

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
CHARLESTON, WEST VIRGINIA

No. 34770

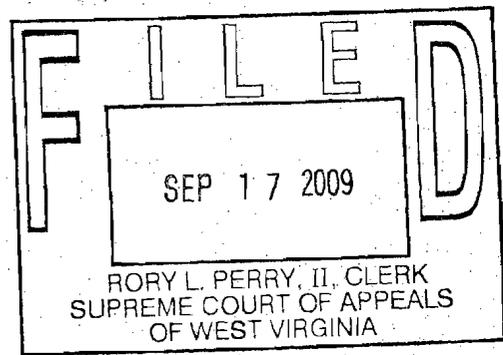
STATE OF WEST VIRGINIA,

Plaintiff Below – Appellee,

VS.

DALLAS HUGHES,

Defendant Below – Appellant.



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CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA  
CASE NO. 04-F-285-H

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REPLY TO RESPONSE OF APPELLEE

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## **UNFAIR SURPRISE**

Dallas Hughes was indicted for first degree murder on or about September 15, 2004. The first count of the indictment charged defendant with "unlawfully, feloniously, maliciously, willfully, deliberately and with premeditation slay, kill and murder one Sacha Mitchell." There can be no dispute regarding the critical purpose and importance placed on the indictment and the language it contains. It is the most fundamental principle of criminal procedure that the indictment shall provide specific and explicit notice of the exact crime alleged, as well as the elements of that crime. Accordingly, the analysis herein must begin with the language of the indictment and two simple questions 1) What does the indictment contain? and, 2) What does the indictment not contain?

### **What Does the Indictment Contain?**

The indictment, in Count 1, does contain statutory language imposed by W. Va. Code §61-2-1. Specifically, that section of the Code states that it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, but it shall be sufficient in every such indictment to charge that the defendant did feloniously, willfully, maliciously, deliberately and unlawfully slay, kill and murder the deceased. The indictment returned against Dallas Hughes does contain the language "did feloniously, willfully, maliciously, deliberately and unlawfully slay, kill and murder," although not necessarily in that order. The indictment returned also included additional language in the form of one word...premeditation. By adding the term "premeditation", the indictment took on a new and specific meaning, thereby narrowing the charge and notifying defendant that he was formally charged therein with the crime of premeditated first degree murder.

The State argues in its brief at 25 that the addition of the term premeditation is mere "surplusage". The State argues at 25-26 that the addition of such surplusage has no practical effect on the indictment and further asserts that "Raleigh County indictments for first degree murder *always* specify the element of premeditation, although such specificity is surplusage." *emphasis added*.

Black's Law Dictionary defines surplusage as extraneous, impertinent, superfluous, or unnecessary matter. Premeditation extraneous? Impertinent? Superfluous and unnecessary? Hardly the definition of premeditation one normally assigns. It is absurd to imagine that the term premeditation is mere "surplusage" when discussing the crime of first degree murder. This Court has reasoned that the West Virginia murder statute contains three broad categories of homicide that constitute first degree murder 1) poisoning or lying in wait, 2) *premeditated* killing and 3) felony murder. Syllabus Pt. 6, State v. Sims, 162 W.Va. 212, 248 S.E.2d 834 (1978), *emphasis added*. Accordingly, while the State may regard premeditation as mere "surplusage", this Court has determined that, quite to the contrary, premeditation is a specific and integral component of West Virginia Code §61-2-1 that carries with it very specific meaning and consequences.

In support of its theory that premeditation is surplusage, the State at 25-26 argues that "Raleigh County indictments for first degree murder *always* specify the element of premeditation, although such specificity is surplusage." *emphasis added*. Not only is it counterintuitive to *always* perform an act that one regards as having no effect, it is likewise untrue that Raleigh County indictments for first degree murder always specify the element of premeditation. On or about January 10, 2007, the

Raleigh County Grand Jury returned a single count indictment against Donita Kay Deberry, attached. In the single count returned against Ms. Deberry, the State charged the defendant therein with first degree murder by virtue of “knowingly, feloniously, willfully, maliciously, deliberately and unlawfully...slay, kill and murder.” Contrary to the claims in the State’s brief at 25-26, the indictment does *not* include the term “premeditation”.

Moreover, when carefully considered, the State’s very argument defeats itself. The State argues that Raleigh County indictments for first degree murder always specify the *element* of premeditation, although such specificity is *surplusage*. The State acknowledges within the first part of its argument that premeditation is specified as an “element”. This stands to reason as the function of the indictment is to notify a defendant of the essential elements of the crime alleged. Syllabus Point 6, State v. Wallace, 205 W.Va. 155, 517 S.E.2d 20 (1999). The State then goes on to argue that such specificity is surplusage. Certainly the State would concede that elements are necessary and essential building blocks of a criminal charge and are never surplusage. The State’s reference of premeditation as an “element” further validates the fact that, regardless of the State’s inention, the indictment returned against Dallas Hughes contained the element of premeditation, thereby placing Hughes on notice that the charge against him was premeditated first degree murder.

#### **What Does the Indictment Not Contain?**

There is no argument by the State that the indictment, on its face, does not explicitly charge defendant with the crime of felony murder. Rather, the State argues that the crime of felony murder is implicit in the charge, easily ascertained from

defendant's statement to police and that the State had no duty to "spoon-feed" the defendant any further such notice.

It may very well be that the State has no duty to "spoon-feed" a defendant. The State does, however, have a duty to provide all defendants with clear notice of the charges that they must defend. West Virginia Constitution, Article III, Section 14. The State argues in its brief, as it did at trial, that the defendant was adequately notified as to the felony murder charge simply because the charge comes straight from defendant's own statement to police.

Defendant's statement to investigators was taken over a period of several hours. During this time, the investigator's audio tape malfunctioned numerous times, failing to capture the entire discussion. The portion of the statement that was recorded and has been transcribed is replete with broken questions, inaudible answers, and deceptive statements from both defendant and investigators. The State's reliance on such a statement to provide defendant notice of the ultimate charges that would affect the rest of his life is unreasonable, unnecessary and unfounded in light of the State's inability to offer any plausible reason as to how including the charge in the indictment would have in any way burdened or prejudiced the State.

The State relies upon Levitt v. Bordenkircher for the premise that "when... evidence of felony murder, is 'discernible from the appellant's confession,' the claim of unfair prejudice by the absence of notice of evidence of felony murder is without merit." 342 S.E2d 127, 136 (W.Va. 1986). Despite the State's analogy, the two cases are factually distinguishable in regard to the defendant's confession. In Levitt, the defendant's confession included the fact that he produced the gun and it discharged,

killing the victim, during an attempted robbery. The defendant in Levitt admitted that it was his intention to and indeed he was in the process of robbing the victim at the time of her death. The defendant's confession in Levitt demonstrates that he knew the act he was undertaking was in fact a criminal act – robbery – aside from the shooting death that took place. Defendant Dallas Hughes' statement does not in any manner indicate that he knew he was committing a burglary at the time of Sacha Mitchell's death.

The State at page 22 alleges that defendant's admission of angrily pushing the door in and then pushing Sacha Mitchell to the stairs is evidence of his burglarious intent to enter Sacha's apartment and assault her. Contrary to the State's representations, the defendant never admits to angrily pushing the door in. The defendant's statement at pages 8 and 12 explain that twice Sacha opened the door for defendant and he pushed the door the remainder of the way open and walked in. Never, throughout his entire statement to police, does defendant characterize his entry as angry. Likewise, defendant's statement does not support the State's assertion that defendant admitted to walking in and pushing Sacha Mitchell down. To the contrary, defendant's statement does not mention pushing Sacha to the stairs until a second argument ensued and she produced the gun. Defendant's statement hardly presents sufficient indicia for him or anyone else to determine that he might be charged with felony murder as a result of burglary.

There can be no question that simply including language of felony murder in the indictment would have provided defendant with proper notice. Yet the State has not and cannot explain how including a felony murder charge in the indictment would in any manner burden the State. In fact, Raleigh County indictments routinely charge both

premeditated and felony murder within the same indictment. On or about January 10, 2007, a Raleigh County indictment was returned against Donita Kay Deberry charging the defendant with “knowingly, feloniously, willfully, maliciously, deliberately, and unlawfully, or in the commission of or attempted commission of delivering a controlled substance...slay, kill and murder.” *emphasis in original, indictment attached.* On or about January 10, 2007, Raleigh County indictments were returned against Thomas E. Leftwich and Michael E. Martin charging each defendant with “unlawfully, feloniously, maliciously, willfully, deliberately, and with premeditation, or in the commission of or attempt to commit a felony of delivering a controlled substance...slay, kill and murder.” *indictment attached.* On or about September 10, 2008, Raleigh County indictments were returned against Daniel Robert Carte, Cecil “Sonny” Harrah and April Dawn Davis wherein the defendants were charged with “unlawfully, feloniously, willfully, maliciously, deliberately, and with premeditation or in the commission of or the attempt to commit arson, did slay, kill, and murder.” *indictment attached.*

These six indictments defy most, if not all, of the State’s reasoning for not providing Dallas Hughes with notice of the felony murder charge. Although the State argues it is not required to spoon-feed defendants notice of such charges, these indictments illustrate the incredible burden the State must overcome to provide notice – the inclusion of eleven simple words – “or in the commission of or attempt to commit a burglary”. Had the State provided these eleven words to the defendant herein there could be no argument of unfair surprise. Rather, the State chose not to include this language but instead rely on defendant’s statement to provide notice of a charge that would affect the remainder of defendant’s life. While the Raleigh County prosecutor

provided explicit notice of alleged felony murder based upon arson and delivering a controlled substance, it chose not to provide notice of an alleged felony murder based upon burglary to this defendant.

Absent notice of felony murder, a defendant may still logically assume a felony murder charge based upon arson when a fire was involved. Likewise, the defendant who was involved in a drug deal at the time the death occurred may likely assume felony murder in relation to the exchange of illegal drugs. And yet, this prosecutor chose to provide such individuals notice of not only the charge of felony murder, but also notice of the underlying felony. In the case *sub judice*, the State expects the defendant to ascertain burglary from an event wherein he entered an apartment he used to call home, entered invited, entered for the purpose of getting some sleep and once inside became involved in a life or death struggle wherein Sacha Mitchell would lose her life. These are the facts that the State allege provide defendant with sufficient notice of burglary and felony murder.

If, in fact, felony murder is so easily ascertained from defendant's statement, then why did the State fail to mention so much as a whisper of the charge until its opening statement at trial. The State asserts profoundly that it has no duty to spoon-feed the defendant notice of felony murder. While at the same time, the State, from the very onset, force-fed the defendant premeditated murder. The State arrested defendant for premeditated murder, held a preliminary examination centering on the charge of premeditated murder, included in the indictment what it refers as the "surplusage" element of premeditation, and held two bond hearings wherein the focus was on premeditated murder. Suddenly, at trial the State argues in its opening, for the first time,

that "under Count 1...there are two alternative means (by) which a person can be guilty of first degree murder...we believe we will prove the defendant guilty of first-degree murder by both of these two ways." State's brief at 23 citing T.T. 519. Even the prosecutor's own words in opening acknowledge that there is a difference between felony and premeditated murder. Despite such recognition, the State continues to argue that it had no duty to provide defendant with notice that he would face such an "alternative" charge. Including a charge of felony murder in the indictment could not possibly prejudice the State. To the contrary, failing to provide such notice severely prejudiced Dallas Hughes. Hughes should not be made to suffer from the State's unjustified refusal to provide him with proper notice of the charges he would face at trial.

#### **ELECTION BETWEEN THEORIES**

This Court held In State v. Walker, that a defendant may make a motion to force an earl[y] election if he can make a strong, particularized showing that he will be prejudiced by further delay in electing." Syllabus Point 2, State v. Walker, 188 W.Va. 661, 425 S.E.2d 616 (1992). Dallas Hughes made such a strong particularized showing of prejudice at trial in two distinct manners. First, Hughes was prejudiced by the utter surprise of the charge of felony murder to which he had no prior notice. Second, Hughes was prejudiced by the fact that defending both a charge of felony murder and premeditated murder would require contradicting defenses.

#### **Lack of Notice**

During the State's opening statement it charged defendant with the crime of felony murder. This was defendant's first notice of the charge. Article III, Section 14 of the West Virginia Constitution guarantees an accused the right to a fair trial. Among the

Constitutional guarantees contained therein is the guarantee that, "In all... trials, the accused shall be fully and plainly informed of the character and cause of the accusation... and shall have... a reasonable time to prepare for his defense." Without prior notice of the felony murder charge, defendant was not permitted the requisite time required to prepare a defense to the charges he would face at trial. Because of the surprise of the new charge of felony murder, and the inability to prepare a proper defense, defendant was entitled to have the State make an election between felony and premeditated murder pursuant to Walker.

The State argues in its brief that such an election would not have benefited defendant because the State very well may have elected to proceed against defendant on the charge of felony murder. The State argues that such a forced election resulting in felony murder contradicts defendant's claim of lack of notice and surprise. While it may be true that an election of felony murder would do nothing to cure defendant's lack of notice, such an election would have allowed defendant to move forward with a single defense, thereby removing the prejudice caused by contradicting defenses. This Court has reasoned that a defendant will suffer prejudice resulting from a new charge interjected at trial if the defense can show that it would have presented its defense differently but for the new charge. State v. Legg, 2005 W.Va. 32500 (2005). Essentially, the new charge is prejudicial against defendant if it creates an occurrence of contradicting defenses.

### **Contradicting Defenses**

The second manner in which defendant was prejudiced was the fact that defending both the charge of felony murder and premeditated murder would require

contradicting defenses. Defendant could not offer one defense sufficient to defend both charges such as alibi, as was the case in Stuckey v Trent. 202 W.Va. 498, 505 S.E.2d 417 (1998). Although Hughes could have presented evidence of self defense in regard to the charge of premeditated murder, such a defense would prove pointless in defending felony murder. Moreover, defending both charges of felony murder and premeditated murder would require this defendant to defend two distinct types of intent. In doing so, the burden would shift to defendant to prove his own innocence, whilst carefully traversing a minefield of intent wherein a defense to one allegation may very well lend credence to an opposite charge.

The State contends in its brief at page 25 that the defendant cannot assert prejudice based upon being "thwarted in his illegitimate intention to fabricate evidence." In support of this argument, the State cites Appellant's brief, keying in on the argument that defendant's defense of felony murder would be countervailing to the defense of premeditated murder, causing defendant to minimize, disavow and/or exploit evidence in different manners depending on the charge being defended. Contrary to the State's misguided argument, these terms are not terms of fabrication – fabrication of course meaning the creation or making up of entirely new and untrue facts. Rather, defense counsel's job at trial, just as the prosecutor's job, is to interpret for the jury exactly what relevance a certain fact may have in terms of the charge faced. By minimizing or exploiting certain facts the defense is not fabricating new facts, but instead explaining what impact those facts shall play in answering the ultimate questions. This is the same duty charged to every trial attorney, civil or criminal, plaintiff or defense, in every proceeding in every courtroom in the entire world.

Defendant made particularized showings at trial that he would be prejudiced if the trial court did not require the State to elect. The State argues that defense counsel did not move for an election until the close of evidence at trial. Contrary to these assertions, defense counsel repeatedly moved for an election to no avail. T.T. 734, 735, 806. Despite the evidence of prejudice, the trial court determined that the State was not required to elect. The consequence was not only contrary to the holdings of Walker and Stuckey supra, but proved fatal to defendant's chance of defending himself against either charge at trial.

### **Prosecutorial Misconduct**

Throughout the underlying trial, the State, from the very onset, made a concerted effort to keep the defendant uninformed and in the dark. After the arrest and prior to trial, defendant was placed in solitary confinement for his own "protection". Once trial began, defendant was notified for the first time of the felony murder charge as discussed herein. Finally, as the trial progressed, the prosecutor routinely and continually stymied defense efforts to speak with witnesses and put on evidence. T.T. at 861, 1166, 1397.

The State's first response is to place the blame on defendant. Essentially, the State argues at page 28 in its brief that any prejudice to defendant is "self-induced" for failing to conduct pre-trial interviews. The question, of course, is not whether defendant conducted pre-trial interviews. The question is whether the prosecutor interfered with defendant's ability to interview witnesses again once notice of the new charge of felony murder surfaced during trial. Any pre-trial interview of these witnesses was thrown out the door the moment the State charged defendant with felony murder in its opening.

Because of this new charge, defendant would need to interview these witnesses again regardless of what interviews took place prior to trial.

The fact of the matter remains that defense counsel was not able to interview several of the State's witnesses after they testified. The reason for the inability to do so is the simple fact that the prosecutor informed each that they did not have to speak with the defense. The State attempts to downplay the direct influence the prosecutor had on these witnesses by alleging that the prosecutor informed all witnesses that they did not have to talk to anyone including her, the defense or anyone. Although not always the case, the fact that the prosecutor chose her words carefully to include herself does very little to mitigate the fact that witnesses refused to talk with defense counsel based on representations by the prosecutor.<sup>1</sup> Regardless of the prosecutor's intentions, the effect was chilling and had a prejudicial effect on defendant. Moreover, the State cannot cite any legitimate reason for the prosecutor going out of her way to provide these witnesses with the knowledge that they did not have to speak to anyone.

Much the same, defendant was unable to call Deputy Harold despite issuing a subpoena for his appearance. As evidenced by the record, defense counsel first attempted to serve Deputy Harold with a subpoena issued and signed by defense counsel himself. Although not technically in compliance with Rule 17, the subpoena

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<sup>1</sup> The State asserts in its brief as it did at trial that witnesses were merely informed by the prosecutor that they were not obligated to speak to anyone, be it the State, defense or anyone else.

This representation is contrary to the proffer of defense counsel at 861 wherein he informed the trial court:

5 ... I went back, pursuant to the  
6 Court's instruction, to get their phone numbers so I could  
7 reach them.  
8 Ms. Keller had beaten me back there, and I get there,  
9 and I hear Ms. Keller telling all of them, "This doesn't  
10 mean you have to talk to Mr. Wooton. You don't have to talk  
11 to him. You don't have to talk to him."

unquestionably provided Deputy Harold with the requisite information that his testimony was sought, where and when. Despite having actual knowledge of a summons to testify, Deputy Harold did not comply.

The reason Deputy Harold did not comply? By the State's own admission on page 31, the prosecutor read to Deputy Harold Rule 17, regarding the requirements for a valid subpoena. The State then argues that the prosecutor never informed Deputy Harold to ignore the subpoena despite the fact that it was invalid. The prosecutor may well have never explicitly told Deputy Harold to ignore the subpoena; however, by reading Rule 17 to Deputy Harold the prosecutor without question "informed" Deputy Harold that he was not required to answer an improperly issued subpoena. There can be no other motivation for reading the rule to the Deputy than to quell his appearance.

The State argues in its brief at page 30 that "Appellant's brief erroneously asserts that there was a 'subpoena issued by the defense for Deputy Harold'" and that "there were no valid defense subpoenas, as none were issued by the Circuit Clerk as required by Rule 17." *emphasis added*. Despite the representations of the State, defense counsel did finally cause to be issued, a valid subpoena for Deputy Harold, a copy of which is attached. T.T. at 1345. By this time it would prove too late as Deputy Harold could no longer be located for proper service.

### **JURY SELECTION**

While Appellant's brief focused its discussion regarding juror bias on only two jurors, Ms. Diehl and Ms. Alpaugh, several prospective jurors likewise exhibited a bias toward defendant. The trial court struck several jurors because of perceived bias including Ms. Yancey questioned at T.T. 60 and struck by the court at T.T. 185, Ms.

Calhoun questioned at T.T. 93 and struck at T.T. 97, Ms. Tammy Jarrell questioned at T.T. 113 and struck at T.T. 121, Ms. Poole questioned at T.T. 121 and struck at T.T. 133, Ms. Moss questioned at T.T. 150 and struck at T.T. 155, Mr. Sarver questioned at T.T. 166 and struck at T.T. 172, Mr. Terry questioned at T.T. 183 and struck at T.T. 184, and finally, Mr. Cochran questioned at T.T. 228 and struck at T.T. 238. Each of these prospective jurors was struck for cause by the trial court after each displayed some disqualifying bias against defendant. Notwithstanding, jurors Mr. Burnette at T.T. 87, Ms. Alpaugh at T.T. 155 and Ms. Diehl at T.T. 174 each exhibited similar bias but were not struck for cause, despite very specific motions by defense counsel. Of these three jurors, Ms. Alpaugh and Ms. Diehl actually served on the juror which convicted defendant.

In response to Appellant's brief regarding juror Alpaugh, the State at 31 avers that the "Appellant's brief misstates the record by indicating that defense counsel's motion to strike Ms. Alpaugh was based upon her belief that, although a person is charged with a crime is not necessarily guilty, there must be a finding of probable cause before a person is charged. In fact, the record confirms that defense counsel made no motion to strike Ms. Alpaugh on the basis of those responses, but only because she knew a potential witness, Officer Bailey." The State's argument itself grossly misstates the record. Defense counsel's motion at T.T. 164, in its entirety, is as follows:

4 MR. WOOTON: Move to strike for cause, Your Honor. I  
5 would refer the Court to Syllabus Point 2 of the case of  
6 State v. Griffin, which says:  
7 Once a prospective juror has made a clear statement  
8 during voir dire reflecting or indicating the presence of a  
9 disqualifying prejudice or bias, the prospective juror is  
10 disqualified as a matter of law and cannot be rehabilitated  
11 by subsequent questioning, later retractions or promises to

12 be fair.  
13 Your Honor, the witness worked and got to know Officer  
14 Bailey well. The witness testified that she would give  
15 greater credence to the testimony of Officer Bailey because  
16 of that relationship than she would someone else.

Clearly defense counsel was articulating two reasons for his motion to strike – the first, which deals with very specific questions and responses as set forth in the syllabus point in Griffin, and a second, relating to the relationship with Officer Bailey. While the State may have been permitted to rehabilitate Ms. Alpaugh regarding her knowledge of Officer Bailey, it was impermissible to attempt to rehabilitate the responses she had given at T.T. 162 indicating a presumption of guilt bias against the defendant.

Regarding juror Diehl, the State again charges the Appellant with omitting “the fact that Ms. Diehl answered ‘yes’ when defense counsel asked if she believed that ‘when someone is charged, they’re more likely than not guilty’ only because she understood that probable cause was required for the issuance of an arrest warrant.” Ms. Diehl never attempted to explain her bias that she believed a person who was charged was more likely than not guilty. The exact exchange between defense counsel and Ms. Diehl at T.T. 178 is as follows:

2 MR. WOOTON: Do you believe that, when someone is  
3 charged, they’re more likely than not to be guilty?  
4 PROSPECTIVE JUROR DIEHL: Yes.  
5 MR. WOOTON: You do believe that?  
6 PROSPECTIVE JUROR DIEHL: Yes, I believe that.  
7 MR. WOOTON: No further questions.

At this point, Ms. Diehl has expressed a disqualifying bias toward defendant pursuant to syllabus point 2 of Griffin. Only after the State’s attempted rehabilitation does Ms. Diehl agree with what amounts to testimonial questions by the prosecutor. The following

exchange occurred despite the fact that Ms. Diehl's responses had already disqualified her and any further attempt at rehabilitation was improper:

- 8 THE COURT: Ms. Keller?  
9 MS. KELLER: Let me follow up on that. Ma'am, are you  
10 aware that, before somebody is arrested, a warrant has to  
11 issue for their arrest?  
12 PROSPECTIVE JUROR DIEHL: Yes.  
13 MS. KELLER: And you're aware that, before a warrant  
14 issues, that a magistrate makes a finding of what's called  
15 probable cause?  
16 PROSPECTIVE JUROR DIEHL: Right.  
17 MS. KELLER: And is that why you answered as you did  
18 because --  
19 PROSPECTIVE JUROR DIEHL: Yes.

Although Ms. Diehl answered a simple yes to the testimonial questions of the prosecutor, it was of no consequence as she was at this point already disqualified as a matter of law and any attempted rehabilitation by the State was improper.

The State argues that Ms. Diehl and Ms. Alpaugh were not disqualified as a matter of law and the State was proper in its attempts to rehabilitate each of them. In support of this argument, the State cites O'Dell v. Miller, 565 S.E.2d 407 (W.Va. 2002). Miller makes a distinction between "inconclusive" and "clear" responses made by prospective jurors. Essentially, under Miller, when a juror is "inconclusive" in his or her response then further questioning is required; however, when a response is "clear", any further questioning is impermissible rehabilitation. Under the guise of Griffin, Ms. Diehl could not be any more clear than her consecutive responses of "yes" and "yes, I believe that" when asked a question nearly identical to the one posed in Griffin. Ms. Diehl did not waver and was definite in her response and from that point could no longer be rehabilitated through further questioning.

## CUMULATIVE ERROR

### Jury Deliberations

During the jury deliberations in the case sub-judice, the jury was not provided with audio recordings played by the State at trial. During the deliberation process the jury wanted to review those recordings. Because the recordings contained extraneous materials that were never redacted, the jury was required to listen to the recordings in open court in front of attorneys, defendant and spectators alike. There was no chance for discussion, debate or further review while honing in on specific areas of interest. Such a process required that the jury conduct portions of its deliberation in open court.

The State in its brief at 34 fails to grasp the gist of Appellant's complaint. The State argues that the in-court censorship was provided for defendant's own benefit. A careful reading of Appellant's brief supports the fact that defendant does not take issue with the in-court censorship. Rather, defendant's exception lies with the fact that the jury was not permitted to consider the recordings with the rest of the evidence from within the private sanctity of the jury room. The State offered no explanation neither at trial, nor in its brief, as to why it failed to properly prepare the evidence for the jury's review. The recordings in question were State's evidence and had been in the State's custody for days prior to jury deliberations. The material deemed extraneous and ordered redacted had likewise been identified by the trial court days prior to deliberations. Despite having ample time to do so, the State made no effort to prepare clean copies of the recordings that could be made available to the jury for consideration during private deliberations.

As evidenced by Deputy Halstead's extemporaneous suggestion as to how to prepare a "clean" copy for the jury, such a feat could have been accomplished quickly and easily. T.T. at 1875. The State mischaracterizes defense counsel's reaction to the dilemma regarding whether to play the recordings again in open court. The State at 35 states that defense counsel "did not object to the jury listening to the redacted recordings in open court and added 'let's go ahead and do it'." The State's characterization cannot be further from the true reaction of defense counsel. Defense counsel at T.T. 1875, line 8 voiced concern that the procedure of playing some tapes in open court may give those that the jury can take back into the jury room greater emphasis. The defense counsel's statement of "let's go ahead and do it" was actually an endorsement of Deputy Halstead's recommendation and not an endorsement of playing the tapes in open court. Although difficult to ascertain from a cold record, defense counsel's intention becomes clear by the response of the trial court. The actual discussion at 1875 is as follows:

19 DEPUTY HALSTEAD: We can take a cassette tape, we can  
20 play it and record, pause and record when there's stuff you  
21 don't need on the tape. I've got blank tapes.

22 MR. COURT: Do you object to that?

23 MR. WOOTON: Well, I don't object to the procedure that  
24 you've got, let's just go ahead and do it.

1876

1 THE COURT: All right. We're not going to do it --  
2 we're going to do it the way we first said. We're going to  
3 bring them back in here and play it for them once we get --  
4 if they need to hear it.

Defense counsel's statement "let's go ahead and do it" is directly followed by the court's immediate response, "we're not going to do it -- we're going to do it the way we first said" which was to play the recordings in open court.

Despite the assertions by the State that the jury was not forced to deliberate in open court, it does not deny that private jury deliberations were interrupted by the trip into open court. The deliberation process is private in nature and cannot be turned on and off like a light. Deliberation as a process requires digestion, inspection and re-inspection of the evidence admitted at trial. Such a process was fatally flawed by the procedure used by the trial court herein.

### **Improper Evidence of Defendant's Previous Firearm**

During the trial the State offered evidence from four separate witnesses that defendant had carried a gun at some point prior to the death of Sacha Mitchell. None of these witnesses testified that the gun they observed was in any manner similar to the one involved in Sacha's death. In fact, most described the gun as black or a black nine millimeter. Defendant maintained throughout all proceedings that he never owned or possessed the revolver responsible for Sacha Mitchell's death and that she was the one who produced it in her final hours.

The State argues that Hughes testified that Sacha never owned or possessed a firearm. This argument belies the fact that Hughes and other witnesses testified that weeks prior to Sacha's death she had told defendant that she had a bright, shiny new gun with defendant's name on it. T.T. 1355, 1412, 1419, 1433, 1436, 1452, 1454. The State argues that the evidence of defendant's prior ownership of a gun was "relevant evidence tending to show that, as between Hughes and Sacha Mitchell, it was more likely that Hughes rather than Sacha Mitchell had possessed the murder weapon." This is exactly the impermissible presumption that the Court in Walker attempts to prevent. State v. Walker, 425 S.E.2d 616 (W.Va. 1992).

## CONCLUSION

The indictment returned against Dallas Hughes failed to provide notice of a possible felony murder charge. The indictment's inclusion of the element of premeditation effectively narrowed the indictment to a charge of premeditated murder in the mind of the defendant and defense counsel. There is no argument that the indictment was void of any language indicating felony murder. The State cannot set forth any plausible reason as to why including such language in the indictment would be burdensome to the State. To the contrary, such language is routinely included in similar indictments as evidenced by the attached indictments.

Because defendant was not given proper notice of the charge of felony murder, he was unable to prepare an adequate defense to such charge. In addition, defending the charge of felony murder would prove contradictory to his planned defense for the charge of premeditated murder. In light of his surprise and contradicting defenses, defendant was entitled to have the State elect between charges, thereby allowing defendant to focus his defense completely on one charge or the other.

In addition to facing a new charge at trial, defendant would also face a jury composed in part with jurors that expressed bias against him in *voir dire*. Despite clear admissions of bias, jurors Diehl and Alpaugh were permitted to sit in judgment of defendant. For these reasons, along with the additional cumulative error outlined in Appellant's brief, defendant Dallas Hughes is entitled to a new trial.

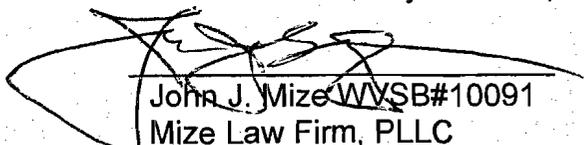
## CONCLUSION

The indictment returned against Dallas Hughes failed to provide notice of a possible felony murder charge. The indictment's inclusion of the element of premeditation effectively narrowed the indictment to a charge of premeditated murder in the mind of the defendant and defense counsel. There is no argument that the indictment was void of any language indicating felony murder. The State cannot set forth any plausible reason as to why including such language in the indictment would be burdensome to the State. To the contrary, such language is routinely included in similar indictments as evidenced by the attached indictments.

Because defendant was not given proper notice of the charge of felony murder, he was unable to prepare an adequate defense to such charge. In addition, defending the charge of felony murder would prove contradictory to his planned defense for the charge of premeditated murder. In light of his surprise and contradicting defenses, defendant was entitled to have the State elect between charges, thereby allowing defendant to focus his defense completely on one charge or the other.

In addition to facing a new charge at trial, defendant would also face a jury composed in part with jurors that expressed bias against him in *voir dire*. Despite clear admissions of bias, jurors Diehl and Alpaugh were permitted to sit in judgment of defendant. For these reasons, along with the additional cumulative error outlined in Appellant's brief, defendant Dallas Hughes is entitled to a new trial.

DALLAS DARON HUGHES  
By Counsel,



John J. Mize WYSB#10091  
Mize Law Firm, PLLC

**IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA**

**State of West Virginia**

**v.**

**Case No. 04-F-285-H**

**Dallas Hughes,**

**Defendant.**

**CERTIFICATE OF SERVICE**

I, John J. Mize, counsel for Dallas Daron Hughes, do hereby certify that a copy of Defendant's **REPLY TO RESPONSE OF APPELLEE** was served upon the State, by hand delivering a true and correct copy of the same to the Office of the Prosecuting Attorney, this the 16<sup>th</sup> day of September, 2009.



**John J. Mize WVSB # 10091**  
**Mize Law Firm PLLC**  
106 ½ South Heber Street  
Suite One  
Beckley, WV 25801  
Phone (304) 255-6493  
Fax (304) 255-0606  
*Attorney for Appellant*

DEFENDANT

State Case

STATE OF WV

VS:

DALLA HUGHES

04-F-285-H

STATE OF WEST VIRGINIA,

To the Sheriff of Raleigh County, Greetings:—

We hereby command you to summon:

RALEIGH COUNTY DEPUTY KEITH HAROLD  
RALEIGH COUNTY SHERIFF DEPARTMENT  
BECKLEY, WV 25801

CIRCUIT CLERK

JANICE B. DAVIS

2005 JAN 13 1 A 9: 50

RECEIVED AND FILED

to appear before the Judge of our Circuit Court of Raleigh County at the Court House thereof at 9:00 o'clock  
A.M., on the 13 day of JANUARY, ~~19~~ 2005

to testify and the truth to speak on behalf of DALLAS HUGHES

at prosecution of the State for a Felony—~~Misdemeanor~~ and have then there this writ.

WITNESS: JANICE B. DAVIS, Clerk of our said Court at the Court House of said County, on the 13TH  
day of JANUARY, 19 2005

Teste: Janice B. Davis Clerk

Central Printing Co., of Beckley, WV

NOTE: Witness is compelled to attend but must look to defendant for pay. File your claim for attendance with  
the Clerk before the end of term of court which you attend.

**Alleged Offense:** FIRST DEGREE MURDER

**Citation:** W.VA. CODE 61-2-1, W.VA. CODE 62-12-2 and W.VA. CODE 62-12-13

**STATE OR WEST VIRGINIA, COUNTY OF RALEIGH, TO-WIT:**

The Grand Jurors of the State of West Virginia, in and for the body of the County of Raleigh,

upon their oaths present that DONITA KAY DEBERRY

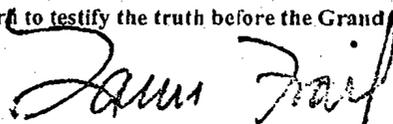
on or about the 5th day of August, 2006 in the said County of Raleigh,

did knowingly, feloniously, willfully, maliciously, deliberately and unlawfully, or in the commission of or attempted commission of delivering a controlled substance, being Fentanyl, a Schedule II controlled substance, slay, kill and murder one James Britton Lowery, II, all

against the peace and dignity of the State, and found upon the testimony of Ron Booker, TRIDENT

duly sworn to testify the truth before the Grand Jury

this the 10th day of January, 2007



Prosecuting Attorney

**STATE OF WEST VIRGINIA**

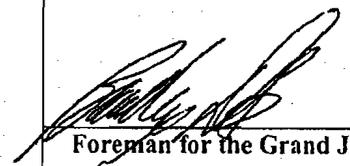
**VERSUS**

DONITA KAY DEBERRY

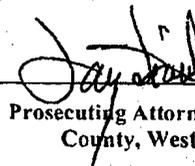
07-F-34-H

**INDICTMENT FOR A FELONY**

A        TRUE BILL



Foreman for the Grand Jury



Prosecuting Attorney for Raleigh County, West Virginia

**VERDICT**

CIRCUIT CLERK *BD*

SARICE S. DAVIS

2007 JAN 10 PM 4:04

RECEIVED AND FILED

**Alleged Offense:** COUNT 1: FIRST DEGREE MURDER/COUNTS 2: USE OF FIREARM/  
COUNT 3: CONSPIRACY

**Citation:** COUNT 1: W.VA. CODE 61-2-1/ COUNT 2: W.VA. CODE 62-12-2/COUNT 3: W.VA. CODE  
61-10-31

**STATE OR WEST VIRGINIA, COUNTY OF RALEIGH, TO-WIT:**

The Grand Jurors of the State of West Virginia, in and for the body of the County of Raleigh,  
upon their oaths present that THOMAS E. LEFTWICH and MICHAEL E. MARTIN  
on or about the 29th day of August, 2006 in the said County of Raleigh,

COUNT 1: did unlawfully, feloniously, maliciously, willfully, deliberately and with  
premeditation, or in the commission of or attempt to commit a felony of delivering a  
controlled substance, slay, kill and murder one Charles E. Smith III,

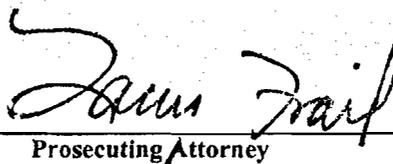
COUNT 2: And the Grand Jurors of Raleigh County, West Virginia, upon their oaths,  
aforesaid, further present that THOMAS E. LEFTWICH, on or about the 29th day of  
August, 2006, in the said County of Raleigh, did commit the felony charged in Count 1 by  
the use, presentment or brandishment of a firearm,

COUNT 3: And the Grand Jurors of Raleigh County, West Virginia, upon their oaths,  
aforesaid, further present that THOMAS E. LEFTWICH and MICHAEL E. MARTIN, on  
or about the 29th day of August, 2006, in the said County of Raleigh, did feloniously  
conspire and agree to commit the felonies against the State set forth in Count 1 of this  
Indictment, all

against the peace and dignity of the State, and found upon the testimony of  
Captain SF VanMeter, WVSP (8th),  
Detective Lieutenant JS Shumate, BCPD (10th)  
Timothy Blackburn (8th)  
Marco Poindexter (8th)

duly sworn to testify the truth before the Grand Jury

this the \_\_\_\_\_ day of January, 2007

  
Prosecuting Attorney

**STATE OF  
WEST VIRGINIA**

**VERSUS**

THOMAS E. LEFTWICH

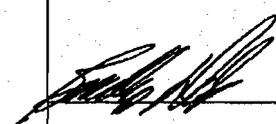
07-F-67-K

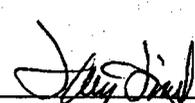
MICHAEL E. MARTIN

07-F-68-K

**INDICTMENT FOR  
A FELONY**

A \_\_\_\_\_ TRUE BILL

  
Foreman for the Grand Jury

  
Prosecuting Attorney for Raleigh  
County, West Virginia

**VERDICT**

CIRCUIT CLERK

JENNIFER S. DAVIS

2007 JAN 10 PM 4:09

RECEIVED AND FILED



**Alleged Offense: FIRST DEGREE MURDER**

**Citation: W.VA. CODE 61-2-1**

**STATE OR WEST VIRGINIA, COUNTY OF RALEIGH, TO-WIT:**

**The Grand Jurors of the State of West Virginia, in and for the body of the County of Raleigh,**

**upon their oaths present that DANIEL ROBERT CARTE, CECIL "SONNY" HARRAH and APRIL DAWN DAVIS**

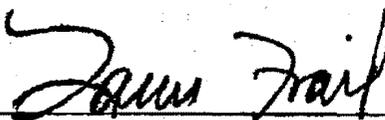
**on or about the 9th day of May, 2006 In the said County of Raleigh,**

**did unlawfully, feloniously, willfully, maliciously, deliberately and with premeditation or in the commission of or the attempt to commit arson, did slay, kill and murder Shelia Karnes, all**

**against the peace and dignity of the State, and found upon the testimony of Trooper GD Williams, WVSP, Gary Boyd, Susan Ray Boyd, Brittany Nicole Brown Carte, Bennie Carte, April Davis Louise Green, Arthur Bryan (Hoss) Reed & Carlos Williams**

**duly sworn to testify the truth before the Grand Jury**

**this the 10th day of September, 2008**



**Prosecuting Attorney**

**STATE OF WEST VIRGINIA**

**VERSUS**

**DANIEL ROBERT CARTE**

**08-F-293-B**

**CECIL "SONNY" HARRAH**

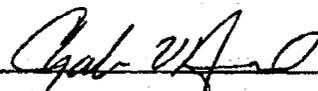
**08-F-294-B**

**APRIL DAWN DAVIS**

**08-F-295-B**

**INDICTMENT FOR A FELONY**

**A TRUE BILL**



**Foreman for the Grand Jury**



**Prosecuting Attorney for Raleigh County, West Virginia**

**VERDICT**

CHIEF CLERK

35

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