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

STATE OF WEST VIRGINIA,
Respondent,

v.

SHANE ERIC HAGERMAN,
Petitioner,

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

PETITIONER'S REPLY BRIEF

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REPLY BRIEF OF PETITIONER SHANE ERIC HAGERMAN

I. ERRORS AND OMISSIONS IN RESPONDENT'S STATEMENT OF THE CASE

Petitioner's Brief with Appendix was filed on July 5, 2022 in accordance with Rule 7 of the West Virginia Rules of Appellate Procedure. Respondent's Brief was filed on August 19, 2022 along with *Respondent's Motion to File a Supplemental Appendix Record* and the *Supplemental Appendix* on same date. Respondent asserts at ¶ 5 of its motion that the Supplemental Appendix Record "is necessary for the Court to understand the posture of this case, as portions of the argument deal with the sufficiency of the evidence," without providing additional substantive argument. Petitioner subsequently filed his Response in Opposition to Respondent's motion on August 25, 2022, arguing that since the filing of Petitioner's Brief on July 5, 2022, "Respondent knew or should have known that a supplemental appendix was 'necessary'" and that Respondent "was afforded ample time and opportunity" to file said motion. Rule 7(g) of the Rules of Appellate Procedure provides:

> (g) Supplemental appendix. A party may file a motion for leave to file a supplemental appendix that includes such matters from the record not previously submitted. The motion shall set forth good cause why the material was not previously included.

As asserted at ¶ 4 of Petitioner's Response in Opposition, Respondent filed the subject motion and supplemental appendix "without leave of the Court to do so." Petitioner further stated at ¶ 5 of his response that Respondent's motion should be denied "[b]ecause of the adequacy of the existing record" and requested that this Court order Respondent "to file a redacted response brief that blacks out all references to the supplemental appendix."

In filing the instant Reply Brief, Petitioner is at a distinct prejudicial disadvantage due to

Respondent's utilization of two separate citations—one to the "A.R." (Appendix Record) as properly authorized and utilized in Petitioner's initial Brief, and the second, the unauthorized citation to "S.A." (Supplemental Appendix) in Respondent's Response Brief.

In its Statement of the Case, Respondent cited the unauthorized Supplemental Appendix 58 times with additional citations of same in later sections of its Brief. It is anticipated that the Court will not address *Respondent's Motion to File a Supplemental Appendix Record* and the *Supplemental Appendix* until after Petitioner's deadline for submitting this Reply. Nevertheless, Petitioner must timely file this Reply Brief pursuant to the Court's established deadlines with the status of the Appellate Record precipitously unresolved—a wholly unnecessary, untimely and unauthorized state of limbo generated by Respondent.

II. REPLY STATEMENT OF CASE

Respondent misstates Petitioner's neighbor Christina Keene [hereinafter Keene] "she heard a loud bang then saw Petitioner running into his house S.A. 628, 641" Respondent's Brief 4.

Keene's testimony was she met Addair through an argument she and him had over him coming on her property to try to attack her husband because Addair was drunk in 2018 months before the shooting. She told Addair to turn around and go back from where he came from. Addair said, "You're nothing but a fucking bitch and I'll slit your fucking throat." She called 911. It was during this incident, "Shane comes running down the trailer park and got ahold of McKinley [Addair]. Muncy pulled up and they put him [Addair] in the car and took him home." S.A. 639-640.

It was this incident that Keene testified about "Shane running." On November 22, 2018 she heard a bang and saw Shane go through his front door. Keene's correct testimony was that she heard

a bang. "I looked out my window I seen Shane go through his front door and I turned and went back to bed. I didn't think anything else of it." S.A. 641.

Petitioner's girlfriend, Hanna Muncy [hereinafter Muncy] gave a statement to Trooper Rose on the morning of the shooting, November 22, 2018 at the scene and a second requested statement at the Welch State Police Detachment to Trooper Woods and Trooper Rose on November 27, 2018 S.A. 207, 210.

The State attempted to examine Ms. Muncy by reading the November 27, 2018 statement. The trial court admonished the State:

> THE COURT: You asked her if you - - if she went to get him. She said she couldn't remember.
>
> Now, if you're trying to impeach her testimony, you ask her, Did you say "I went to go get somebody?" You don't need to read the blah, blah, blah, the before and the afterwards, just that part of it.
>
> And then I can tell the jury that that's not being introduced for the truth of the matter asserted. It's only being introduced as to impeach her testimony. - -
>
> MR. MORGAN: And, Your Honor - -
>
> THE COURT: - - as to whether or not she's telling the truth or not. S.A. 213.

On pag 4 of Respondent's Brief, Respondent misrepresents Muncy's testimony that Petitioner beat up Addair throughout the night, even going so far as breaking a beer bottle and holding the broken pieces to Addair's neck. S.A. 231-33.

The State read from her November 27, 2018 statement given to the State Police. Ms. Muncy testified under oath that she didn't recall. The trial Court again admonished the State:

> THE COURT: Once again for the jury, this is not being introduced for the truth of the matter asserted, but as to whether or not the witness has made prior inconsistent statements. S.A. 233.

Although Respondent refers to Muncy's prior statement [November 22, 2018 statement to

the State Police] Respondent's Brief 4, the trial court ruled that Muncy's statement is not testimony and that the jury disregard.

> MS. STEPHENS: Objection, Your Honor. Asked and answered.
> THE COURT: Well, I will sustain that, not because of that, because he said "in her statement." We have to go by what is testimony, not what is in her [Muncy] statement.
> MR. MORGAN: Yes, sir, Your Honor.
> THE COURT: Her [Muncy] statement is not testimony; so the jury will disregard that part and I will sustain the objection, because it refers to her [Muncy] statement, not her testimony. S.A. 750

Respondent only discusses the cross-examination of Lee Tessner in Statement of the Case [Respondent's Brief 2-4]. It fails to mention his cross-examination testimony that supports that the shooting was self-defense. The following testimony from Tessner supports not only that it was self-defense but also that Petitioner was stabbed

> **BY MS. STEPHENS**
>
> Q. After the shooting - - shooting, Shane came in, had blood all up and down his side, laid down on the floor and said, "He stabbed me. He stabbed me. It was self-defense."
> Isn't that correct?
> A. Yes
> Q. When you were practically dragging Shane to Mrs. Keene - -she's the neighbor that called 911 - - he said to you, "He stabbed me, man. He stabbed me. It was self-defense."
> And you said, "I know, man. It's all right. You're going to be all right."
> Isn't that correct?
> A. I did, but I wouldn't say that I - -
> Q. Isn't that correct?
> MR. MORGAN: Your Honor, if - - I would object and allow him to answer if he does have context to his answer.
> THE COURT: He can answer the question and then he can - - you can re- - - you can re-examine him as to a more complete statement.
> MR. MORGAN: Yes, Sir.
> MS. STEPHENS (Resuming):
> Q. Is what I just - - well, I'll repeat it.
> He said to you, "It was self-defense."

And you said, "I know, man. It's all right. You're going to be all right." Isn't that correct?

A. Yes, that's correct.

Q. Now, when he said, "It was self-defense, " he was defending - - defending himself, isn't that correct?

A. I don't know. I can't answer that because I didn't see what happened on the porch.

Q. When he said to you, "It was self-defense," it meant that he was defending himself; isn't that correct?

A. Yes, that's what he meant.

Q. Now, Shane went out the back door, but he couldn't get out the back door. He couldn't unlock the back door.

You unlocked the door because Shane couldn't open it; isn't that correct?

A. He could open it, but I did unlock it.

Q. Shane did not open the door.

A. I opened the door, but I held the door, put my hand out, and I said, ":If you're going out this back door, don't do nothing stupid."

Q. You opened the door isn't that correct?

A. Yes, ma'am.

Q. But for you opening the door, Shane could not have gone out the door; isn't that correct?

A. I don't see why not. He could have.

Q. He couldn't open it. Shane was unable to open the door. You had to open the door for him.

A. I don't - - if he wanted to open the door, he could have opened the door. He wasn't unable.

Q. He wasn't able to open the door. You had to open the door for him; isn't that correct?

A. No. I opened the door for him - -

Q. You opened the door for him?

S.A. 391-393

Tessner also testified regarding his November 27, 2018 statement to the State Police that McKinley[Addair] stabbed him [Petitioner] and admitted at trial that Addair stabbed Petitioner. S.A. 396-397

III. REPLY 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 defendant 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 in the future.

IV. ARGUMENT IN REPLY TO RESPONDENTS' BRIEF

Shane Eric Hagerman respectfully requests that this Court reverse the Sentencing Order, dated March 5, 2022, in the Circuit Court of McDowell County, the Honorable Rudolph J. Murensky, II presiding.

By Order entered March 5, 2022, Petitioner Hagerman was sentenced to the custody of the Commissioner of Corrections for a determinant sentence of 30 years, with credit for time served (35 days), upon his jury conviction of second-degree murder. The Court immediately remanded Petitioner Hagerman into custody as a State prisoner to serve his sentence.

West Virginia Rules of Appellate Procedure, Rule 10 (d), provides in pertinent part: Unless otherwise provided by the Court, the argument section of the respondent's brief must specifically respond to each assignment of error, to the fullest extent possible. If respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the

petitioner's position on the issue. The Respondent failed to respond to "trial court deliberately concealing from Petitioner" disqualifying then excluding prior to trial six Bradshaw. Based on the foregoing, the Court must assume that Respondent agrees with the Petitioner's position on the issue of "trial court deliberately concealing from Petitioner" disqualifying then excluding prior to trial six Bradshaw Jurors since the Respondent did not respond to this assignment of error in its brief.

B. Respondent's Argument No. 1

The court did not err in requesting the jurors from Bradshaw and Raysal be diverted to a second, later pool, as the jurors were not removed entirely from the panel, and the panel was randomly selected in the first instance.

Respondent makes the following specious arguments pursuant to its Argument No. 1:

1. Page 10: "First, the court did not remove the jurors entirely from the panel; rather, the clerk randomly selected a cross-section of McDowell County residents, then the court asked that the jurors from Raysal and Bradshaw, six in total, be excluded from the first set of jurors called for potential service. [citing Mot. Hr'g 15.] The judge specifically indicated that "had we not had a sufficient panel out of the first set [of jurors], then they would have been called in on the second set." [citing Mot. Hr'g 16] Thus, the six jurors were not removed from the panel and were still subject to being called had there not been enough jurors deemed eligible to empanel a fair jury from the initial set called."

Without providing any supporting legal authority on this specific argument, Respondent concluded: "Petitioner's Sixth Amendment right was simply not violated."

The Sixth Amendment of the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, **by an impartial jury of the State and district wherein the crime shall have been committed,** which district shall have been previously ascertained by law, and

> to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. (Emphasis added.)

Respondent neglects to address Petitioner's argument that 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.**" [Petitioner's Brief, p. 6] (Emphasis added.) *See* also, West Virginia Code § 52-1-8 *Disqualification from jury service*, which, in fact, does not include a category based on geographic location as "provided on the juror qualification form or interview with the prospective juror or other competent evidence." Moreover, Respondent does not contest Petitioner's assertion on Page 6 that the trial court excluded the Bradshaw residents "[w]ithout the knowledge of Petitioner and his counsel."

Respondent's Brief flatly states at Page 10 that West Virginia Code § 52-1-1 "was not violated in this case" without further providing the substance of said statute, which is as follows:

> **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.

Respondent's Brief erroneously advances the assumption that there is a legal basis for arguing, as demonstrated on Page11, that "[u]nlike *Stanley*, the selection of this matter was random; further, the six jurors in question, remained on the same panel they were chosen for, but were simply moved to the second half of the panel to be called . . ." And Respondent further argued, same page, that "[t]he randomness of the jury was still maintained and the six jurors remained in the larger pool

to be called; they simply were reserved for empanelment in the event that the original venire did not allow for a fair jury." To be sure, there is no applicable legal authority that allows a court to play such games with residents from a particular geographical area, as it has done here. And as discussed, *supra*, the trial court improperly added a disqualification category not found in West Virginia Code § 52-1-8.

Respondent fails to refute the argument that the trial court provided an unsustainable rationale for excluding all eligible residents of Bradshaw, McDowell County from the initial panel selected for the trial of this case. Respondent oddly characterizes the exclusion as "the diversion of the jurors to the second venire[.]" at Page 11, and further states:

> The circuit court specifically noted that no juror was excluded on the basis of race, color, religion, sex, national origin, economic status, or being a qualified individual with a disability. (Citation omitted). Indeed, . . . the diversion of these jurors to a later pool was in the interest of public policy, **as these jurors had independent biases which would have disqualified them, and the movement to a later pool allowed greater judicial economy in the jury selection process in this case.** (Emphasis added.)

Respondent fails to provide any explanation as to exactly what "independent biases" would have justified disqualification of Bradshaw residents specifically, and "the movement to a later pool allowed greater judicial economy in the jury selection process in this case." Respondent's Brief 12. While it could be perceived favorably, that the court was exercising judicial economy in what it did in deceptively and arbitrarily removing the six Bradshaw jurors, the judicial economy concept is not and was not designed to supersede, replace or eradicate the basic tenets of Due Process of Law, notice and the right to be heard.

2. Reply: Even if the court erred, it was harmless in this case.

Failure to observe a constitutional right constitutes reversible error unless it can be shown

that the error was harmless beyond a reasonable doubt. State ex rel. *Grob v. Blair* 158 W. Va. 647, 648 214 S.E.2d 330, 331 (1975) Syl. 5

The Respondent contends that: In this case, the Bradshaw jurors would have been stricken from the venire based on their actual or presumed biases; accordingly, error in their movement to the later portion of the jury pool was harmless beyond a reasonable doubt. Respondent's Brief 14. Once again, Respondent persists with the baseless and unsupportable argument that ti was inevitable that the Bradshaw jurors would have been stricken from the venire.

Bradshaw jurors were disqualified and excluded without any examination under oath by the trial court, the State or defense counsel. They were not subjected to voir dire. The Bradshaw jurors didn't even appear in court for the trial. Based on the foregoing, "actual or presumed biases" could not have been determined to have them stricken. Therefore, Respondent's argument that any error was harmless beyond a reasonable doubt fails.

The Respondent correctly asserts that "the trial court has broad discretion in determining whether to strike jurors for cause and we will reverse only where actual prejudice is demonstrated." Respondent's Brief 15 However, this does not apply to the Bradshaw jurors in that they were never examined, never subjected to void dire. Respondent cites three cases to support its assertion and that all the [Bradshaw] jurors at issue would fall under the exclusions of the cited cases. However, in the cases cited the disqualifications of jurors occurred after being subjected to voir dire.

> *State v. Miller* 197 W.Va. 588,, 605, 476 S.E.2d 535, 552 (1996) (citation omitted). "Actual bias can be shown either by a 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." *Id* at Syllabus point 5. A juror who cannot act as a fair or impartial fact-finder should be excused from service, Syl. Pr. 4, *State v. Newcomb,* 223 W.Va. 843, 679 S.E.2d 675 (2009), and any doubts on whether a juror can be fair and impartial should be resolved "in favor of excusing the juror.". Syl. Pt. 2, in part,

State v. Cowley, 223 W.Va. 183, 672 S.E.2d 319 (2008) (internal quotation and citation omitted). **All of the [Bradshaw] jurors at issue would fall under these exclusions.** Emphasis added. Respondent's Brief 15

Again, in the above cases cited by the Respondent the disqualifications occurred after being subjected to voir dire. This case is distinguishable from the cited cases, the Bradshaw jurors did not appear at trial and were not subject to void dire. Thus, they would not fall under the cited cases exclusions. Actually, the cases support Petitioner's position that the Bradshaw jurors should have been subjected to voir dire instead of being disqualified and excluded by the trial court prior to trial. [See Petitioner's Brief 9-10]

Moreover, Respondent's reliance on *State v. Miller*, 197 W.Va. 588, 601, 476 S.E.2d 535, 548 (1996) is inapt and misplaced in that the supposed error in jury selection occurred when the trial judge requested the circuit clerk to ask the prospective jurors some general voir dire questions before proceeding to allow questions from counsel. In the instant appeal, the Court's error occurred prior to the trial not during the trial and therefore has no precedential value herein. A review of two additional cases relied upon by Respondent, *State v. Newcomb*, 223 W. Va. 843, 679 S.E2d 675 (2009) and *State v. Cowley*, 223 W.Va. 183, 672 S.E.2d. 319 (2008) likewise have no probative value in the instant matter for the same reason.

Respondent asserts that "[e]ven if the Court erred, it was harmless in this case." Respondent presciently argues, as if gazing into a crystal ball, without any basis in fact whatsoever: "In this case, the Bradshaw jurors would have been stricken from the venire based on their actual presumed biases; accordingly, any error in their movement to the later portion of the jury pool was harmless beyond a reasonable doubt."

In its *Order Denying Defendant's Motion for Judgment of Acquittal and in the Alternative*

a New Trial, filed on February 22, 2022, the lower court provided an unsustainable rationale for excluding all eligible residents of Bradshaw, McDowell County from the initial panel selected for the trial of this case. The Court described its *sua sponte*, voluntary involvement in selection of the initial set of jurors for the case, as follows:

> 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.)

So, after the trial where Petitioner was convicted and sentenced to decades in prison, the Court conjured up a rationale for its prior unorthodox efforts to exclude the Bradshaw residents for geographic reasons, stating as follows in said Order:

> 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.

Assuming *arguendo*, that the Court's *sua sponte* action in this unusual case—without the knowledge of your Petitioner and his counsel— is sustainable, the trial court erred in providing only the thinnest of rationale, blanket statements, for the exclusion of each of these six jurors, devoid of any relevant substance such as who, what, when, where, why. As discussed *supra,* **the trial court improperly added a disqualification not found in the West Virginia Code §52-1-8.** (*Disqualification from jury service statute*) (*See* also *Petitioner's Brief*, p. 6) (Emphasis added.) Respondent merely states, with an uncanny ability to see into the future:

> As noted by the circuit court, the six jurors diverted to the later panel were all from a tiny tightknit community comprised of only 207 people **and likely all would have had familiarity with the parties in this case and the incident in question. Mot. Hr'g 15. Individually, the jurors would have been disqualified for other reasons as well.** (Emphasis added).

Consequently, the trial court's intentional removal of at least six jury panel members from the town of Bradshaw, deliberately concealing from of Petitioner and his counsel, constitutes an egregious failure to select jurors randomly in clear violation of West Virginia Code §52-1-8.

This has Court elaborated on juror disqualification issues to be addressed during voir dire most recently in Syllabus Point 3and 4 of *O'Dell v Miller*, 211 W.Va. 285, 565 S.E.2d 407 (2002) which held:

> 3. When considering whether to excuse a prospective juror for cause, a trial court is required to consider the totality of the circumstances and grounds relating to a potential request to excuse a prospective juror, to make a full inquiry to examine those circumstance and to resolve any doubts in favor of excusing the juror.

4. If a prospective juror makes an inconclusive or vague statement during *voir dire* reflecting or indicating a possibility of disqualifying bias or prejudice, further probing into the facts and background related to such prejudice is required.

In *State v. Hobbs*, 168 W.Va. 13, 282 S.E.2d 258 (1981), it was claimed denied a fair trial because the trial juries were unconstitutionally selected and empanelled, and that the trial court erred in not conducting an evidentiary hearing with respect to the selection of the jurors in violation of the Sixth and Fourteenth Amendments of the United States Constitution. The *Hobbs* case was a challenge to the jury selection. Petitioner is not challenging the jury selection. Petitioner is challenging the trial court's sua sponte decision to disqualify and remove already selected members of the jury panel then deliberately concealing it. *Hobbs* is not applicable this case.

The Respondent asserts "This court has stated that without a showing that a defendant was injured by the method in which the jury was drawn, there is no prejudice. *State v. Hankish,* 147 W.Va. 123, 127, 126 S.E.2d 42, 45 (1962). Therefore even if there was error in this case, Petitioner cannot show prejudice, and the error is harmless beyond a reasonable doubt." Respondent's Brief 16.

It would appear questionable whether the harmless error doctrine would be available to the Respondent in this case because of the deceptive nature of the trial court. The trial court did not disclose to the Petitioner before the selection of the jury, during the trial or even after the verdict was rendered the fact that it had removed these six jurors from the initial panel of jurors for this case. It was not until Petitioner's discovery after the fact, that the aforementioned had been done did the trial court try and give reasons and explanations about what it had done. Therefore, based on the lack transparency and disclosure by the trial court on this issue it becomes highly problematic whether harmless error can be utilized.

Further, it is Petitioner's position that the trial court violated the West Virginia Code of Judicial Conduct because of the deceptive, non-disclosure/concealment nature of the trial court.

The West Virginia Code of Judicial Conduct as set forth below provides:

> 1.1 - **Compliance with the Law**
>
> A judge shall comply with the law, including the West Virginia Code of Judicial Conduct.
>
> 1.2 - **Confidence in the Judiciary**
>
> A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

The Respondent basically concedes that the trial court erred in removing the six jurors from the initial panel, and as a fall back attempts to utilize the harmless error doctrine, not withstanding the deceptive, non-disclosure/concealment nature of what the trial court had done. If the trial court was so confident that what it had done was proper, why did it not fully disclose what it had done prior to the selection of the jury?

Moreover, a review of the pertinent facts of this case clearly shows that this was not a slam dunk case for the State. The video in evidence shows what happened in this case. The alleged victim was the aggressor, was highly intoxicated, and belligerent. The alleged victim was put out of the house of Petitioner and had every opportunity to leave but chose to stay there and continue to knock on the door to try and regain entrance into Petitioner's house. The alleged victim had also used a knife to stab the Petitioner twice. This is a case whereby the jury could have found the Petitioner not guilty or guilty of a lesser charge than 2nd degree murder.

The bottom line is that at one of if not the most critical stage of the proceedings, that being

the selection of the jury to hear and decide this case, Petitioner was deliberately kept in the dark about what the trial court had done with the six jurors that it removed from the jury panel.

C. The jury instruction for voluntary manslaughter, which was not objected to below, is not erroneous and does not necessitate reversal.

This court addressed a similar jury instruction in *State v. Drakes*, 243 W.Va. 339, 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 follows:

> 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."

Respondent asserts that Petitioner's reliance on this Court's holdings in *Drakes* is misplaced [Respondent Brief 20]. The error in the voluntary manslaughter instruction in *Drakes* by the circuit court was in direct contravention to the Court's holding in *McGuire*. The Court ruled the instructional error 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 instruction error in this case warrants a reversal and remand for a new trial.

Respondent's Argument No. 1.

1. Petitioner cannot succeed under the plain error doctrine.

In *Drakes*, this Court discussed the plain error doctrine regarding the voluntary manslaughter

instruction, but did not apply the four prongs that guide the plain error analysis. 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 ground 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]

Pursuant to West Virginia Rules of Criminal Procedure, Rule 30, we request this Court in the interest of justice, notice plain error in giving the voluntary manslaughter instruction.

Respondent's Argument No. 2.

2. Petitioner's rights were not substantially affected, nor was the integrity and fairness of his trial brought into question because the instructions, as a whole, reflect a correct and complete statement of the law.

Voluntary manslaughter is an intentional killing without malice and the trial court erred by requiring the jury to find additional elements before considering it as a lesser included offense. The gross provocation and heat of passion are not elements of voluntary manslaughter and the trial court instructed that they were.

The trial court's instructions made it more difficult to consider lesser included offenses by adding to voluntary manslaughter the elements of gross provocation and heat of passion. Adding extra elements to a lesser included offense unconstitutionally shifted the burden of proof to defendant. Shifting the burden of proof to the defendant is a consequence of adding elements to lesser included offenses.

It is clear that the State relied on the November 27, 2018 statement that Muncy gave the State Police at the Welch State Police detachment not her initial statement that she gave at the scene on

November 22, 2018. Neither statement was under oath. The trial court ruled: "We have to go by what is testimony , not what is in her [Muncy] statement. Her statement is not testimony; so the jury will disregard that part and I will sustain the objection, because it refers to her [Muncy] statement, not her testimony." S.A. 750

A reading of Muncy's trial testimony clearly shows the State tried to use her statement instead of her actual trial testimony. S.A. 200-274. The Respondent is doing the same in what it reports to be Muncy's testimony in its Brief. It is using the statement not her testimony.

Morgan (State) Direct Examination of Hannah Muncy

Q. Okay. And did Shane throw the first punch?
A. It seems like it, but I don't remember for sure, but I think so.
S.A. 216
Q. So you do not recall, as you sit here today with the jury, him [Shane] busting a beer bottle?
A. No

. . .

Q. Why would you tell the state police this happened if - I mean, are you saying it did not happen?
A. It didn't happen
S.A.232

Once again the Court instructed the jury regarding the State's use of the statement that: " This [statement] is not being introduced for the truth of the matter asserted, but as to whether or not the witness [Muncy] has made prior inconsistent statement". S.A. 233

Petitioner's testimony was that Addair was beating on the door trying to break in. The video shows Addair beating on the door. Addair was using the knife that he stabbed Petitioner with to beat on the door. The knife had Petitioner's blood on it. The knife was bent from Addair trying to slide it in to undo the top bolt lock on the door. S.A. 720-721. Petitioner went outside in only his boxers to stop Addair from breaking into his home with a shot gun that had not fired. S.A. 724-728.

Although Respondent asserts that Tessner and Muncy did not see Petitioner get stabbed twice by Addair, the evidence was Petitioner was stabbed by Addair [A.R.II 643-650] S.A. 391-393.

As in *Drakes*, the trial court instructed the jury it could not consider voluntary manslaughter as a lesser included offense unless it found Petitioner acted "upon gross provocation and in the heat of passion" [A.R.I 84-85; A.R. II 826-827]. These unnecessary elements included in a lesser included offense instruction, shifted the burden of proof to Petitioner.

This error affected the outcome of the proceedings in the trial and resulted in prejudice to the Petitioner. 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 court's error created a substantial miscarriage of justice.

V. CONCLUSION

The trial court disqualified then excluded [removed] prior to trial competent jurors from the jury panel solely because of their geographic location. The trial court deliberately concealed this from Petitioner preventing a challenge to the jury selection procedure. Thereby, allowing the trial court to determine the composition of the jury.

For the above-stated arguments, this case must be reversed and remanded for a new trial.

Respectfully submitted
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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 Reply and ten copies were delivered to the Office of the Clerk, via Certified Mail on the 1st day of September, 2022 and a copy to the Office of the Attorney General by U.S. Mail

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