He might not have known he signed the petition or might not have heard the general questions during *voir dire*. The evidence does not support a reversal.

5. **The trial court did not rest its ruling on a lack of Petitioner’s diligence, and an inference was not created by the trial court that its ruling rested on any lack of Petitioner’s diligence.**

Petitioner argues that an inference can be drawn from the trial court's ruling that the ruling rests on a lack of Petitioner's due diligence in bringing the juror issue before the court. Pet'r's Br. at 22-24. Petitioner correctly analyzes much of the West Virginia law on diligence in the discover of potential juror issues. *Id.* However, Petitioner's diligence was not a basis for the trial court's ruling.

In this case, Petitioner moved for a new trial based on the discovery of a juror issue. The trial court held a hearing on the motion and concluded that a new trial was not warranted. At that hearing, the trial court stated, "if I would have known, if it were brought to my attention by Defense Counsel that he signed the petition I would probably have struck Mr. Burke." App. vol. II, M-8 at 7-8. The trial court also stated, "I would have struck him if the motion was made, but the motion was not made." *Id.* In these two short statements, the trial court discussed the hypothetical situation of what the court possibly would have done if it knew of the issue prior to trial. The trial court was not suggesting its ruling on a motion for a new trial was based on defense counsel's lack of diligence. Removing a potential juror prior to trial is often done with an over-abundance of caution. Granting a new trial due to juror bias is done with actual evidence before the court. These two short statements show that the trial court was discussing a hypothetical for probably striking a juror prior to trial to avoid an issue, not enumerating evidence on which it determined its ruling on a motion for a new trial nor in determining whether bias actually existed.

Therefore, an inference was not made that the trial court's ruling rested on any lack of Petitioner's diligence in bringing this issue to the court.

D. Error, if any existed, concerning the alleged juror misconduct was harmless.

Constitutional error may be deemed harmless. In *State ex rel. Grob*, this Court adopted the United States Supreme Court’s general rule that constitutional error can be harmless: “Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.” Syllabus Point 5, *State ex rel. Grob v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975); Syl. Pt. 5, *State ex rel. Farmer v. McBride*, 224 W. Va. 469, 686 S.E.2d 609 (2009).³ Under this rule, even if, *arguendo*, a juror is found to be partial, that error might be harmless if the partiality is very slight and the weight of the evidence against a defendant is great.

The evidence of Petitioner’s guilt presented at trial was substantial. At trial, five eye witnesses—David Jeffers, Patricia Mooney, James Mooney, Richard Arthur, and Jennifer Arthur—testified that Petitioner struck the victim in the head with a pool cue on December 23, 2006. App. vol. II, T-3, at 32-35, 100, 131-132; App. vol. II, T-4, at 83-84, 102. All five witnesses testified that Petitioner struck the victim twice. App. vol. II, T-3, at 34-35, 100, 131-132; App. vol. II, T-4, at 83-84, 102. Petitioner also admitted in his testimony that he struck the victim in the head with a pool cue. App. vol. II, T-6, at 30-32. He testified that he could have been angry at the time of the incident and specifically aimed for the victim’s head. *Id.* at 64-65, 69. The medical examiner testified that the victim died from complications related to blunt force trauma to the head. App. vol. II, T-5, at 62-64. The testimony proves beyond a reasonable doubt that Petitioner maliciously and intentionally struck the victim twice in the head with a pool cue, killing him. Hitting the victim in the head,

³ The United States Supreme Court also stated that “there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.” *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967). However, the Court did not state that any and all juror error falls within this harmless exception. Juror error might not rise to the level of a constitutional violation, and even if constitutional error arises, it might be deemed harmless.

specifically aiming for the head, twice was “a deliberate and cruel act” that was “nonreflexive,” and according to Petitioner’s own testimony he could have struck the victim due to anger.

Therefore, the evidence supports a finding of guilt of Second-Degree Murder to the satisfaction of any reasonable juror beyond a reasonable doubt. Any error due to the implied bias of Juror Burke’s signing the pretrial petition was harmless in light of the substantial evidence supporting the jury’s finding of guilt.

V.

CONCLUSION

Therefore, the trial court did not abuse its discretion in admitting the cut pool cue into evidence nor in denying Petitioner’s motion for a new trial. The pool cue was one of seven recovered by police. It was determined that one of these seven was the murder weapon. The pool cue chosen to be cut open was the lightest of these seven, and its interior was an aid for the jury to understand the nature of the murder weapon. The juror did not commit misconduct such that Petitioner’s right to a trial by impartial jury was violated. Moreover, if the Court finds any error in these two issues, that error was harmless. The evidence against Petitioner was substantial. Petitioner was properly convicted of Second-Degree Murder.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, LAURA YOUNG, Assistant Attorney General, do hereby certify that I have served a true copy of the *Brief in Response to the Petitioner's Brief* upon Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 18th day of August, 2011, addressed as follows:

To: Richard H. Lorensen, Esq.
WV Public Defender Services
One Players Club Drive, Suite 301
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LAURA YOUNG