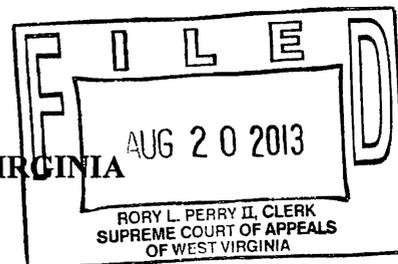


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0240



DAVID BALLARD, WARDEN,  
MT. OLIVE CORRECTIONAL COMPLEX,

*Respondent Below,  
Petitioner,*

v.

PHILLIP REESE BUSH,

*Petitioner Below,  
Respondent.*

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REPLY ON BEHALF  
OF THE PETITIONER

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MT. OLIVE CORRECTIONAL COMPLEX,

*Respondent Below,  
Petitioner,*

v.

PHILLIP REESE BUSH,

*Petitioner Below,  
Respondent.*

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REPLY BRIEF ON BEHALF  
OF THE PETITIONER

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On June 17, 2013, the Petitioner David Ballard (hereinafter “Petitioner”) in his capacity as Warden of the Mount Olive Correctional Complex, by counsel, Laura Young, Assistant Attorney General, filed an appeal of the decision of the Ohio County Circuit Court issuing a writ of habeas corpus reversing the Respondent’s conviction on two counts of felony murder. On August 1, 2013, the Respondent filed a “Brief in Response” to the petitioner’s appeal.

Comes now the Petitioner, pursuant to Rule 10(g) of the Revised Rules of Appellate Procedure and files this Reply.

I.

ARGUMENT

- A. **THE RESPONDENT HAS FAILED TO CITE ANY APPLICABLE AUTHORITY REFUTING THE CONTROLLING CASES ON THIS ISSUE CITED BY THE PETITIONER.**

On August 1, 2013, the Respondent filed a brief in response to the Petitioner's appeal in which counsel for the Respondent argued nearly everything *except* the controlling authorities advanced by the Petitioner in support of reversing the findings of the lower court.

The Respondent, instead, argued that he is in prison not because he savagely murdered two people after luring them to a trap in an act of cold blooded revenge, but because the legislature failed to amend a statute by replacing the word "rape" with "sexual assault" and as a result the jury heard "prejudicial" evidence they otherwise would not have. This, of course, if only his lawyers had been savvy enough to exploit a meaningless loophole in the statute to the Respondent's advantage.

In the Respondent's brief, appellate counsel accused the undersigned of being "sleazy" and of committing an "outrageous and shameless act void of professional conduct" for including information outside the record regarding the Respondents unrelated crimes of rape and pending charges for three more blood thirsty murders.<sup>1</sup> (Resp't Br. at 2.) The Respondent called the

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<sup>1</sup>This Court has written that "Lawyers' conduct should be characterized at all times by personal courtesy and professional integrity. In fulfilling their duty as lawyers to represent a client vigorously, they should be mindful of their obligations to the administration of justice. Lawyers owe to opposing counsel, the parties, the courts and the court's staff a duty of courtesy, candor, honesty, diligence, fairness and cooperation." W. Va. Std. Prof. Cond. Preamble. And "[a]lthough there exists no sanctions for a violation of the Standards for Professional Conduct," nonetheless, "lawyers should regulate themselves diligently by observing these Standards of Professional Conduct at all times." *Finley v. Norfolk and Western Ry. Co.*, 208 W. Va. 276, 284, 540 S.E.2d 144, 152 (1999) (per curiam) (Workman, J., concurring) (footnote omitted). *See also Hartwell v. Marquez*, 201 W. Va. 433, 436 n.5, 498 S.E.2d 1, 4 n.5 (1997) ("... we strongly urge practitioners to adhere to the W. Va. Standards of Professional Conduct recently adopted by this Court.").

The Respondent's brief launches into numerous *ad hominem* attacks on the Attorney General's Office which are contrary to W. Va. Std. Prof. Cond. I.A.1. ("A lawyer should treat all counsel, . . . in a civil and courteous manner, not only in court, but also in all other written and oral communications. A lawyer should not, even when called upon by a client to do so, abuse or indulge in offensive conduct, disparaging personal remarks or acrimony toward other counsel, parties or witnesses.") and I.A.3 ("A lawyer should not, absent good cause, attribute bad motives or improper conduct to other counsel or bring the profession into disrepute by unfounded accusations of impropriety."), if not the mandatory Rules of Appellate Procedure themselves. *See, e.g., Amax Coal Co. v. Adams*, 597 N.E.2d 350, 352 (Ind. Ct. App. 1992) ("On a darker note, if such commentary in appellate briefs is actually directed to opposing counsel for  
(continued...)

Petitioner's recitation of the underlying evidence of guilt presented at trial "gory" and a "low blow in each of the 15 rounds of a championship prize fight" meant only to prejudice him in the eyes of this Court. (*Id.*)

The Respondent does not complain that the Petitioner is wrong or misrepresented the record, but rather the Respondent complains that the Petitioner has the bad taste to make him look bad with the facts. However, evidence of guilt is meant to be prejudicial; "Virtually all evidence is prejudicial or it isn't material." *State v. Winebarger*, 217 W. Va. 117, 125, 617 S.E.2d 467, 475 (2005). Moreover, it is crucial for purposes of a harmless error analysis. The minor references made by the Petitioner to the Respondent's prior rape conviction and pending charges for three more murders, were but a fleeting reference when compared to the evidence of guilt presented at trial. Moreover, reference to the past was relevant procedural history. Reference to pending charges are accurate.

The Respondent's Rumpelstiltskin-esque reaction to the fact that the Petitioner had the nerve to call this Court's attention to the facts of this case suggests a certain unfamiliarity with dynamics of the adversarial nature of appellate proceedings and the role of the facts in a harmless error analysis. The Petitioner will be more than glad to address this dynamic more fully below.

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<sup>1</sup>(...continued)

the purpose of sticking hyperbolic barbs into his or her opposing numbers' psyche, the offending practitioner is clearly violating the intent and purpose of the appellate rules." Nonetheless the Office takes solace in this Court's recognition that "the representation by the Attorney General's office on behalf of State entities (and the independent submissions of the Attorney General's Office when that office has been asked to make submissions by this Court) have consistently been of the highest professional caliber." *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 39 n.22, 569 S.E.2d 99, 115 n.22 (2002). The Office will live up to the trust this Court has reposed in it and will not respond the Respondent's petulant, vituperative, undignified, and unjustified insults merely pointing out that this Court has stated it does not "countenance these types of ad hominem personal attacks" and that it has "caution[ed] counsel, and all members of the Bar who practice before this Court, that such inappropriate references will not be tolerated in the future." *Tanner v. Rite Aid*, 194 W. Va. 643, 647 n.5, 461 S.E.2d 149, 153 n.5 (1995).

The Petitioner, however, will not be led down the Respondent's rabbit hole of an argument which operates to do nothing more than divert this Court's attention from the reams of persuasive and controlling authority demonstrating that the lower court's order was so wrong on so many levels a treatise could be written on it. Rather the Petitioner will stand on its previously argued authorities and on the demonstrable fact that the authority cited by the Respondent is inapplicable, irrelevant, factually distinguishable and perhaps most significantly, issued decades before many of the controlling cases cited by the Petitioner.

The most significant decision cited by the Petitioner refuting the lower court's reasoning to the point of blowing it out of the water, is this Court's decision in *State v. Berry*. In discussing the distinction between a constitutionally defective ground in a general verdict and a legally defective ground, the Respondent gave *Berry* all of one line of text: "The West Virginia Supreme Court has recently discussed this distinction in *State v. Berry*, 227 W. Va. 221 \_\_\_\_, 707 S.E.2d 831, 837-838(2011)." (Resp't Br. at 23.) The Respondent goes no further but rather moves on to cite a thirty year old Fourth Circuit case on factually distinguishable grounds: *U.S. v. Head*, 641 F.2d 174, 179 (1981). *Head* not only came out decades before the most significant Supreme Court cases cited by the Petitioner that applied *Stromberg*, and thirty years before *Berry*, but it is factually distinguishable as well.

In *Head* the Fourth Circuit applied the rule of lenity to void a conviction on grounds that the jury's verdict rested on a multiple count indictment containing charges with varying statutes of limitations, some of which had expired. *Head* has nothing to do with the case at bar. The rule of lenity applies where statutes are ambiguous. "In construing an ambiguous criminal statute, the rule of lenity applies which requires that penal statutes must be strictly construed against the State and

in favor of the defendant.” Syllabus Point 5, *State ex rel. Morgan v. Trent*, 195 W. Va. 257, 465 S.E.2d 257 (1995). Such is not case here. Likewise, no other state or federal court in the country has applied *Head* since it was issued including the Fourth Circuit. In *Griffin v. U.S.* 502 U.S. 46, 57 n.2 (1991), the Supreme Court rejected *Head* outright as “irrelevant” to the same issue as in the present. (See Petitioner’s Brief for a full discussion of *Griffin*.)

The Respondent next cites *Adams v. Wainwright*, 764 F.2d 1356, 1364 (11th Cir. 1981), an equally obscure and inapplicable case where the Eleventh Circuit rejected a harmless error analysis of *Stromberg* cases, nearly thirty years *before* the Supreme Court applied harmless error to reject *Stromberg* in *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (per curiam). There is simply no explanation for the level of denial required for Respondent to cite to *Adams* in light of *Hedpepeth* and *Berry*.

**Trial Counsel and Post Conviction Counsel Were Not Ineffective. Nor Can the Respondent Satisfy the Prejudice Prong of the *Strickland/Miller* Analysis If the Ineffectiveness Prong Were Satisfied.**

The Respondent will reassert (but not reargue) the ground of waiver previously asserted on this issue. Because trial counsel did not object at trial to the challenged instruction on the grounds cited by the Respondent (as grounds for error herein), any challenge to the Respondent’s conviction on those grounds are waived absent a showing of plain error. As already argued and demonstrated by the Petitioner, there has been no plain error flowing from any ground resting on the wording of the felony murder statute.

With regard to Respondent’s claim that trial counsel was ineffective for not objecting to the challenged instruction based on the wording of the felony murder statute, given that there was little likelihood the trial court would have ruled favorably to the defense on any such motion, there can be no finding of ineffectiveness. An absence of ineffectiveness is fatal to any claim under the two

pronged analysis of *Miller/Strickland* discussed in the Petitioner's brief. But even were the Respondent to show ineffectiveness, there was no resulting prejudice.

- 1. The trial court may have taken notice of the discrepancy between the instructions, the charges and the wording of the felony murder statute, but there is little likelihood the trial court would have ruled in favor of the defense on the grounds cited by Respondent in support of this claim.**

According to the Respondent, every lawyer involved in his case from the trial court proceedings right through years of post conviction proceedings, were incompetent. It is only just now in this latest round of proceedings that the string of lawyers and judges involved in this case over the past thirty years have recognized grave constitutional error in the Respondent's conviction.

The Respondent argues that trial counsel were ineffective for: "permit[ting] the State to advance a theory of felony murder premised on a non-enumerated felony . . ." (Resp't Br. at 9.) The Respondent further argues that all post conviction counsel were ineffective for failing to raise and argue the issue on appeal and during habeas proceedings.

Firstly, despite the conclusory nature of the Respondent's argument in this regard, there is absolutely nothing in the record or in the law to suggest that the trial court would have granted any motions made by the defense to exclude from trial, instructions or evidence of sexual assault of Kathleen Williams based on the wording of the felony murder statute.

The trial court may have taken note of the discrepancy between the statute and the instructions and said so at pre-trial, but in order to grant any defense motion on those grounds, the trial court would have had to reason that the legislature *intended* to invalidate rape and sexual assault as a predicate offense for felony murder and as a result, purposefully create a loophole for defendants like the Respondent to crawl through.

This scenario is highly unlikely, not to mention unsupported by the law, given that such a ruling would be frowned upon for any number of reasons because it would require the trial court to usurp the intent of the legislature without authority and any such ruling is strictly forbidden for many reasons. “When a statute is clear and unambiguous and the legislative *intent* is *plain* the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.” Syllabus Point 1 *State ex rel. Fox v. Board of Trustees of the Policemen’s Pension or Relief Fund of the City of Bluefield, et al.*, 148 W. Va. 369, 135 S.E.2d 262 (1964). Nor do the courts allow for an interpretation of a statute so literal that it would defeat the ends of justice:

It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will *uphold the law and further justice*. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity.

Syl. pt. 2, *Click v. Click*, 98 W. Va. 419, 127 S.E. 194 (1925) (emphasis added). Accord Syl. pt. 2, *Newhart v. Pennybacker*, 120 W. Va. 774, 200 S.E. 350 (1938) (“Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made.”)

See also, *Weston, Inc. v. Mineral County*, 638 S.E.2d 167, 171, 219 W. Va. 564, 568 (2006) “Courts should favor the plain and obvious meaning of a statute as opposed to a narrow or strained construction.” citing *Thompson v. Chesapeake & O. Ry. Co.*, 76 F. Supp. 304, 307-308 (S.D. W. Va.1948).

It is difficult to imagine that the trial court judge would determine that the legislature intended to invalidate rape and/or sexual assault as a predicate offense of felony murder and proceed to so rule on the grounds of a strained construction that would defeat justice - grounds forbidden by

law. Likewise, it is highly unlikely that the trial court would have found in the defense's favor given that the court was within its discretion to read both the felony murder statute and the Sexual Assault Act in *para materia* to hold that the legislature did *not* intend to invalidate felony murder based on the newly enacted sexual assault statute.

Under yet another scenario that defeats both the ineffectiveness and prejudice prong of the *Strickland/Miller* analysis, even had the trial court granted any such motion invalidating the evidence and crime of sexual assault of Kathleen Williams on any of the grounds cited by the Petitioner, the evidence would have been admissible at trial.

The evidence of sexual assault was intrinsic to the offense and thus admissible as *res gestae*. “Events, declarations and circumstances which are near in time, casually connected with and illustrative of transactions being investigate are generally *res gestae* and admissible at trial.” Syllabus Point 3, *State v. Ferguson*, 165 W. Va. 529, 270 S.E.2d 166 (1980) overruled on other grounds by *State v. Kopa*, 173 W. Va. 43, 311 S.E.2d 412 (1983). Syl. Pt. 5 *State v. Biehl* 224 W. Va. 584, 687 S.E.2d, 367 (2009).

With regard to the prejudice prong of the *Strickland/Miller* analysis, those “gory” details recited by the Petitioner alone are facially sufficient to be fatal to any such argument. There was clearly sufficient evidence to convict the Respondent on the robbery theory of felony murder for both victims. Combined with the fact that the evidence of sexual assault was admissible anyway, this claim cannot meet either the ineffectiveness prong nor prejudice prong of *Strickland/Miller*.

The Respondent further argues that the trial court erred by allowing the State to proceed to trial on a “non existent crime”. (Resp’t Br. at 17.) However, under the controlling authority the trial court was right to do so. Brilliant in fact, and quite prescient given that the legislature made its intent

well known when it did indeed amend the felony murder statute a few years later to replace “rape” with “sexual assault,” thus clearly expressing its intent, which was consistent with the State’s prosecution of the sexual assault theory of felony murder.

**2. Aside from the fact that the lower court was wrong to apply *Stromberg* to the facts present in this case, *Stromberg* error is not structural.**

In addition to disregarding the authority cited by the Petitioner demonstrating that *Stromberg* was misapplied in this case, the Respondent also disregards the reams of authority holding that *Stromberg* error is not structural error- even in a genuine *Stromberg* case, which this case isn’t.

The Petitioner will not re-argue this point but only expand on the previously asserted argument regarding the harmless error standard that applies to this case.

Among the “gory” facts and unpleasantries that undermine the Respondent’s position and render the findings of the lower court a perfect storm of bad reasoning, is the fact that the lower court found that a showing of *Stromberg* error required automatic reversal without a harmless error analysis.

In granting relief, the lower court first incorrectly found that *Stromberg* applied in this case. We’ve established that it doesn’t. But the trial court went on to not only incorrectly apply *Stromberg*, but did so without even so much as considering the ensuing 82 years of jurisprudence that rendered *Stromberg* inapplicable and also subject to a harmless error analysis. Aside from the Supreme Court’s specific application of a harmless error analysis in *Stromberg* cases, there is a separate body of law that delineates the very narrow grounds for structural error applied by the Supreme Court - and *Stromberg* error is not included.

The courts have been loathe to find grounds for structural error in any situation and the circumstances that render error structural are narrow and few. Likewise, this Court has yet to

announce a bright line standard for structural error but has opted for the more fact based plain error analysis (in cases of waiver) which is *still* subject to a harmless error analysis. When this Court did examine a *Stromberg* claim in *State v. Berry*, it looked instead to *Griffin v. United States*, 502 U.S. 46, (1991), and *Griffin* all but overruled *Stromberg*.

The Supreme Court cited to examples of structural error in *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). In citing to the very rare and extreme situations that caused structural error, the Supreme Court cited to the following narrow examples: denial of the right to an impartial judge (*Tumey v. Ohio*, 273 U.S. 510, 511(1927)); denial of the right to counsel (*Gideon v. Wainwright*, 372 U.S. 335, 342, 345 (1963)); denial of the right of self representation (*McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984)); denial of right to a public trial (*Waller v. Georgia*, 467 U.S. 39, 49 & n. 9,(1984)) and; the unlawful exclusion of a member of a defendant's race from a grand jury (*Vasquez v. Hillery*, 474 U.S. 254, 260 (1986)).

A structural error by definition is an error that pervades and corrupts the entire trial court process from beginning to end. *Arizona v. Fulminante* 499 U.S. at 310 ((structural errors affect “the framework within which the trial proceeds.”). Such was not the case here. In fact, the “error” had absolutely no discernable effect on the proceedings except to give the Respondent grounds to attempt to game the system and defeat justice.

Even where constitutional error is actually present the most basic constitutional rights can be subject to harmless error analysis. “Most errors, including constitutional ones are subject to harmless error analysis.” *State ex rel. Waldron v. Scott* , 222 W.Va. 122, 126,663 S.E.2d, 576, 580 (1993) citing *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993).

The most the Respondent could argue under the present set of facts is that the supposed “error” was a technical glitch in the wording of the indictment. No more, no less, and the courts have long retreated from finding reversible error on technicalities. “We have long held harmless, a technical error that does not affect the judgment, because the correction of such error would not tend to produce a different result.” *Weirton Medical Center, Inc. v. West Virginia Bd. of Medicine*, 192 W. Va. 72, 79, 450 S.E.2d 661, 667 (1994). *See also Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946) (“Technical errors, defects, or exceptions which do not affect the substantial rights of the parties” are harmless.); *State v. Grimmer*, 162 W.Va. 588, 593, 251 S.E.2d 780, 785, (1979.) (“So long as a defendant has not been denied any constitutional or statutory right, but, to the contrary, has been afforded all constitutional and statutory protections to which he is entitled, mere technical errors that do not deprive or unduly prejudice the defendant in the conduct of his defense will be considered harmless.”)

To reiterate, the court in *Stromberg* found that one of the charges in a general verdict instruction, was a violation of the First Amendment right to free speech and was invalid on constitutional grounds as extended to the states by the Fourteenth Amendment. But because the offending charge was combined in a general verdict of guilt, the Supreme Court held that the error could not be harmless or cured since there was no way to determine whether or not the jury relied on the illegal charge.

There is no such error in the case at bar. The statute the Respondent was charged under did not violate any constitutional right under any amendment to the United States Constitution. The felony murder statute was not a violation of any constitutional right applied to the states through the Fourteenth Amendment. That is a simple fact that cannot be disputed by the Respondent. This alone

is enough to be fatal to every claim the Respondent argues as grounds to uphold the findings of the lower court.

By defeating *Stromberg*, the lower court's findings crumble and the Petitioner will not be lured into a wild goose chase of inapplicable issues such as ineffective assistance of every counsel in this case, or *ex post facto* or *pre ex facto* or *post ex fact*. The Petitioner restates his position that the Respondent is not in prison because the legislature failed to amend the felony murder statute. He's not in prison because his lawyers did not object to the charges based on the legislature's failure to amend the statute or because they did not file motions that were unsupported by the law. He's not in prison because a jury was influenced by the fact that the legislature failed to amend the felony murder statute. The Respondent is in prison because he murdered two people and following a fair trial that satisfied every constitutional right the Respondent was entitled to. Twelve people so found.

That is the standard. the Respondent must overcome. He has not.

The Respondent and the Petitioner, however, do agree on one thing- even a "bad actor" is entitled to the right to a fair trial and the protections of the United States Constitution. To the Respondent's credit, he has not parlayed this claim into one of actual innocence. But the Office of the Attorney General has a proven record with this Court of declining to defend cases where genuine constitutional or prejudicial reversible trial court error is present. Such is not the cases here. Not by a long shot and the State is not about to walk away from a double murder conviction reversed on bad law, bad reasoning and complete lack of legal foundation.

The Respondent argues that the Petitioner has failed to demonstrate beyond a reasonable doubt that the error in this case was not harmless. That is not the standard. There is no error, as demonstrated in the original brief. However, even if error (which is not conceded) is shown, the

Petitioner has met and exceed its burden of demonstrating the error was harmless. The standard of review the Petitioner must meet is to show that the lower court's decision was wrong as a matter of law. The Petitioner has met that burden as well.

**II.**

**CONCLUSION**

Your petitioner respectfully requests that the order of the Circuit Court of Ohio County, granting Philip Reese Bush relief in habeas corpus be reversed, and that the convictions for the first degree murders of Kathleen Williams and Charles Goff be reinstated and the sentences, consecutively, of life without mercy be ratified.

Respectfully submitted,

DAVID BALLARD, WARDEN  
Mt. Olive Correctional Complex  
*Petitioner*

By counsel

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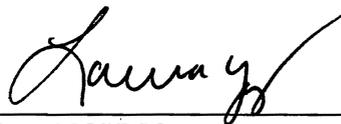
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*Counsel for Respondent*

**CERTIFICATE OF SERVICE**

I, LAURA YOUNG, Assistant Attorney General and counsel for the petitioner, do hereby verify that I have served a true copy of the *REPLY ON BEHALF OF THE PETITIONER* upon counsel for the Respondent by depositing said copy in the United States mail, with first-class postage prepaid, on this 20<sup>th</sup> day of August, 2013, addressed as follows:

To: Donald J. Tennant, Jr., Esquire.  
TENNANT LAW OFFICES  
38 Fifteenth Street, Suite 100  
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---

LAURA YOUNG