IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No: 22-0219

STATE OF WEST VIRGINIA,
Respondent,

v.

Circuit Court No: CC-27-2019-F-11
McDowell County, West Virginia

SHANE ERIC HAGERMAN,
Petitioner,

PETITIONER'S BRIEF

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B. The trial court erred in instructing the jury it could not convict Petitioner of voluntary manslaughter as a lesser included offense without proof of gross provocation and heat of passion.

II. STATEMENT OF CASE

On November 22, 2018, Petitioner, his girlfriend, Hannah Muncy, a male friend, Lee Testner, and the victim, McKinley Addair, had been drinking at Petitioner's mobile home for several hours. All of the parties became very intoxicated. Petitioner was only dressed in his boxers. He was so drunk, at one point, he took off his boxers and walked around nude. Mr. Addair, age 41, and Petitioner, age 24, had known each other since Petitioner was five years old. Mr. Addair was the ex-husband of Petitioner's sister. Petitioner is the uncle of their two minor daughters. They had a father/son relationship.

Petitioner and Mr. Addair got into a physical altercation during which Petitioner was stabbed by Mr. Addair. Mr. Addair could have left the residence during the altercation, but he did not. Petitioner had to physically put Mr. Addair out of the residence using a shotgun.

Once outside, Mr. Addair refused to leave. Instead he began banging on the porch door with a knife trying to break into the residence. Testner, Muncy and Petitioner repeatedly yelled at Mr. Addair to stop and leave. Still dressed only in his boxers, Petitioner went to the back door to go

outside to stop Mr. Addair from breaking in. Petitioner could not open the back door because he was too drunk. Testner opened the backdoor for him. Petitioner confronted Mr. Addair with the shotgun in an attempt to make him stop trying to break in with a knife. After Mr. Addair stabbed Petitioner a second time, Petitioner shot him in self-defense. Mr. Addair died on the porch.

A cellphone video was made from inside the residence of Mr. Addair beating on the door trying to break in with a knife. In the video, Petitioner is nude except for his boxers holding a shotgun. On the cellphone video, the arguing and yelling can be heard when Petitioner confronts Mr. Addair outside. The shotgun shot can be heard and then Testner exclaiming he [Mr. Addair] stabbed you [Petitioner]. Testner "pretty much dragged Petitioner to a neighbor's porch, Christina Keene, to get help and call 911. Mrs. Keene testified at trial that Petitioner blacked out on her porch, was pale, had blood coming from his hip and his armpit. And before he collapsed on the grass, that Petitioner said that Mr. Addair stabbed him. [A.R.II 643-650 Christina Keene Testimony/ Trial Transcript] Petitioner was interrogated by the State Police at the scene. He gave an interview admitting that after Mr. Addair stabbed him a second time he shot him in self-defense. Petitioner was arrested and then incarcerated.

Petitioner was indicted for first-degree murder on February 21, 2019. [A.R.I 41] After a four day trial, he was convicted by a jury of second-degree murder on November 19, 2021. [A.R. I, 94] The jury did so after the trial court disqualified then excluded competent Bradshaw jurors from the jury panel in violation of the Sixth Amendment to the United States Constitution; Article 3, §14 of the West Virginia Constitution; and West Virginia Code §52-1-1 et seq. and instructed the jury it could not consider voluntary manslaughter as a lesser included offense unless it found additional elements of gross provocation and heat of passion.

Defendant's Motion for Judgment of Acquittal and in the Alternative a New Trial was filed on December 7, 2021 [A.R. I 100] and Reply to States Response was filed on December 13, 2021 [A.R. I 111] States Response to Defendant's Motion for Judgment of Acquittal and in the Alternative a New Trial was filed on December 10, 2021. [A.R. I 104] The Order Denying Defendant's Motion for Judgement of Acquittal and in the Alternative a New Trial was entered on February 22, 2022 [A.R. I 115] On February 28, 2022, Petitioner was sentenced to a determinate sentence of thirty (30) years, with credit for time served (35 days). The Sentencing Order was entered on March 5, 2022. [A.R. I 121]

III. SUMMARY OF ARGUMENT

Prior to trial and deliberately concealed from defense, the trial court disqualified at least six competent Bradshaw residents that were on the jury panel based solely on their geographic location and excluded [removed] them from the jury panel. The trial court decided that Bradshaw residents were disqualified as jurors and excluded them on the ground of geographic location.

W.Va. Code §52-1-1, et seq. requires that prospective jurors be selected randomly. The statutory law delineating the manner in which prospective jurors be selected does not permit, prior to trial , a trial court to sua sponte disqualify and exclude [remove] competent jurors that are on the randomly selected jury panel. To do so would render the panel no longer random. The trial court's disqualification and intentional exclusion of at least six(6) competent Bradshaw jurors from the jury panel was failure to select jurors randomly in violation of W.Va. Code §52-1-1, et seq.

W.Va. Code §52-1-15(a) provides procedures to challenge compliance with selection procedures only **before** the jury is sworn to try the case. Petitioner did not discover until **after the trial that the trial court deliberately concealed his intentional and in person ordered a deputy**

circuit clerk to exclude [remove] competent Bradshaw jurors from the jury panel. The jury panel had been selected randomly, but by removing competent Bradshaw jurors from the panel, the jury panel was no longer random. Thereby, violating W.Va. Code §52-1-1, et seq. and determining the composition of the jury by removing competent jurors from the jury panel. [A.R. II 1-35 Motion for Judgement of Acquittal and in the Alternative a New Trial/Hearing Transcript] Because of the deliberate concealment, Petitioner was denied an opportunity to challenge the noncompliance with the selection procedure pursuant to W.Va. Code §52-1-15. In the absence of fraud, the procedures prescribed by W.Va. Code §52-1-15(a) is the exclusive means by which a person may challenge a jury on the ground that the jury was not selected in conformity with the statute. W.Va. Code §52-1-22 provides: Fraud in selection of jurors: A person is guilty of fraud by tampering with the jury wheel or jury box prior to drawing jurors or any other way in the drawing of jurors. The removal of competent jurors from the jury panel prior to trial and the deliberate concealment from defense should be considered fraud.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests a Rule 20 oral argument due to the unsustainable exercise of power by the trial court. To Petitioner's knowledge, this Court has never addressed : 1. A trial court disqualifying then excluding [removing] prior to trial from the jury panel competent jurors based solely on their geographic location; and 2. A trial court's deliberate concealment that prevented a Petitioner from challenging the propriety of the jury selection procedure. Thereby, allowing the trial court to influence the composition of the jury. As this is an issue of first impression, both an oral argument and signed opinion are necessary to provide unequivocal direction to all courts in West Virginia going forward..

V. ARGUMENT

STANDARD OF REVIEW

Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we [the Court] apply a de novo standard of review. Syl. Pt.1, *Chrystal R. N. v. Charlie A.L.,* 194 W.Va. 138, 459 S.E.2d 415 (1995).

The Court's review of the jury instructions is governed by the following standard of review:

> A trial court's instructions to the jury must be correct statement of the law and supported by the evidence. Jury instruction are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not mis[led] by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.
> Syl. Pt. 4, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

This Court has also stated that "if an objection to a jury instruction is a challenge to a trial court's statement of the legal standard, this Court will exercise *de novo* review" *Id.* at 671, 461 S.E.2d at 177. Finally, if, in connection with th legal sufficiency of the instructions, it is determined that the petitioner failed to object to one or more instruction regarding the legal sufficiency, our review would be under the plain error standard. *Id.* n13 (citing *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995)).

A. The trial court erred in denying Petitioner's Motion for a Judgment of Acquittal and in the Alternative a New Trial based on the trial court disqualifying then excluding prior to trial and deliberately concealing from Petitioner six Bradshaw, McDowell County residents that were on the jury panel based solely on their geographic location in violation of the Sixth Amendment to the United States Constitution; Article 3, 14 of the West Virginia Constitutional and West Virginia Code §52-1-1 et seq.

The trial court's excluding competent jurors from the town of Bradshaw, McDowell County from the jury panel based solely on their geographic location was in violation of the Sixth Amendment to the United States Constitution, Article 3, § 14 of the West Virginia Constitution, and West Virginia Code §§ 52-1-1 *et seq.* constitutes reversible error. None of the Bradshaw residents requested to be excused from being on the jury panel. [A.R. II 1-35 Motion for Judgment of Acquittal and in the Alternative Motion for a New Trial/ Hearing Transcript]

The trial court sua sponte decided that Bradshaw residents on the jury panel were disqualified based solely on their geographic location and excluded [removed] them from the jury panel on that ground alone prior to trial. The trial court improperly added a disqualification not found in the statute. See West Virginia Code §52-1-8 Disqualification from jury service.

Without the knowledge of Petitioner and his counsel, the trial court's intentional exclusion [removal] of at least six jury panel members from the town of Bradshaw constituted a failure to select jurors randomly in violation of West Virginia Code § 52-1-1, *et seq.*

The trial court's exclusion of competent Bradshaw jury panel members unconstitutionally violated Petitioner's right to a fair trial and unbiased jury guaranteed by the Sixth Amendment to the United States Constitution and Article 3, §14 of the West Virginia Constitution.

Petitioner's *Motion for Judgment of Acquittal and in the Alternative a New* Trial, filed on December 7, 2021, [A.R. I 100] *and the Reply to State's Response to Defendant's Motion for Judgment of Acquittal and in the Alternative a New Trial*, filed on December 13, 2021 [A.R. I 110], argued that the evidence presented "was insufficient to sustain a conviction," as follows:

> 1. Unduly attempting to influence the composition of the jury. Prospective jurors from Bradshaw may have been excluded from the jury pool. Defendants are not entitled to a jury of any particular composition, but the jury wheels, pools of names,

panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof. *Taylor v. Louisiana*, 419 U.S. at 538, 95 S. Ct. at 702, 42 L. Ed. 2d at 703

2. Unduly attempting to influence the composition of the jury. The exclusion of at least six(6) prospective jurors from Bradshaw was the failure to select jurors randomly as required by W.Va. Code §52-1-1. [1]

In its *Order Denying Defendant's Motion for Judgment of Acquittal and in the Alternative a New Trial*, [hereinafter Order] filed on February 22, 2022, [A.R. I 115] the trial court addressed Petitioner's jury selection argument, as follows:

(1) The Defendant's first reason in support of his motion is that the Court unduly attempted to influence the composition of the jury. This is false. No juror was excluded from the case on account of race, color, religion, national origin, economic status or being a qualified individual with a disability. See W. Va. Code 52-1-2. The jury was selected at random from a fair cross section of the population of the area served by the court, which is McDowell County.
See W.Va. Code §52-1-1. [A.R. I, 115]

After the Circuit Clerk's Office selected the initial set of jurors for the case, the Court inquired of the Circuit Clerk's Office if any of the jurors lived in the community or neighborhood of the alleged crime. The court was advised that six jurors were lived [*sic*] in the community or neighborhood of the alleged crime. The Court advised the clerk's office not to call them on the initial panel, hoping the initial panel would be sufficient to sit a jury Although six from this community or neighborhood were not notified to report, other jurors from surrounding communities were notified to report. In reviewing these six jurors it is doubtful that any of these would have been allowed to serve on the jury. (Emphasis added.)[A.R. I 116.]

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[1] W.Va. Code §52-2-2 Declaration of policy. It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all citizens have the opportunity in accordance with this article to be considered for jury service and an obligation to serve as jurors when summoned for that purpose.

One of the six jurors is the father of the Prosecuting Attorney, who was prosecuting for the case.

A second juror works for 911, whose supervisor was a witness.

A third juror works for the Welch Community Hospital, who had an employee subpoenaed to testify.

A fourth juror is a retired employee from the Department of Health and Human Resources, who appeared in court on behalf of the DHHR, represented by the McDowell County Prosecuting Attorney's Office.

The fifth has a relative involved in a CPS case, in which the McDowell Prosecuting Attorney's office is involved

Juror Six was part of an alleged sexual assault investigation, where she complained that she was a victim and was or is still part of an investigation in which the McDowell County Prosecuting Attorney's office is a part thereof.

There was no systematic disqualification of jurors. The alleged crime occurred in a small tight knit community of approximately two hundred fifty people. The people in this community generally know each other and would be aware of the local knowledge or gossip of a shooting death in their community. The Court would be suspect of any juror who didn't know the parties involved or have some knowledge of the facts of this case.

Reason number one is a red herring and is not a reason for a judgment of acquittal or for a new trial.

Pursuant to West Virginia Code § 52-1-1, "[i]t is the policy of this State that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all citizens have the opportunity in accordance with this article to be considered for jury service and an obligation to serve as jurors when summoned for that purpose."

In its *Order*, the trial court provided an unsustainable rationale for excluding [removing] all

competent residents of Bradshaw, McDowell County from the initial panel selected for the trial of this case.

In drafting said Order and at the hearing, the trial court, after the fact, apparently returned to the list of potential jurors and retroactively attempted to justify his decision to exclude the six individuals from Bradshaw, setting forth an ineffectual and improper pretext for exclusion as to each of the six jurors. Your Petitioner has found no West Virginia authority that authorizes a circuit court judge before trial to usurp the voir dire process at a criminal trial.

"October 2021 Term Petit Jurors," [A.R. I 43] contains "Juror Profiles," setting forth information derived from prior juror questionnaires. The said profiles are limited to the following data: name, address, age, occupation, excuse needed, spouse name, spouse's occupation and employer, number of children and their ages, race, education, mileage, marital status, employer, and payment of property tax. A comparison of the private juror information contained in the trial court's Order and the "Juror Profiles" is significant. The trial court included personal information—not contained in the "Juror Profiles"—in its said "review" of the subject six jurors from Bradshaw, as set forth in its Order. Your Petitioner asserts that the trial court's independent "review" is not authorized by statute, rule or decisional law and constitutes reversible error upon appellate review of this case. The impropriety of the trial court's independent investigation is clear on the face of the Order wherein the court admits: "In reviewing these six jurors it is doubtful that any of these would have been allowed to serve on the jury". [A.R. I, 116]

See State v. Ashcraft, 172 W. Va. 640, 646, 309 S.E.2d 600, 606 (1983):

> It is a fundamental tenet of due process, guaranteed by the sixth and fourteenth amendments to the United States Constitution and by article III, section 14 of the West Virginia Constitution, that a criminal defendant is entitled to trial by an impartial and objective jury. Thus, we have long held that a criminal defendant is entitled to insist upon a jury "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. McMillion,* 104 W.Va. 1, 8, 138 S.E. 732, 735 (1927).

The traditional means for vindicating this right is examination of prospective jurors on their voir dire, *i.e.* on their oath "to speak the truth." 47 Am. Jur. 2d, Jury, § 196 (1969). *See* also Black's Law Dictionary at 412 (5th ed. 1979). Voir dire examination is recognized both in our statutory law, see W. Va. Code § 56-6-12 (1966), (Footnote omitted) and in our rules of criminal procedure, W. Va. R. Crim. P. 24(a). (Footnote omitted) It "is designed to allow litigants to be informed of all relevant and material matters that might bear on possible disqualification of a juror and is essential to a fair and intelligent exercise of the right to challenge either for cause or peremptorily." *West Virginia Human Rights Comm'n v. Tenpin Lounge, Inc.*, 158 W.Va. 349, 211 S.E.2d 349, 353 (1975).

In *State ex re. Stanley v. Sine*, 215 W.Va. 100, 594 S.E.2d 314 (2004), Petitioner Stanley, an attorney with the Public Defender Corporation, learned that Defendant Sine, the Circuit Clerk of Berkeley County, selected prospective jurors in sequential alphabetical order from that term of the court's jury panel list. 215 W.Va. 100, 102, 594 S.E.2d 314, 316.

The sole issue presented pursuant to the Petition for Writ of Prohibition was "whether the statutory law delineating the manner in which prospective jurors should be selected permits prospective jurors to be selected in sequential alphabetical order." 215 W.Va. 100, 103, 594 S.E.2d 314, 317.[1]

This Court further stated:

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1. Relevant to this Petition, the *Stanley* Court issued two original syllabus points and one from *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968), as follows:

2. "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syllabus point 2, State v. Elder, 152 W. Va. 571, 165 S.E.2d 108 (1968).

3. The jury selection procedures enumerated in W. Va. Code § 52-1-6(c) (1993) (Repl. Vol. 2000) do not permit prospective jurors to be selected in sequential alphabetical order.

4. A circuit court judge adopting rules governing the selection of prospective jurors pursuant to W. Va. Code § 52-1-7(a) (1993) (Repl. Vol. 2000) must comply with the public policy and stated requirements of the statutory jury selection procedures set forth in W. Va. Code § 52-1-1, et seq.

> Stanley contends that the present method of selecting prospective jurors in sequential alphabetical order is not sufficiently random to comply with the governing common law and statutory requirements mandating the random selection of prospective jurors. Citing W. Va. Code § 52-1-1, *et seq.*; *Toothman v. Brescoach*, 195 W. Va. 409, 465 S.E.2d 866 (1995) (per curiam) (recognizing importance of random jury selection (citing *Taylor v. Louisiana*, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); *Bennett v. Warner*, 179 W. Va. 742, 372 S.E.2d 920 (1988) (observing that random selection of jurors is important public policy recognized by Legislature); *State v. Nuckols*, 152 W. Va. 736, 166 S.E.2d 3 (1968) (finding that same random selection procedures for grand jury panels apply to petit jury panels). In short, Stanley argues that the failure to randomly select prospective jurors unconstitutionally violates a litigant's right to a fair and unbiased jury guaranteed by the Sixth Amendment to the United States Constitution and Article 3, § 14 of the West Virginia Constitution.
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> 15 W.Va. 100, 104, 594 S.E.2d 314, 318.

In granting the writ of prohibition, this Court stated that "the method by which prospective jurors are selected requires a random selection process," explaining:

> "[i]t is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all citizens have the opportunity in accordance with this article to be considered for jury service and an obligation to serve as jurors when summoned for that purpose."
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> 15 W.Va. 100, 105, 594 S.E.2d 314, 319.
>
> The Court held that "the jury selection procedures enumerated in W. Va. Code § 52-1-6(c) (1993) (Repl. Vol. 2000) do not permit prospective jurors to be selected in sequential alphabetical order. To the extent that Clerk Sine has been selecting prospective jurors in this improper manner, we grant as moulded the requested writ of prohibition." 15 W.Va. 100, 107, 594 S.E.2d 314, 321.
>
> The *Stanley* Court further held:
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> In light of the extreme importance of randomness and the role it plays in our judicial system, we simply cannot construe the jury selection statutes as permitting a circuit court judge to establish rules that contravene this purpose, no matter how innocent his/her intent may have been in adopting the same. **Accordingly, we hold that a circuit court judge adopting rules governing the selection of prospective jurors pursuant to W. Va. Code § 52-1-7(a) (1993) (Repl. Vol. 2000) must comply with the public policy and stated requirements of the statutory jury selection procedures set forth in W. Va. Code § 52-1-1, et seq. Therefore, insofar as the**

circuit judge of Berkeley County has adopted rules directing Clerk Sine to select prospective jurors in sequential alphabetical order, we grant the requested prohibitory relief. (Emphasis added)

15 W.Va. 100, 107, 594 S.E.2d 314, 321.

Additionally, *see Toothman v. Brescoach*, 195 W. Va. 409, 412 465 S.E.2d 866, 869 (1995), as follows:

> W. Va. Code 52-1-1 (1986) et seq. describes a selection process for petit juries so that "all persons selected for jury service [should] be selected at random from a fair cross section of the population of the area served by the court. . . . [Emphasis added.]" The assignment of jurors to jury panel must be "at random." W. Va. Code 52-1-9 (1986). *See* W. Va. Code 52-1-7(a) (1993) required each circuit to "provide by order rules relating to the random drawing by the clerk of panels from the jury wheel or jury box for juries in the circuit. . . courts. [Emphasis added.]" It is also the stated policy of this State that "[a] citizen may not be excluded from jury service on account of race, color, religion, sex, national origin, economic status or being a qualified individual with a disability." W. Va. Code 52-1-2 (1992). The Code also provides a procedure which is "the exclusive means" for challenging the jury selection process. *See* W. Va. Code 52-1-15 (1993). In *Taylor v. Louisiana*, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975), the United States Supreme Court noted that "the policy of the United States [is] that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division where in the court convenes." 419 U.S. at 529, 95 S. Ct. at 697, 42 L. Ed. 2d at 697, quoting 28 U.S.C. § 1861 (the Federal Jury Selection and Service Act of 1968).

West Virginia Code § 52-1-15(c) does provide the procedures a person may utilize to challenge the propriety of the jury selection process in a given case **before** the trial of the case. Petitioner did not discover until **after** the trial the circuit court intentionally and in person instructed the deputy circuit clerk to exclude [remove] jurors from the town of Bradshaw that where on the jury panel. The trial court sua sponte decided that six competent Bradshaw residents on the jury panel were disqualified based solely on their geographic location then excluded [removed] them from the jury panel. This was deliberately concealed from Petitioner. Petitioner's failure to

raise a challenge to the composition of the jury that convicted him was because of this deliberate concealment by the trial. Clearly, a trial court judge is not allowed to determine the composition of the jury not only without the consent or knowledge of the defense, but deliberately concealing it, thereby preventing the defense the opportunity to challenge the jury selection under West Virginia Code § 52-1-15(c).

If the trial court had revealed to Petitioner that it had disqualified and then excluded [removed] Bradshaw jurors from the jury panel before the trial, Petitioner would have challenged the selection procedures pursuant to W.Va. Code § 52-1-15. The trial court's deliberate concealment made compliance with "the exclusive means" for challenging the jury selection process impractical and impeded any effort to comply.

Importantly, the statutory procedure for challenging the jury selection process requires only a finding of a substantial failure to comply with article 1, chapter 52, of the Code to support such a challenge, with **no showing of prejudice required.** [Emphasis added] In *Bennett v. Warner,* 179 W. Va. 742, 372 S.E.2d 920 (1988); Syllabus Point 5:

There are very few cases in this country addressing the following issues in this case:

1. The trial court sua sponte disqualified and excluded [removed] competent jurors from the jury panel prior to trial;

2. The trial court deliberately concealed that it had disqualified and excluded [removed] competent jurors from the jury panel; and

3. The deliberate concealment of competent jurors prevented a challenge to the jury selection.

In *Hildreth v. City of Troy* 101 N.Y. 234, 4 N.E. 559 (N.Y. 1886) upon the impaneling of the

jury, the plaintiff "excused" eight jurors drawn from the regular panel, resident of the city of Troy, upon the ground that they were interested in the result of the action to which proceeding the city attorney objected on the ground that residents and tax payers of the city are not disqualified as jurors in city cases, if otherwise competent. The court overruled the objection and held that all such jurors were disqualified. The trial court ruled that residents of the city were legally disqualified as jurors, and excluded them on that ground alone.

In *Hildreth v. City of Troy*, the Court held:

> The main purpose of the statutes for the drawing and selection of trial jurors is the securing of a fair and impartial jury. To this end, provisions are made, which, if followed, prevent the selection of a jury either **by the court, or the officers of the court, or by either of the parties to the action**, [Emphasis added] and exclude from the jury box all jurors not indifferent, or who for any reason are disqualified to act as jurors; while at the same time they secure to the parties the advantage of a jury constituted by lot from all the qualified jurors undrawn on the panel.
>
> The violation of the legal right of the party to have the case tried by competent jurors, would be conclusive. **The error in this case was in improperly rejecting competent jurors. The court added a disqualification, not only not found in the statute, but which the statute declares shall not constitute a disqualification.**[Emphasis added]
>
> The law prescribes the qualification of jurors. **The court cannot add to, or detract from them [statutes]. It cannot itself select the jury, directly or indirectly. It cannot in its discretion, or capriciously, set aside jurors as incompetent, whom the law declares are competent, and thus limit the selection of the jury to jurors whose names may be left.** [Emphasis added]

B. The trial court erred in instructing the jury it could not convict Petitioner of voluntary manslaughter as a lesser included offense without proof of gross provocation and heat of passion.

In *State v. McGuire*, 200 W. Va. 823 at 825 , 490 S.E. 2d 912 at 914 (1997).Syl. Pt.3, this Court noted: "Gross provocation and heat of passion are not essential elements of voluntary

manslaughter, and therefore, they need not be proven by evidence beyond a reasonable doubt. It is intent without malice, not heat of passion, which is the distinguishing feature of voluntary manslaughter." When the State seeks conviction for voluntary manslaughter, it does not need to prove provocation or passion, and certainly the defense need not prove those elements to establish it as a lesser included offense."

In this case at bar, the trial court's voluntary manslaughter instruction provided: Voluntary Manslaughter involves a sudden intentional killing upon *gross provocation and in the heat of passion.* Thus, Voluntary Manslaughter arises from the sudden *heat of passion*, while Murder is from the wickedness of the heart and mind. [Emphasis added.] The term "provocation", as it is used to reduce a homicide to Voluntary Manslaughter, consists of certain types of acts and conduct committed against the defendant which would cause a reasonable person to kill. This means that the provocation must be such that it would cause a reasonable person to lose control of himself and act out of the heat of passion to kill, and that the defendant in fact did so in this case. [A.R. I 84-85; A.R. II 826-827]

In *McGuire*, a jury convicted the defendant of voluntary manslaughter. Id. at 826. The defendant appealed, arguing that the circuit court had failed to instruct the jury it needed to find "gross provocation" and "heat of passion" Id. at 832-33. This Court affirmed the appeal, in part because adding extra elements would negate the legislature's intent that manslaughter be a lesser included offense of murder. Id. at 834. " In West Virginia, there can be no doubt that we also have considered voluntary manslaughter as a lesser included offense of murder....It is intent without malice, not heat of passion, which is the distinguishing feature of voluntary manslaughter." Id. at 834-835.

This Court addressed a similar jury instruction in *State v. Drakes*, ___ W.Va. ___, 844 S.E. 2d 110 (2020). In *Drakes*, the Court determined that adding "sudden excitement" and "heat of passion" to the voluntary manslaughter jury instruction was error and, in that case, warranted reversal and remand for a new trial. The Court's discussion in *Drakes* is as follow:

> Thus, to the extent that the jury was instructed that voluntary manslaughter required proof that the petitioner killed the victim "unlawfully and intentionally, without premeditation, deliberation, or malice, *but upon sudden provocation and in the heat of passion*[,]" the instruction contained elements that were not essential to a conviction for voluntary manslaughter. [Emphasis added]. The error in the instruction given by the circuit court is in direct contravention to the Court's holding in *McGuire*. This instructional error also warrants a reversal and remand for a new trial."

By adding gross provocation and heat of passion, the trial court compelled the jury to believe it must find these two additional elements to render a verdict of voluntary manslaughter. As in *Drakes*, this instructional error warrants a reversal and remand for a new trial.

In *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114, the Court provided that "in West Virginia criminal cases the sole basis for attacking an unobjected jury charge are plain error and/or ineffective assistant of counsel." 194 W.Va. At 17, n. 23, 459 S.E.2d at 128 n. 23. The Court in *Miller* established four prongs plain error analysis: there must be an error; that is plain; that affects substantial rights; and seriously affects the fairness, integrity, or public reputation. To affect substantial rights means that the error was prejudicial. It affected the outcome of the proceedings in the trial court.

The first prong of analysis is whether there was an error. Pursuant to *Drakes*, it was error by including "sudden provocation" and "heat of passion". The second prong whether the error was plain, [clear and obvious). Pursuant to the ruling in *Drakes* and *McGuire*, the error was plain. In determining whether the plain error affected substantial rights of the defendant, the defendant need

only demonstrate the jury verdict in his case was actually affected by the unobjection to error. *State v. Marple*, 197 W.Va. 47, 475 S.E.2d 47 (1996). The trial court ,made it more difficult for the jury to consider voluntary manslaughter by adding the elements of gross provocation and heat of passion. If the jury had been properly instructed, it may have found an absence of malice sufficient to acquit him of second degree murder. It affected the outcome of the proceedings in the trial court. The error affected substantial rights of Petitioner. It resulted in prejudice to the Petitioner.

The error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. The jury convicted the Petitioner of second degree murder upon the erroneous belief that voluntary manslaughter required gross provocation and in the heat of passion. The error had the capacity to mislead the jury on the elements of the offense, and lead the jury not to convict for voluntary manslaughter. The trial courts error created a substantial miscarriage of justice.

In *Drakes*, this Court discussed the plain error doctrine but did not apply the four prongs that guide the plain error analysis.

In *Drakes*, the Court stated:

We disagree with the state's argument that the assigned error was not preserved by the petitioner below. Even assuming, arguendo, that it was not properly preserved, the Court could review it under the plain error doctrine. See W.Va. Rule of Crim. P. 30 ("No party may assign as error the giving or the refusal to give an instruction or the giving of any portion of the charge unless that party objects thereto before the arguments to the jury are begun, stating distinctly the matter to which that party objects and the grounds of the objection; *but the court or any appellate court may, in the interest of justice, notice plain error in the giving or refusal to give an instruction, whether or not it has been made the subject of objection"*) Id. Pg. 120. [Emphasis added]

VI. CONCLUSION

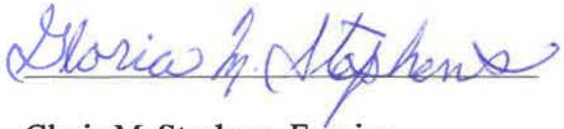
It will be argued that no injury resulted to the Petitioner from the erroneous disqualification and exclusion [removal] of competent jurors, since a competent jury actually tried the case. It cannot be said that the trial would have resulted differently if the Bradshaw jurors had not been removed from the jury panel. Except for the erroneous decision by the trial court, the jury would have been differently constituted. The statutory procedure for challenging the jury selection process requires only a finding of a substantial failure to comply with W. Va. Code 52-1-1 et. seq. to support such a challenge, with no showing of prejudice required.

For the above-stated reasons, this case must be reversed and remanded to the lower court.

Respectfully submitted,

Shane Eric Hagerman

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

STATE OF WEST VIRGINIA
Respondent,
Plaintiff Below,

v. No. 22-0219

SHANE ERIC HAGERMAN
Petitioner,
Defendant Below.

CERTIFICATE OF SERVICE

I, Gloria M. Stephens, Counsel for the Petitioner, certify that the original of the foregoing Petitioner's Brief and Appendix and ten copies were delivered to the Office of the Clerk, via hand delivery on the 5th day of July, 2022 and a copy to the Office of the Attorney General.

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