No.:_____

IN THE SUPREME COURT OF THE UNITED STATES

_____

Jeremy Todd Saunders, *Petitioner*,

v.

State of West Virginia, *Respondent.*

_____

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the new syllabus point issued by the Supreme Court of Appeals of West Virginia permitting a trial court judge to make further inquiry of a juror after an affirmative response in support of the announced verdict during a poll of the jury violate federal due process protections and the prohibition on double jeopardy?

2. In applying the aforementioned new rule, did the Supreme Court of Appeals of West Virginia violate the Petitioner's right not to be re-tried after an acquittal by failing to reverse the trial court and remand for entry of a judgment of acquittal?

PARTIES TO THE PROCEEDINGS BELOW

1. Jeremy Todd Saunders.

    a. Mr. Saunders is a criminal defendant in the Circuit Court of Calhoun County West Virginia, whose conviction is the subject of the instant Petition for Writ of Certiorari.

    b. Mr. Saunders is the Petitioner in the direct appeal of his conviction to the Supreme Court of Appeals of West Virginia, in *State v. Jeremy S.,* Docket No. 19-0006, (W.Va., June 8, 2020).

2. The State of West Virginia.

    a. The State of West Virginia is the Plaintiff in Mr. Saunders' criminal case in Calhoun County, West Virginia.

    b. The State of West Virginia is the Respondent in Mr. Saunder's direct appeal of his conviction to the Supreme Court of Appeals of West Virginia, in *State v. Jeremy S.,* Docket No. 19-0006, (W.Va., June 8, 2020).

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Jeremy Todd Saunders, respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the Supreme Court of Appeals of West Virginia, for the reasons stated herein.

CITATIONS OF OPINIONS AND ORDERS

State v. Jeremy S., Docket No. 19-0006, (W.Va., June 8, 2020). Signed Opinion of the Supreme Court of Appeals of West Virginia (included in the Appendix to this Petition at p. 1). The Supreme Court of Appeals of West Virginia denied Mr. Saunders' timely petition for rehearing by order entered on September 3, 2020. (Appendix, at p. 28).

STATEMENT OF JURISDICTION

The Petitioner's convictions were affirmed on direct appeal by Signed Opinion issued by the Supreme Court of Appeals of West Virginia on June 8, 2020. This Honorable Court has jurisdiction over final judgments of the highest court of a state pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

U.S. Const. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV, sec. 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

W. Va. R. Crim. P. 31(d):

Poll of jury. — When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

STATEMENT OF THE CASE

The Petitioner was initially arrested and prosecuted by criminal complaint in 2013, prior to being indicted by the Calhoun County Grand Jury in May of 2014 on 24 sexual charges relating to his daughter. The matter did not ultimately go to trial until November of 2017, at which time a mistrial was declared due to a hung jury. At the subsequent trial, in 2018, the Petitioner was found guilty and convicted of all nine counts that went to that jury. He was ultimately sentenced to an effective sentence of 16-40 years of incarceration.

This Petition concerns the sequence of events that took place during the jury's deliberation at the conclusion of the first trial. The jury indicated to the Court that it was deadlocked, and was read an instruction pursuant to *Allen v. United States*, 164 U.S. 492 (1896). The transcript reflects the following sequence of events shortly thereafter:

(A break was taken from 3:30 p.m. to 4:30 p.m.)

THE COURT: We are back on the record in Case No. 14-F-29, the State of West Virginia versus Jeremy Saunders. Mr. Saunders appears with his attorneys. The prosecuting attorney is also here. While we were in recess, we received a handwritten note from the jury. May we get a better explanation of the paragraph explaining reasonable doubt where it says that the jury views evidence as permitting two conclusions of innocence or guilt, that the jury should adopt a conclusion of innocence on the third paragraph of page five? It is then signed by the grand [sic] jury foreman. Provided the note to counsel for the defendant, also prosecuting attorney. I believe it's agreed upon that I'm going to handwrite on the bottom of this, If the jury feel two – feels two conclusions - in parentheses - guilty and not guilty – end parentheses - are possible based on all the evidence, the jury should adopt the conclusion of innocence. Is that correct --

MS. JOHNSON [Prosecuting Attorney]: Yeah.

THE COURT: -- and agreed upon?

MR. MINARDI [Defense Counsel]: Yes.

THE COURT: No objections?

MS. JOHNSON: No objection.

THE COURT: Okay. I will do my best to make it legible. Will you please show that to counsel? And if there are still no objections, return it to the jury room.

MS. JOHNSON: No objection, Judge.

MR. MINARDI: No objection.

THE COURT: Okay. We're in recess.

(A break was taken from 4:33 p.m. to 4:41 p.m.)

THE COURT: We're back on the record in Case No. 14-F-29, State of West Virginia versus Jeremy Saunders. Mr. Saunders again appears in person and with his attorneys. The prosecuting attorney is present representing the State of West Virginia. I've received an indication from the bailiff that the jury has reached a verdict. I'm going to ask the foreperson, has the jury reached a verdict?

FOREPERSON: Yes, sir.

THE COURT: Will you please deliver the verdict form to the bailiff? I'm going to hand the verdict to the clerk and ask that she read the verdict.

THE CLERK: Jury verdict count one. We the members of the petit jury, as to count one of the indictment, we find the defendant, Jeremy Saunders, not guilty. We the members of the petit jury, as to count five as to the issued joined as count five of the indictment find the defendant, Jeremy Saunders, not guilty. We the members of the petit jury, as to the issues joined as count eight of the indictment, find the defendant, Jeremy Saunders, not guilty. We the members of the petit jury as to the issues joined as count nine of the indictment, find the defendant, Jeremy Saunders, not guilty. We the members of the petit jury, as to the issues joined as count 13 of -- of the indictment, find the defendant, Jeremy Saunders, not guilty. We the members of the petit jury, as to issues joined as count 16 of the indictment, find the defendant, Jeremy Saunders, not guilty. We the members of the petit jury, as to issues joined as count 17 of the indictment, find the defendant, Jeremy Saunders, not guilty. We the members of the petit jury, as to the issues joined as count 21 of the indictment, find the defendant, Jeremy Saunders, not guilty. We the members of the petit jury, as to the issues joined as count 24 of the indictment, find the defendant, Jeremy Saunders, not guilty.

THE COURT: If you'll please deliver the jury verdict form to counsel so they can inspect the same. So says each member of the jury, is that your verdict?

(Affirmative responses.)

THE COURT: Is there a request to poll the jury?

MS. JOHNSON: Yes, Judge.

THE COURT: We'll have to go back and get a list of names. We've been back and forth.

THE CLERK: I'm sorry.

MS. JOHNSON: Do you want -- I have --

THE CLERK: Do you have a list?

MS. JOHNSON: -- one in my office.

THE CLERK: The one that has the 13?

MS. JOHNSON: Uh-huh.

THE CLERK: Can I have that, please?

MS. JOHNSON: Yeah. It's right in the box on the table in my office.

THE COURT: You heard the verdict which your foreman signed and which the clerk read. When your name is called, you will answer and signify whether that verdict was then and is now your own true verdict.

THE CLERK: Marisha Collins, is that your verdict?

JUROR: I guess it has to be by the law.

THE COURT: Go through the list.

THE CLERK: Amanda Frederick, is that your verdict?

JUROR: Yes.

THE COURT: Samuel McCartney, is that your verdict?

JUROR: Yes.

THE COURT: Lisa McCumbers, is that your verdict?

JUROR: Yes.

THE CLERK: Matthew Nicholson, is that your verdict?

JUROR: Yes.

THE CLERK: Michele Nicholas, is that --

JUROR: Yes.

THE CLERK: -- your verdict?

JUROR: Yes.

THE CLERK: Stephen Pope, is that your verdict?

JUROR: Yes.

THE COURT: Lisa Ramsey, is that your verdict?

JUROR: Yes.

THE CLERK: Gary Richards, is that your verdict?

JUROR: Yes.

THE COURT: Marty Roberts, is that your verdict?

JUROR: Yes.

> THE CLERK: Robert Siers, is that your verdict?
>
> JUROR: Yes.
>
> THE CLERK: Ryan Slider, is that your verdict?
>
> JUROR: By law, I guess.
>
> THE COURT: Ms. Collins, you expressed some hesitation as to whether or not that was your verdict. There were several questions back to me to further explain the law. After you heard my -- what I'm going to say are written explanations as to the law, was -- is that your verdict?
>
> JUROR: If it has to be.
>
> THE COURT: It doesn't have to be.
>
> JUROR: Then no.
>
> THE COURT: Okay. Mr. Slider, if I were to ask you the same question I had just asked Ms. Collins, you -- there were several questions made during the course of deliberations. I submitted handwritten answers. Is your verdict a verdict of not guilty on all charges?
>
> JUROR: No, sir.
>
> THE COURT: Okay. At this time, I am going to direct the jury to go back to the jury room. What I'm going to instruct you to do now is -- you're not deliberating on the verdict. You are -- you are going to determine whether or not getting dinner, coming back, and deliberating more may help. Or if coming back -- coming back on Monday after having the weekend off may help. I'm not doing this in any way to try to influence a decision one way or the other. The only thing I want a response back whenever you come back in here is more time may help, more time will not help.

Appendix, at pp. 38-43.

Following this exchange, a mistrial was declared as a result of a hung jury, on the motion of Petitioner's trial counsel. After the Petitioner was convicted at the subsequent trial and sentenced, he filed a direct appeal to the Supreme Court of Appeals of West Virginia ("the lower court"), raising several issues including, germane to this Petition, that "[t]he Circuit Court plainly erred by failing to record the jury's verdict of not guilty when the jury was polled

and all twelve jurors replied in the affirmative as to their verdict." The Petitioner raised a federal due process question in the direct appeal, relating to the federal prohibition on double jeopardy, on page 9 of the Petitioner's Brief:

> Because there was unanimous concurrence, as required by Rule 31(d), the only appropriate action for the Circuit Court to take was to record the not guilty verdict, and discharge the Petitioner from further prosecution. The Circuit Court's failure to do so constitutes a due process violation, specifically by trying the Petitioner a second time for the same offense following a valid acquittal. (See, *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992); Article III, Section 5 of the West Virginia Constitution; Double Jeopardy Clause, Fifth Amendment, United States Constitution, as incorporated by the Fourteenth Amendment, United States Constitution.)

Appendix, at p. 53.

In resolving the direct appeal, and denying relief to the Petitioner, the lower court issued a signed opinion containing two new Syllabus Points:

> 1. When a circuit court polls a jury pursuant to Rule 31(d) of the West Virginia Rules of Criminal Procedure, it is within the circuit court's sound discretion to evaluate the jurors' responses and determine whether clarifying questions should be asked of the jurors.
>
> 2. When a circuit court polls a jury pursuant to Rule 31(d) of the West Virginia Rules of Criminal Procedure, and appropriate, neutral questions reveal that a juror is confused about a matter, feels coerced to join the majority's verdict, or is otherwise in need of further instruction, the circuit court may respond in a very limited manner with appropriate, non-coercive, neutral statements that address the concern.

Appendix, at p. 2.

The lower court determined, based on these new rules, that the questions the trial court put to the jurors during the jury poll did not violate Rule 31(d). The Petitioner now seeks review on the merits of the lower court's determination, for the reasons more fully set forth below.

ARGUMENT AMPLIFYING REASON FOR ALLOWANCE OF THE WRIT

Pursuant to Rule 10(b) of the Rules of the Supreme Court of the United States, the Petitioner asserts that the Supreme Court of Appeals of West Virginia, a state court of last resort, has decided an important question of federal law raised in this petition in a manner which conflicts with the decisions of another state court of last resort and/or a United States court of appeals. Alternatively, the Petitioner asserts that this question should be, but has not yet been, decided by this Court pursuant to Rule 10(c).

It is the Petitioner's contention that Syllabus Point 1 of the signed opinion affirming his conviction violates the prohibition on double jeopardy by granting a trial court discretion to go behind the jury's announced unanimous verdict, and an individual juror's affirmative response in a jury poll, and probe for a basis to invalidate a valid acquittal. West Virginia's Rule 31(d) is worded differently but substantively identical to Rule 31(d) of the Federal Rules of Criminal Procedure. The newly announced Syllabus Point contradicts the plain language of the rule by allowing further judicial inquiry after a unanimous affirmative jury poll. In that manner, it violates principles of due process and the federal prohibition on double jeopardy pursuant to the Fifth and Fourteenth Amendments to the United States Constitution.

Prior to the instant case, the lower court's interpretation of Rule 31(d) was expressed as follows:

> 1. Rule 31 of the West Virginia Rules of Criminal Procedure, which is modeled after Rule 31 of the Federal Rules of Criminal Procedure, mandates that the verdict in a criminal case be unanimous and provides a procedure for ensuring that the verdict is unanimous, i.e., the jury poll.
>
> 2. Federal cases have held that the language of Rule 31(d) of the Federal Rules of Criminal Procedure requires that when a juror indicates in a poll that he either disagrees with the verdict or expresses reservations about it, the trial court must either direct the jury to retire

> for further deliberations or discharge the jury. Although the rule does not explicitly so state, courts have also recognized that appropriate neutral questions may be asked of the juror to clarify any apparent confusion, provided the questions are not coercive. We adopt this procedure for Rule 31(d) of the West Virginia Rules of Criminal Procedure.

Syl. Pts. 1 & 2, *State v. Tennant*, 319 S.E.2d 395, 173 W.Va. 627 (1984) [page numbers omitted].

The *Tennant* court clearly sought to act in conformity with federal courts that had assessed the jury polling question in light of federal constitutional principles. It correctly limited the questioning of jurors to those whose poll responses "disagree[d]" or "expresse[d] reservations" about the verdict. Now, the lower court has determined, contrary to the express language of the rule, that a trial court may "evaluate" *any* jury poll response and "determine whether clarifying questions should be asked of the jurors." Appendix, at p. 2. This result cannot withstand federal constitutional scrutiny on due process and double jeopardy grounds. "Any criminal defendant. . . being tried by a jury is entitled to the uncoerced verdict of that body." *Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988).

The most factually similar case to the instant case arising out of any federal circuit is that of *U.S. v. Love*, 597 F.2d 81 (6th Cir. 1979). In *Love*, like this case, an *Allen* charge was read, following which the jury returned a "not guilty" verdict. The jury was then polled. Here the two cases diverge: one juror in *Love* explicitly disavowed the verdict. The 6th Circuit analyzed the situation and determined, based on the explicit disagreement of one juror, that the retrial of the defendant was not barred by double jeopardy:

> In the present case the jury had failed to reach a verdict after lengthy deliberations. After further instructions, though it first appeared that a unanimous verdict had been reached, the poll revealed the fact that one juror did not agree with the verdict as announced. The experienced and able trial judge then exercised his discretion and

> declared a mistrial. This unforeseeable circumstance was not brought about by any act of the court or counsel. Though the defendant suffered the anguish of seeing his apparent acquittal vanish as a result of the jury poll, we believe "the public's interest in fair trials designed to end in just judgments," *Wade v. Hunter*, 336 U.S. at 688-89, 69 S.Ct. at 837, justified the declaration of a mistrial.

Love, 597 F.2d at 87.

In this case, to the contrary, both of the responses of the jurors in question were affirmative: "I guess it has to be by the law" and "By law, I guess." Furthermore, the answers indicate that the jurors, while perhaps unenthusiastic about their verdict, rendered it in conformity with the law as they were instructed. The District of Columbia Court of Appeals has previously considered whether a juror saying "I guess" is sufficient to disturb a verdict during polling, and has determined that it is not. *Johnson v. United States*, 470 A.2d 756 (D.C., 1983). The *Johnson* Court persuasively observed that:

> An example provided during oral argument serves to illustrate this common use (or misuse) of the phrase "I guess." When two judges pass in the hall shortly before they are both scheduled to attend an appellate argument, one might well inquire of his colleague, "See you in court?" The answer could reasonably be, "Sure, I guess." This response would not, however, generally be understood to mean that the responding judge is uncertain whether he will be attending the argument.

Id., at footnote 2.

Another state court of last resort has held similarly. In Georgia, the third syllabus point of *Parker v. State*, 81 Ga. 332, 6 S.E. 600 (Ga., 1888), states:

> 3. Same—New Trial — Statement by Juror that He Agreed to Verdict Reluctantly.
>
> It is not ground for setting aside a verdict, in a trial for carrying a concealed weapon, that one of the jurors, when polled, stated that he agreed to the verdict reluctantly.

The *Parker* Court further stated:

> There was no error in overruling the motion upon the sixth ground thereof, to-wit, that one of the jurors, when polled, answered that he

> had agreed to the verdict, but had agreed to it reluctantly. If a juror agrees to a verdict, that in law is sufficient. If verdicts are to be set aside because some of the jurors agree to them reluctantly, very few verdicts in important cases would be allowed to stand. The law does not inquire as to the degree of reluctance or willingness with which a juror's mind assents to the verdict. Its only inquiry is, does he agree to it? If he does, that is sufficient.

Id., 6 S.E. at 601.

By allowing trial courts to interrogate jurors, even when their poll response indicates no disagreement or reservation, the lower court has transformed Rule 31(d) into a sword against criminal defendants. "The purpose of affording a right to have the jury polled is not to invite each juror to reconsider his decision, but to permit an inquiry as to whether the verdict is in truth unanimous." *U.S. v. Shepherd*, 576 F.2d 719 (7th Cir. 1978). By allowing a court to inquire of an affirming juror, the new syllabus point empowers trial courts to "invite each juror to reconsider his decision."

In *Brown v. Gunter*, 562 F.2d 122 (1st Cir. 1977), the court considered a Massachusetts state court case in which, after a jury verdict of "not guilty," the jury petitioned on its own to change the verdict, and ultimately the defendant was convicted and the conviction upheld. In this case, the determination of no double jeopardy violation arose from a lack of judicial interference:

> The Supreme Judicial Court considered and rejected the claims now before us on the theory that the same principle that allows juries to correct formal or clerical errors "applies to deny finality to the original verdicts here, since the jury, by their own action and **without any suggestion from the judge** or any one else, immediately indicated that the verdicts reported did not state what they had agreed to."

Id., 562 F.2d at 124 [emphasis added].

To the contrary, the lower court in the instant case has enabled the precise sort of judicial interference which should, under this rule, render a verdict changed after its

announcement invalid. The trial court's duty is to determine uncertainty in a verdict, not to obtain a modification of a unanimous verdict.

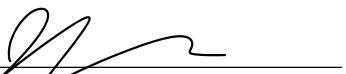
> In any case upon the appearance of any uncertainty or contingency in a jury's verdict, it is the duty of the trial judge to resolve that doubt, for "(t)here is no verdict as long as there is any uncertainty or contingency to the finality of the jury's determination." *Cook v. United States*, 379 F.2d 966, 970 (5th Cir.); *Sincox v. United States*, 571 F.2d 876, 878 (5th Cir.); *United States v. McCoy*, 139 U.S.App.D.C. 60, 63, 429 F.2d 739, 742 (D.C.Cir.); *Matthews v. United States*, 252 A.2d 505, 506-07 (D.C.App.).

U.S. v. Morris, 612 F.2d 483, 489 (10th Cir. 1979).

An affirmative response is not uncertainty; a reality reflected by the text of Rule 31(d) that the lower court has now warped beyond constitutional permissibility. It is for these reasons that the Petitioner respectfully requests that this Court grant a writ of certiorari, and consider this matter on the merits.

Respectfully Submitted,

Petitioner, Jeremy Saunders
by counsel,



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