

NO. 35463

IN THE SUPREME COURT OF APPEALS  
OF  
WEST VIRGINIA

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CHARLESTON, WEST VIRGINIA

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STATE OF WEST VIRGINIA,  
Plaintiff Below - Respondent,

VS.

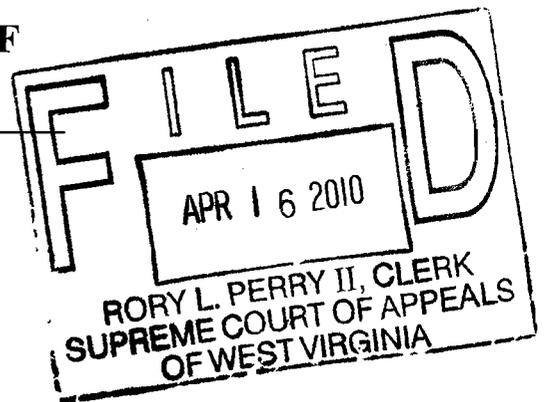
CIRCUIT COURT OF JACKSON COUNTY  
CRIMINAL CASE NO. 07-F-69

STEPHEN L. MAHOOD,  
Defendant Below - Petitioner.

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APPELLANT'S BRIEF

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Counsel for Petitioner:

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**KIND OF PROCEEDING AND NATURE OF RULINGS BELOW**

The petitioner, Steven Lee Mahood, appeals to this Honorable Court from a re-sentencing order entered April 14, 2009, regarding the jury trial in the Circuit Court of Jackson County, West Virginia, criminal case no. 07-F-69, where the jury reached a unanimous guilty verdict for murder of the first degree without a recommendation of mercy. The trial concluded on October 17, 2008.

On October 16, 2008, the petitioner, by counsel, moved for mistrial during the State's direct examination of its witness, for wrongful introduction of character evidence, which motion was denied by the trial court.

**STATEMENT OF FACTS**

1. The grand jury attending the October 2007 term of the Jackson County Circuit Court returned an indictment charging your petitioner with one count of First Degree Murder and two counts of Possession of a Stolen Vehicle.

2. A jury trial commenced upon the aforesaid First Degree Murder Charge on October 14, 2008.

3. During the presentation of the State's case in chief, the prosecutor, on direct examination, elicited inadmissible character evidence in the presence of the jury to which the defense timely objected, moved to strike and moved for a mistrial. The pertinent testimony, motions and rulings by the trial court on this issue are found in the trial transcript as follows:

Q. . . . What type of relationship did you have with Mr. Mahood?

A. Just friends.

Q. Did you ever have any other type of relationship with him?

A. Yes.

Q. What type of relationship was that?

A. Sexual relationship.

Mr. Benford: Objection, your Honor. Move to strike. Move to approach the bench.

The Court: Approach.

...

Mr. Benford: Your Honor, I believe this is evidence that goes into character that should not be permitted and --

The Court: How is it admissible?

Ms Baldwin: I think it is admissible because the night -- the night that she died -- the night before she died, they were all -- they were at Lisa Harrison's house. And their relationship could have been broken off but --

The Court: Whose relationship?

Ms. Baldwin: Lisa and Steve's. But he called her "Ol' Blue Eyes." And I just think it is relevant in terms of -- I mean, obviously, she was killed the very -- that evening or the next --

The Court: What does that have to do with whether she was having a sexual relationship with the defendant?

Ms. Baldwin: Well, the fact that he called her "Ol' Blue Eyes," that -- I think that was a little bit of a history there, with Mona asking her why she kept calling her that. I think that maybe that may have been what started the fight --

The Court: I assumed it was being offered as evidence of motive in some way.

Ms. Baldwin: I think it is, yeah.

The Court: How is it relevant or probative to motive?

Ms. Baldwin: Well, within a couple of hours after leaving their house the victim was killed. And they weren't having a sexual relationship then, but -- I just think that it may have come up afterwards, and that is why they got into a fight.

The Court: Well, yeah, but we deal with evidence.

Ms. Baldwin: Well, I don't have anything specifically linking it, except for the "blue eyes" comment and the fact that I think Mona had asked her why.

The Court: Yeah, but if it is probative of motive, you would have to have some evidentiary basis for concluding that the reason the victim was killed had to do with Lisa.

Ms. Baldwin: Well, I mean, I don't know that.

The Court: Okay.

Ms. Baldwin: I don't know what happened when they got home.

The Court: Okay. All right. What is your motion?

Mr. Benford: Move for a mistrial, your Honor.

The Court: All right. Well, I think that is -- the Court is going to instruct the jury to disregard it, and in today's times, I don't see that as amounting to such prejudice that it can't be overcome by a limiting instruction. So I'm not going to grant your motion for mistrial.

07-F-69 Trial Transcript, Direct examination of State's witness Lisa Harrison Whitehouse, Vol. III pp. 35-38, October 16, 2009.

## POINTS AND AUTHORITIES RELIED UPON

### FEDERAL CASES

Darden v. Wainwright, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986).

### STATE CASES

State v. Sugg, 193 W. Va. 388, 456 S.E. 2d 469 (1995).

State v. Guthrie, 194 W. Va. 657, 461 S.E. 2d 163 (1995).

McDougal v. McCammon, 193 W. Va. 229, 455 S.E. 2d 788 (1995).

### **THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR MISTRIAL BASED ON THE STATE IMPROPERLY INTRODUCING EVIDENCE OF DEFENDANT'S BAD CHARACTER IN THE PRESENCE OF THE JURY.**

At trial, the prosecutor improperly introduced character evidence surprising the defense and the trial court by prompting the witness's disclosure of an extramarital affair between the accused and the witness during examination of the State's witness, Lisa Harrison Whitehouse during a murder trial where the victim was the wife of the accused. The trial judge did not remind the jury to disregard this prejudicially surprising introduction of inadmissible character evidence before adjourning for juror deliberations, although the judge did instruct the jury to disregard the prejudicial statement prompted by the prosecutor after calling counsel to the bench for discussion.

Therefore, the prosecutor's improper surprise of irrelevant character evidence regarding the sexual *mores* of the accused in open court in itself biased the jury casting serious doubt as to whether the jury reached its verdict based on the admissible evidence

beyond reasonable doubt or decided the case on their own community standard of sexual *mores* depriving the defendant of the fundamental right to the due process of law.

In determining whether a statement made or evidence introduced by the prosecution represents an instance of misconduct, we first look at the statement or evidence in isolation and decide if it is improper. If it is, we then evaluate whether the improper statement or evidence rendered the trial unfair. Several factors are relevant to this evaluation, among them are:

- (1) The nature and seriousness of the misconduct;
- (2) the extent to which the statement or evidence was invited by the defense;
- (3) whether the statement or evidence was isolated or extensive;
- (4) the extent to which any prejudice was ameliorated by jury instructions;
- (5) the defense's opportunity to counter the prejudice;
- (6) whether the statement or evidence was deliberately placed before the jury to divert attention to irrelevant and improper matters; and
- (7) the sufficiency of the evidence supporting the conviction.

State v. Guthrie, 194 W. Va. 657, 677, 461 S.E. 2d 163, 183, fn. 25 (1995), *quoting* McDougal v. McCammon, 193 W. Va. 229, 239, 455 S.E. 2d 788, 798 (1995); See generally Darden v. Wainwright, 477 U.S. 168, 106 S. Ct. 2464, 91 L.Ed. 2d 144 (1986); State v. Sugg, 193 W.Va. 388, 456 S.E. 2d 469 (1995).

(1) The nature and seriousness of the prosecutor's misconduct is most severe because it occurred during the State's direct examination of the witness, who was with the accused and the victim very close in time to the homicide, and the prosecutor laid a suggestive foundation based on "friendship" with further inquiry of the "type of relationship" building inference upon inference to illicit a dramatic response in open

court before the jury. Such misconduct renders an undue prejudice to the defendant's right to a fair trial. As such, the trial court committed reversible error by not sustaining defendant's motion for a mistrial.

(2) The defense in no way or extent invited the statement by the State's witness Lisa Harrison Whitehouse. As such, the trial court committed reversible error by not sustaining defendant's motion for a mistrial.

(3) The prosecutor's statement regarding an extramarital affair between the accused and a State's witness was isolated to just this one State's witness. Nevertheless, such misconduct renders an undue prejudice to the defendant's right to a fair trial. As such, the trial court committed reversible error by not sustaining defendant's motion for a mistrial.

(4) No amelioration of the prosecutor's improper examination is found in the jury instructions. The court addressed this misconduct only once during the trial, which the judge gave to the jury after conferring with counsel at the bench. Such misconduct renders an undue prejudice to the defendant's right to a fair trial. As such, the trial court committed reversible error by not sustaining defendant's motion for a mistrial.

(5) The direct examination of Lisa Harrison Whitehouse by the prosecutor left no opportunity for the defense to counter the prejudice until after the jury would be tainted by the improper direct examination. Such misconduct renders an undue prejudice to the defendant's right to a fair trial. As such, the trial court committed reversible error by not sustaining defendant's motion for a mistrial.

(6) The record demonstrates the subjective intent of the prosecutor to bias the jury against the defendant:

The Court: Yeah, but if it is probative of motive, you would have to have some evidentiary basis for concluding that the reason the victim was killed had to do with Lisa.

Ms. Baldwin: Well, I mean, I don't know that.

The Court: Okay.

The prosecutor, Ms. Baldwin,: I don't know what happened when they got home. 07-F-69 Trial Transcript, direct examination of Lisa Harrison Whitehouse, October 16, 2009.

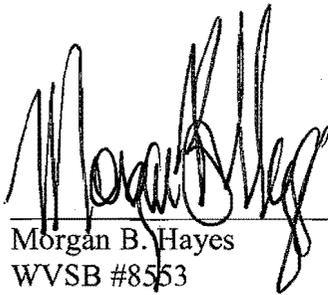
Furthermore, the transcript reveals the improper conduct by an experienced prosecutor during direct examination of her witness. Such misconduct renders an undue prejudice to the defendant's right to a fair trial. As such, the trial court committed reversible error by not sustaining defendant's motion for a mistrial.

Therefore, the trial court committed reversible error by not sustaining defendant's motion for a mistrial based on the improper conduct of the prosecutor, who surprised the jurors and the court with character evidence of an extramarital affair with severe prejudicial effect. The prejudicial effect is so severe that such an unreasonable public airing of private conduct would cast condemnation to any Jackson County resident who upholds the generally accepted, traditional values within the community.

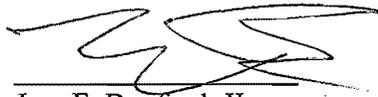
**PRAYER FOR RELIEF**

The petitioner prays that the Honorable Court reverses the trial court's rulings raised on this appeal in the 07-F-69 case, remand for a new trial, and any and all other relief to which your petitioner may be entitled.

Respectfully submitted,  
By counsel:



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## CERTIFICATE OF SERVICE

I, Lee F. Benford II, hereby certify that I have served this **PETITION FOR**

**APPEAL** on the 16 day of April 2010, by personal delivery to the following:

Darrell McGraw  
West Virginia Attorney General  
Building 1, Room 26-E  
Charleston, WV 25305



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