No. 28404—*State of West Virginia v. Michael Brown*

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July 25, 2001
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OF WEST VIRGINIA

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McGraw, Chief Justice, dissenting:

I would reverse Brown's conviction for the same reasons expressed in my dissent to *State v. Lightner*, 205 W. Va. 657, 520 S.E.2d 654 (1999), in that "any deviation from th[e] constitutional requirement [of twelve jurors] must be accomplished through a knowing and intelligent waiver." *Id.* at 664, 520 S.E.2d at 661 (McGraw, J., dissenting). Resort to plain error analysis is therefore misplaced in this context, and a violation of the constitutional right to a twelve-person jury must be presumed prejudicial absent an affirmative showing that the error was harmless beyond a reasonable doubt. *See* syl. pt. 5, *State ex rel. Grob v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975) ("Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt."). Contrary to the position taken by the majority, the fact that the alternate did not actively participate in deliberations is far from dispositive, as prejudice may arise "either because the alternates actually participated in the deliberations, verbally or through 'body language'; or because the alternates' presence exerted a 'chilling' effect on the regular jurors." *United States v. Olano*, 507 U.S. 725, 739, 113 S. Ct. 1770, 1780, 123 L. Ed. 2d 508 (1993) (citations omitted). Since I would reverse and remand for a new trial on this issue, I respectfully dissent.