IN THE HIGH COURT OF AUSTRALIA **No P51 of 2013**

PERTH OFFICE OF THE REGISTRY

BETWEEN **MARK SHARNE SMITH**

Appellant

and

THE STATE OF WESTERN AUSTRALIA

Respondent

RESPONDENT'S SUBMISSIONS

Part I – Publication

1. These submissions are in a form suitable for publication on the internet.

Part II – Concise statement of issues

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2. The respondent agrees generally with the three issues as articulated by the appellant but raises an additional issue. The issues raised by the appeal are as follows:

   2.1. Does the exclusionary rule render inadmissible evidence of 'physical coercion' between jurors, whatever that phrase might mean, in proceedings aimed at impugning a jury's verdict;

   2.2. Does the common law recognise an exception to the exclusionary rule in an extreme or exceptional case;

   2.3. If not, should this Court modify the common law rule to allow for the receipt of
20 evidence of jury deliberations in certain circumstances; and

   2.4. What is the threshold that an applicant must meet before a Court may properly authorise an inquiry into matters that would inevitably adduce evidence concerning the deliberations of a jury?

Prepared on behalf of the Respondent by the Director of Public Prosecutions for Western Australia whose address for service is Level 1, 26 St Georges Terrace, Perth, WA 6000.
Reference No: DPP 11/475 Telephone No: 9425 3901 Facsimile No: 9425 3614
Filed on: 7 November 2013

Part III –Section 78B of the *Judiciary Act 1903* (Cth)

3. It is certified that this appeal does not involve a matter arising under the Constitution or involving its interpretation.

Part IV –Statement of contested material facts

4. The respondent agrees with the appellant's summary of the facts subject to the following.

5. At 6.53 pm on 17 January 2012 the Clerk of Arraigns asked the members of the jury whether they had agreed upon their verdict and whether the verdict was the verdict of all members.[1] Upon receiving the affirmation of the foreman, the trial judge entered judgments of conviction and immediately discharged the jury.[2] The trial judge directed the Sheriff's officer to assist the jury to leave the court house.[3] The trial Judge listed the sentencing hearing for 2 March 2012 and then adjourned. However, the court reconvened to consider the question of the appellant's bail, awaiting sentencing, at 2.15 pm on 18 January 2012.

6. The trial judge stated at the reconvened hearing on 18 January 2012 that 'a note in an envelope was left on the jury table' and that it was addressed to the judge.[4] It is unknown at what time the note was found. The trial judge did not order an inquiry for the reason that he considered that a judgment of conviction had been entered and that the jury had been discharged.[5]

7. With respect to the text of the note which is reproduced at paragraph [17] of the appellant's submissions, the second sentence was only a partial, incomplete sentence and did not contain a full stop at the end of the text. The note read:[6]

'I have been physically coerced by a fellow juror to change my plea to be aligned with the majority vote. This had made my ability to perform my duty as a juror on this panel'

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[1] Trial transcript p 177.
[2] Trial transcript p 177.
[3] Trial transcript p 178.
[4] Trial transcript p 187.
[5] Trial Transcript pp 186 to 189.
[6] ***Smith v The State of Western Australia*** [2013] WASCA 7 [5].

Part V – Applicable statutes and regulations

8. The appellant's list of applicable statues refers to the *Community Protection (Offender Reporting) Act 2004* (WA). This Act is irrelevant to any issue raised by the appeal. The respondent has annexed a list of additional relevant statutes not cited by the appellant.

Part VI – Statement of argument

The scope of the exclusionary rule

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9. The nature and history of the exclusionary rule was considered by Martin CJ[7] who referred to Atkin LJ's statement of the common law rule in ***Ellis v Deheer***:[8]

> *'The court does not admit evidence of a juryman as to what took place in the jury room, either by way of explanation of the grounds upon which the verdict was given, or by way of statement as to what he believed its effect to be.'*

10. In ***R v Skaf***[9] the New South Wales Court of Criminal Appeal cited with approval[10] the modern formulation of the exclusionary rule articulated by Arbour J in delivering the
20 judgment of the Canadian Supreme Court in ***R v Pan, R v Sawyer.***[11] That modern formulation reads:

> *'statements made, opinions expressed, arguments advanced and votes cast by members of a jury in the course of their deliberations are inadmissible in any legal proceedings. In particular, jurors may not testify about the effect of anything on their or other juror's minds, emotions or ultimate decision. On the other hand, the common law rule does not render inadmissible evidence of facts, statements or events extrinsic to the deliberation process, whether originating from a juror or from a third party, that may have tainted the verdict.'*[12]

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[7] ***Smith v The State of Western Australia*** [2013] WASCA 7 [9] to [28].
[8] ***Ellis v Deheer*** [1922] 2 KB 113 (121).
[9] ***R v Skaf*** [2004] NSWCCA 37; (2004) NSWLR 86.
[10] ***R v Skaf*** [212] (Mason P, Wood CJ at CL, Sully J).
[11] ***R v Pan; R v Sawyer*** [2001] 2 S.C.R. 344.
[12] ***R v Pan; R v Sawyer*** [77]. Support for the proposition that evidence of jury deliberations is inadmissible in all legal proceedings, and not just those directly challenging the verdict of the jury, may be found in ***Nanan v The State*** [1986] 1 AC 860 (875C).

11. In ***R v Mirza; R v Connor and Rollock***[13] Lord Hope of Craighead expressed the general rule as, 'the court will not investigate, or receive evidence about, anything said in the course of the jury's deliberations while considering their verdict in the retiring room.'[14]

12. Although an appellate court will not inquire into what has passed between members of a jury during the course of their deliberations, a guilty verdict is nonetheless vitiated by material improper *extraneous* influences upon the jury.[15] The exclusionary rule does not render inadmissible evidence of prejudicial events that are extrinsic to the deliberative process as such evidence does not involve any examination about what occurred during the course of the jury's deliberations.[16] At a conceptual level the distinction between internal deliberations amongst the jury and extraneous influence upon the jury is clear. In practice the dividing line between internal and external influence may be difficult to draw.[17]

13. There are strong policy considerations that favour retaining rules preserving the secrecy of jury deliberations.[18] There is a need to promote full and frank discussion amongst jurors, to ensure the finality of the verdict, to protect jurors from harassment or pressure and to maintain public confidence in the jury system.[19] Discussion and disagreement in public as to what happened in the jury room is likely to undermine public confidence in the jury system.[20] There is a 'real risk' that allegations will be made that are without foundation but will reduce confidence in the jury system.[21]

14. One aspect of the rule and a manifestation of the underlying policy rationale,[22] is that where the verdict is announced by the foreman in the presence of all the other members of the jury, with an affirmation to the question, 'and that is the verdict of you all?' and no members protest, there is a presumption that all jurors assented to the verdict. This presumption may be rebutted if circumstances *in connection with the delivery of the*

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[13] ***R v Mirza; R v Connor and Rollock*** [2004] UKHL 2; [2004] 1 AC 1118.
[14] ***R v Mirza*** [95].
[15] ***R v Softley*** (1999) 206 LSJS 48 (53-56) (Doyle CJ, Debelle and Wicks JJ agreeing).
[16] ***Shrivastava v The State of Western Australia [No 2]*** [2011] WASCA 8 [38] (Pullin JA).
[17] ***R v Minarowska and Koziol*** (1995) 83 A Crim R 78 (85-88) (Gleeson CJ, James and Ireland JJ agreeing); ***R v Skaf*** [2004] NSWCCA 37; (2004) 60 NSWLR 86 [216] (Mason P, Woods CJ at CL, Sully J); ***R v K*** [2003] NSWCCA 406; (2003) 59 NSWLR 431.
[18] Martin CJ considered the rationale at [29].
[19] ***R v Skaf*** [211] (Mason P, Wood CJ at CL, Sully J).
[20] ***R v Mirza*** [47] (Lord Slynn).
[21] ***R v Mirza*** [53] (Lord Slynn). Even Lord Steyn, alone in dissent in ***Rv Mirza*** in favouring significant reform to the exclusionary rule, nonetheless considered the complaint in the concurrent appeal of ***R v Connor and Rollock*** to be nothing more than an 'exaggerated protest of a disgruntled juror' [32].
[22] See: ***Re Matthews and Ford*** [1973] VR 199 at 210.

verdict establish that they did not all assent.[23] In this case, although there was a remark by the trial judge that the jury were 'unusually noisy' following the verdict, there is no evidence of dissent by any of the jurors when the verdict was announced.

15. The rule and the underlying rationales have been consistently affirmed.[24]

16. Whilst there are cogent policy arguments that favour relaxing the strict application of the exclusionary rule in an extreme case, there would inevitably be considerable controversy as to what degree the rule ought to be modified. As noted by Lord Rodger of Earlsferry in ***R v Mirza***:

> *'It is even less obvious how, exactly, it is said that the law should be modified. In attractive submissions counsel for the appellants invited the House to open the door of the jury room just enough to deal with the particular allegations of impropriety in these cases – on the implied assurance that this would not mean having to open it as widely or more widely in other cases.'*[25]

17. Arbour J in ***R v Pan; R v Sawyer*** expressed the understandable concern that 'erosions of the guarantees of jury secrecy beyond the existing boundaries would also result in the eventual erosion of the integrity of the jury as decision maker in criminal cases.'[26]

18. Whilst most common law jurisdictions accept the general policy underlying such rules, 'there are significant differences in the way in which a balance is struck between the need to give effect to those policy considerations, the interest of free speech, and the desire to avoid miscarriages of justice.'[27]

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[23] ***Ellis v Deheer*** [1922] 2 KB 113 (12). ***Ellis v Deheer*** was an example of where this rule did not apply, as evidence was adduced that a number of jurors, because of where they were positioned in the court room, did not hear the foreman pronounce the verdict and did not assent to it. Other cases involving juror dissent not infringing the exclusionary rule include ***R v Wooller*** (1817) 2 Stark 111 (where not all of the jurors were present in the courtroom when the verdict was announced) and ***R v Challinger*** [1989] 2 Qd R 352 (where a juror indicated her dissent by shaking her head when the verdict was announced).

[24] See: ***R v Mirza***; ***R v Papadopoulos*** [1979] 1 NZLR 621 at 626; ***Minarowska v The Queen*** (1995) 83 A Crim R 78 (Gleeson CJ, James & Ireland JJ agreeing); ***R v Skaf*** [2004] NSWCCA 37; ***Re Portillo*** [1997] 2 VR 723; ***Shrivastava v The State of Western Australia [No 2]***; ***Re Matthews and Ford*** [1973] VR 199 (209-211); ***R v Pan; R v Sawyer*** [80]-[83]; See: Boniface D, Juror Misconduct, Secret jury business and the exclusionary rule (2008) 32 *Criminal Law Journal* 18 at 24 – 26; The Hon. Justice McHugh, "Jurors Deliberations, Jury Secrecy, Public Policy and the Law of Contempt", in Findlay M & Duff P, *The Jury Under Attack*, Butterworths, Sydney 1988, 60-67.

[25] ***R v Mirza*** [169].

[26] ***R v Pan; R v Sawyer*** (347).

[27] Gleeson, M; *The Secrecy of Jury Deliberations* (1996) Newc LR Vol 1 No 2 (14).

19. In ***R v Minarowska***[28] Gleeson CJ observed that, given the underlying policy reasons, the 'distinction between what may and what may not be proved, and what may and may not be challenged, is not drawn by reference to the degree of seriousness or potential injustice of what might have occurred.'

20. In the present case the court below correctly held that the note, 'falls squarely within the exclusionary rule' for the reason that, '[t]o the extent that the note suggests that he or she may have done so by reason of some improper influence exerted by another juror, it would involve receiving evidence with respect to the deliberations of the jury and, in particular, the reasons why a juror voted in a particular way, contrary to the exclusionary rule.'[29] In any event, the note is replete with uncertainty and is not a secure foundation to impeach the verdict.

Legislation concerning the secrecy of jury deliberations

21. At paragraph [49] of the appellant's submissions it is contented that the Western Australian legislation 'is declaratory of matters extrinsic to the [exclusionary] rule rather than a statutory exception to the rule's operation.'[30] The legislation has no declaratory role.

22. The Western Australian legislation reinforces the exclusionary rule by criminalising the disclosure[31] or solicitation[32] of 'protected information'[33] in circumstances where it was disclosed or solicited for the purpose of publication.[34] The legislation does not criminalise disclosure or solicitation that has no connection with publication (such as jurors discussing what occurred in the jury room with their family or acquaintances) and expressly does not criminalise disclosure to courts and investigative or regulatory bodies.[35]

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[28] ***R v Minarowska*** (86-87).
[29] ***Smith v The State of Western Australia*** [38].
[30] Appellant's submissions [49].
[31] Section 56B *Juries Act 1957* (WA).
[32] Section 56C *Juries Act 1957* (WA).
[33] 'Protected information' is defined by section 56A(1)(a) of the *Juries Act 1957* (WA) to mean, 'statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations, other than anything said or done in open court.' The subsection mostly adopts the language of section 8(1) of the *Contempt of Court Act 1981* (UK) and was adopted by the Canadian Supreme Court in articulating the modern scope of the exclusionary rule in ***R v Pan, R v Sawyer***. The phrase also appears in equivalent statutes in other Australian jurisdictions.
[34] There is considerable doubt as to whether, prior to the enactment of section 8(1) of the *Contempt of Court Act 1981* (UK), disclosure of the content of deliberations by a juror constituted contempt of court under the common law of England. See generally Campbell, E. *Jury Secrecy and Impeachment of Verdicts – Part I* (1985) Crim. L. J. 132 (132-133).
[35] Sections 56B(2) and 56C(2) *Juries Act 1957* (WA).

23. Sections 56A to 56E of the *Juries Act 1957* (WA) have no bearing on the operation of the exclusionary rule. In ***Shrivastava v The State of Western Australia***[36] Buss JA held that the exceptions contained in sections 56B(2), 56C(2), 56D(2) and 56E do not evince a parliamentary intention to alter the general proposition that a court will not receive evidence from a former juror as to discussions between jurors in the course of their deliberations, the reasons for the jury's verdict or the individual thought processes of a juror referable to the verdict.[37] Analogous provisions in Victoria have been interpreted similarly.[38] The observation of Pullin JA in ***Shrivastava***[39], upon which reliance is placed at paragraph [48] of the appellant's submissions, is not inconsistent with the view expressed by Buss JA in that case.

24. There are similar statutory provisions in other Australian jurisdictions. Queensland[40], South Australia[41], Tasmania[42], Northern Territory[43] and the Australian Capital Territory[44] all have statutory provisions that criminalise disclosure or solicitation of jury deliberations where there is a likelihood or intention to publish the contents of those deliberations. The Victorian legislation is similar to these jurisdictions,[45] although it also contains a provision to the effect that it is not an offence to publish or disclose information about jury deliberations if that information is incapable of identifying a juror or the relevant legal proceedings.[46]

25. In New South Wales, the *Jury Act 1977* criminalises solicitation of the contents of jury deliberations, but differs from other jurisdictions in that there is no element relating to publication of solicited information. Furthermore, the legislation prohibits jurors disclosing their deliberations during a trial but does not criminalise disclosures by jurors after proceedings are concluded.[47] Section 75C of the *Jury Act* 1977 provides that a juror may report misconduct and other irregularities to the court. Subsection 75C (2) provides a former juror may report any irregularity to the sheriff. Irregularity, in relation to a juror's

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[36] ***Shrivastava v The State of Western Australia [No 2]*** [2011] WASCA 8.
[37] ***Shrivastava v The State of Western Australia [No 2]*** [73]-[84].
[38] ***R v Medici*** (1995) 79 A Crim R 582 (595-596) considering the (now repealed) section 69A of the *Juries Act 1967* (Vic).
[39] ***Shrivastava v The State of Western Australia [No 2]*** [31]-[32].
[40] Section 70 *Jury Act 1995* (Qld).
[41] Section 246 *Criminal Law Consolidation Act 1935* (SA).
[42] Section 58 *Juries Act 2003* (Tas).
[43] Section 49A *Juries Act 1962* (NT).
[44] Section 42C *Juries Act 1967* (ACT).
[45] Section 78 *Juries Act 2000* (Vic).
[46] Section 78(7) *Juries Act 2000* (Vic).
[47] Sections 68A and 68B *Jury Act 1977* (NSW).

membership of a jury or the performance of the juror's functions, includes the commission by a juror of an offence under the Act.[48]

26. Section 8 of the United Kingdom's *Contempt of Court Act 1981* provides that it is a contempt of court to obtain, disclose or solicit 'statements made, opinions expressed, arguments advanced or votes cast' in the course of a jury's deliberations. The UK legislation is more prohibitive than Australian legislation, in that mere solicitation or disclosure without an intention or likelihood of publication infringes the statute.

27. Neither the Australian nor the United Kingdom statutory provisions have modified the scope or application of the exclusionary rule by rendering admissible evidence of jury deliberations otherwise inadmissible under the common law. The same cannot be said of relatively recent reforms in New Zealand.

28. Section 76(1) of the *Evidence Act 2006* (NZ), which came into force on 1 August 2007, prohibits a person from giving evidence about the deliberations of a jury. Section 72(2) provides that matters going to the competency, capacity or disqualification of a juror do not form part of the 'deliberations of a jury', but that phrase is otherwise left undefined by statute.

29. Section 76(3) permits the admission of evidence of jury deliberations if a judge is satisfied that 'the particular circumstances are so exceptional that there is a sufficiently compelling reason to allow that evidence to be given.' In determining that issue, the judge is obliged to balance the competing public interests of:

    29.1. 'protecting the confidentiality of jury deliberations generally'; and
    29.2. 'ensuring that justice is done in those proceedings.'[49]

30. The fact the New Zealand Parliament considered it necessary to create a statutory exception to the exclusionary rule belies the appellant's submissions at [104]-[106] that earlier New Zealand jurisprudence recognised that such an exception existed at common law.

31. The New Zealand legislation, which commences with a presumption of inadmissibility, reinforces the public policy considerations justifying the exclusionary rule by requiring exceptional circumstances and 'a sufficiently compelling reason' to allow the rule to be

[48] Section 75C(4) *Jury Act 1977* (NSW).
[49] Section 76(4), *Evidence Act 2006* (NZ).

breached. The legislation also articulates the requirement to balance competing public interests when determining whether evidence of jury deliberations ought to be admitted.

There are no exceptions to the exclusionary rule

32. There is no exception to the exclusionary rule that intrinsic evidence may be admitted in exceptional circumstances.

33. In ***Shrivastava***, McLure P observed[50] that the, 'clear weight of current authority in Australia is that there is no residuary discretion to allow evidence of jury deliberations even where there are sufficiently compelling reasons to do so.'

34. The exclusionary rule relates both to facts that may or may not be proved and to evidence that may or may not be adduced. Rules of evidence resting on general policy considerations operate to exclude evidence falling outside of those rules regardless of the cogency, reliability or importance of the evidence under consideration[51] and regardless of any resulting prejudice.

35. If the degree of prejudice suffered by an accused is an irrelevant consideration when determining the scope and application of the exclusionary rule then there can be no discretion to relax the rule in exceptional cases. In ***R v Minarowska***, Gleeson CJ emphatically rejected any link between the degree of prejudice and the application of the exclusionary rule. His Honour stated:[52]

'Because the underlying policy aims to preserve the secrecy of jury deliberations, and to maintain the integrity and finality of a formally expressed verdict, the distinction between what may and what may not be proved, and what may and may not be challenged, is not drawn by reference to the degree of seriousness or potential injustice of what might have occurred. It is primarily drawn by reference to the outer limits of the veil of secrecy which is drawn over the jurors [sic] *deliberations.'*

36. The majority of the Law Lords in ***R v Mirza*** expressly declined to recognise an exception to the exclusionary rule, despite being invited to do so.

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[50] ***Shrivastava v The State of Western Australia [No 2]*** [5] (McLure P). Cf [96] Buss JA.
[51] ***R v Mirza*** [170] (Lord Rodger of Earlsferry).
[52] ***R v Minarowska*** (87).

37. In ***R v Mirza,*** Lord Hope of Craighead proposed a modification to the exclusionary rule to the effect that evidence that a jury declined to deliberate at all and returned a verdict by a process such as a toss of a coin should be admitted.[53] Lord Slynn also accepted that such a case should be an exception to the rule.[54] In the subsequent decision of ***R v Smith (No 2)***[55] a majority of the Law Lords in that case, in articulating the exclusionary rule, opined that such an exception *may* exist where there has been no deliberation at all. In any event, evidence that a jury did not deliberate at all may be regarded as extrinsic to a (non-existent) deliberative process, and may properly be categorised as falling outside the scope of the rule rather than being an exception to it.

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38. Insofar as agreement with the verdict announced in court is concerned, a court may receive evidence that a juror is not competent to understand proceedings (such as not understanding English).[56] However, evidence will not be received to the effect that a juror agreed with a verdict but disagreed with the quantum of damages awarded[57] or, with relevance to this appeal, that the juror disagreed with the verdict but was too frightened to say anything about that disagreement when the verdict was announced.[58]

39. The case that most starkly illustrates the absence of any exception to the exclusionary rule, regardless of the degree of prejudice suffered by an accused, is the decision of the
20 Privy Council in ***Nanan v The State.***[59] Nanan was convicted by a jury of murder. Trinidad law required verdicts in murder cases to be unanimous, but the trial judge omitted to direct the jury to this effect. Nanan was sentenced to death. A number of the jurors, including the foreman, provided affidavits to the effect that the jury was split 8 votes to 4 and the foreman thought that the word 'unanimous' meant 'majority' when asked by the clerk if the verdict was unanimous when delivering the verdicts. There were no circumstances connected with the delivery of the verdict indicating any dissent. The affidavits of the jurors were held to be inadmissible in accordance with what is now referred to as the exclusionary rule.

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[53] ***R v Mirza*** [123].
[54] ***R v Mirza*** [55].
[55] ***R v Smith (No 2)*** [2005] UKHL 2 [16(2)] (Lord Carswell, Lord Walker of Gestingthorpe and Lord Bingham of Cornhill agreeing).
[56] ***Ras Behari Lal v King-Emperor*** [1933] All ER 723. The case was decided on the basis that, 'the objection is not that he did not assent to the verdict, but that he so assented without being qualified to assent.'
[57] ***Nesbitt v Parrett*** (1902) 18 TLC 510.
[58] ***R v Roads*** [1967] 2 All ER 84. The report does not identify the source of the juror's fear.
[59] ***Nanan v The State*** [1986] AC 860.

The alleged exception to the exclusionary rule in New Zealand case law

40. The appellant's submissions at [104]-[105] rely upon a line of New Zealand authority, cited by Gleeson CJ in ***Minarowska***, to the effect that there exists an exception to the exclusionary rule in extraordinary cases. An analysis of the New Zealand authorities does not support the existence of such an exception to the rule.

41. In ***Minarowska***, Gleeson CJ noted[60] that in ***Tuia v The Queen***[61] the Court of Appeal of New Zealand was of the view that if, in a particular case, 'a sufficiently compelling reason were shown, a court, balancing competing public interests, might depart from the normal rule of confidentiality.' His Honour said that it was unnecessary to decide that question in ***Minarowska***. His Honour did not express any opinion for or against the proposition that such a residual discretion exists.

42. Writing extra judicially the following year, Chief Justice Gleeson noted that this statement in ***Tuia*** was a qualification *proposed* by the Court of Appeal of New Zealand that there *may* be circumstances in which it would be permissible to depart from the normal rule of confidentiality.[62]

43. The statement of the New Zealand Court of Appeal in ***Tuia***[63] relied upon an earlier decision of that court in ***R v Taka.***[64] In ***Taka***, consideration of the existence of a residual discretion appears in a single sentence:[65]

'The case could not possibly be argued to fall within the extreme category where the rule of confidentiality of jury deliberations may be subject to an exception, as mentioned in Papadopoulos at pp 626-627.'

44. Thus in ***Taka*** the New Zealand Court of Appeal simply concluded that the rule existed and only cited the case of ***R v Papadopoulos***[66] as the authority for that proposition. Similarly in the case of ***R v Tawhiti***[67] the New Zealand Court of Appeal stated that the

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[60] (87) (James and Ireland JJ agreeing).
[61] ***Tuia v The Queen*** [1994] 3 NZLR 553.
[62] Gleeson, M; *The Secrecy of Jury Deliberations* (1996) Newc LR Vol 1 No 2 (12).
[63] (556.30).
[64] ***R v Taka*** [1991] 2 NZLR 129.
[65] *Ibid* (131.46).
[66] ***R v Papadopoulos*** [1979] 1 NZLR 621.
[67] ***R v Tawhiti*** [1994] 2 NRZL 696 (699.50).

rule was not absolute, but this conclusion was expressed in a short paragraph not based upon an analysis or citation of authority.

45. In ***Papadopoulos***, a juror swore an affidavit to the effect that she only went along with the verdict because she believed the jury would be kept together until a unanimous decision was reached. At pages 626-627 (the passage cited in ***Taka***), the Court simply noted a submission put forward by the appellant's counsel that there must be exceptions to the rule in an extreme instance. However, counsel conceded his case was not such an extreme case. The Court then concluded that, *'...so the question [of the existence of a discretion in extreme cases] need not be explored further.'*

46. When the history of these statements is traced in this manner, it is apparent that the basis for the purported existence of a residual discretion was a brief submission, unsupported by authority, by an appellant's counsel before the New Zealand Court of Appeal that considered, *'...the question need not be explored further.'* Subsequent consideration by other courts either found the question of the existence of the discretion unnecessary to decide or, the respondent respectfully submits, erroneously concluded that ***Papadopolous*** is authority for the existence of such discretion.

47. The appellant's reply to this argument, by simple reference to a common judicial officer giving the lead judgement in ***Papadopoulos*** and ***Taka***,[68] does nothing to detract from the fact that the source of this proposed exception to the exclusionary rule was a submission made by counsel in ***Papadopoulos*** unsupported by authority. Martin CJ's description of this purported exception to the exclusionary rule in New Zealand having 'developed incrementally from an insecure foundation'[69] is accurate.

The appellant's analogy with legal professional privilege

48. The appellant's submissions at paragraphs [77]-[83], which endeavour to draw an analogy with legal professional privilege, does not assist in determining whether misconduct between jurors within a jury room falls within the exclusionary rule.[70]

49. The principal underlying rationale for legal professional privilege is that it serves the public interest in the administration of justice by preserving the confidentiality of

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[68] Appellant's submissions [105].
[69] ***Smith v The State of Western Australia*** [42].
[70] Appellant's submissions [77]-[83]. As to the concept of privilege having no application to communications between jurors, see Campbell, E. *Jury Secrecy and Impeachment of Verdicts – Part I* (1985) Crim. L. J. 132 (143-144). See also ***Re Matthews and Ford*** [1973] VR 199 (209).

communications between lawyer and client, encouraging the client to make a full and frank disclosure of the relevant circumstances to the legal adviser.[71] If the communications the subject of the claim for privilege are criminal in themselves, or intended to further a criminal purpose then the client, for reasons of public policy, the claimant should not be permitted to avail themselves of the privilege.

50. The rationales underlying the exclusionary rule as outlined at paragraphs [13] to [19] above are completely different. Further, unlike legal professional privilege the exclusionary rule is not a right of claim for a single juror to invoke or waive.

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Does the note fall within the scope of the exclusionary rule?

51. If the appellant is not successful in establishing that the note's contents are extrinsic to the deliberative process, then it is inadmissible.

52. Before the Court of Appeal, the appellant's counsel conceded the note was intrinsic to the deliberative process.[72] The appellant's submissions do not address this concession which is now departed from in this Court.

20 53. As held by Martin CJ in the court below, to the extent the note is capable of sustaining a conclusion that the deliberations of a juror were the subject of improper influence by another, it falls squarely within the exclusionary rule.[73] McLure P expressed agreement that the note was not evidence of events extrinsic to the process of jury deliberation.[74]

Categorisation of conduct as criminal or non-criminal

54. The appellant purports to draw a distinction between criminal and non-criminal misconduct on the part of a juror in determining whether the exclusionary rule applies.[75] The proposition advanced by the appellant is that criminal misconduct is always extrinsic,
30 whereas non-criminal misconduct may or may not be extrinsic. There is no authority supporting this distinction.[76] Given the modern rule is concerned with the intrinsic/extrinsic dichotomy and not the type of misconduct or its degree of prejudice, the

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[71] ***Esso Australia Resources Ltd v FCT*** (1999) 201 CLR 49 [35] (Gleeson CJ, Gaudron and Gummow JJ); ***Grant v Downs*** (1976) 135 CLR 674 (685) (Stephen, Mason and Murphy JJ).
[72] Transcript of hearing before the Court of Appeal, p 26.
[73] ***Smith v The State of Western Australia*** [38].
[74] ***Smith v The State of Western Australia*** [51].
[75] Appellant's submissions [52]-[53].
[76] As to the 'coin toss' example of ***Vaise v Delaval*** cited by the appellant on this point, Lord Mansfield in that case considered the misconduct to amount to a 'very high misdemeanour' on the part of the jurors.

application of the exclusionary rule cannot turn upon the categorisation of the impugned misconduct as being criminal or otherwise. The exclusionary rule cannot be circumvented by simply declaring all behaviour constituting an offence is automatically extrinsic to the deliberative process.

55. However, the attachment of the characterisation of criminal misconduct to the action of a juror during deliberations self evidently must be the source of disquiet and may evidence an extreme case where conduct between jurors ceases to be part of the deliberations. Evidence concerning deliberations is inadmissible, but evidence establishing that a prejudicial event between jurors may be extrinsic to the process of deliberation is admissible.

56. The exclusionary rule is not confined to discussions in the course of deliberations in the jury room but extends to any process or interaction that may properly be characterised as deliberations by the jury.[77] In the present case it is not known at what time and in what circumstances the alleged incident the subject of the note occurred. An interaction between two jurors may occur in circumstances where it does not form part of the deliberations.[78] There may be occasions where interactions between jurors, after retiring to consider a verdict, may be characterised as extrinsic and evidence is admissible.[79]

57. At paragraph [59] of the Appellant's submissions the incomplete note is characterised as grounding an allegation of criminal conduct contrary to section 123 of the *Criminal Code*. For reasons outlined below, the note does not support that contention. In any event, given the uncertainty regarding the note, the reliance on s 123 of the *Criminal Code* is problematic. Section 123, in part, criminalises intimidation and threats of any kind to influence a juror. That jury deliberations may involve intimidation or undue pressure (including robust discussion that may be perceived as threats) is not uncommon.[80]

58. The appellant contends at paragraph [59.1] that 'coercion' of a juror by a fellow juror is a crime under s 123 of the *Criminal Code*. The section does not refer to 'coercion'. A juror who is a party to robust deliberations may hold a perception that they have been subject to coercion to reach an accord. A juror may feel intimidated or perceive actions from other jurors as threatening during deliberations. Such occurrences, whilst regrettable, may not

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[77] ***R v Young*** [1995] QB 324 (331-332).
[78] ***R v Skaf*** (where two jurors made an unauthorised visit to the crime scene).
[79] ***R v Young*** (where the use of a ouija board by some of the jurors at a hotel where they were staying overnight before resuming deliberations the next day was found to be extrinsic).
[80] ***Smith v The State of Western Australia*** [2013] WASCA 7 [37].

objectively amount to unlawful conduct. Ultimately, the issue is whether the juror gives a verdict that is consistent with their oath.

59. However, if there was evidence of physical violence between jurors, described with sufficient particularity, then it may be an event extrinsic to the exclusionary rule rather than being an exception to the rule or subject to an exercise of discretion.

60. Similar to the appellant, the respondent has been unable to find any authority considering the exclusionary rule and criminal conduct between jurors. There are, however, remarks concerning hypothetical extreme examples in some Australian authorities.[81] In ***R v Myles*** Pincus JA considered that the exclusionary rule cannot be absolute and that 'If one of the jurors were credibly alleged to have conveyed to others, in the jury room, threats of physical retaliation if they acquitted an accused, it is inconceivable that could not be gone into by way of inquiry.'[82]

61. In respect to the example given by Pincus JA a critical distinction is whether the juror was conveying threats of another person not being a member of the jury (extrinsic and not subject to the exclusionary rule) rather than the juror unilaterally stating his intention to inflict physical retaliation (intrinsic and subject to the exclusionary rule unless characterised, in all the circumstances as being extrinsic to deliberations).

62. In ***R v Myles***[83] Fitzgerald P considered that 'an unqualified approach can no longer be justified and should not be accepted' and illustrated that observation with 'a case in which an innocent person was convicted by jurors frightened by threats to their lives made in the jury room by one of their number who confessed to his or her own guilt of the crime.'

63. The extreme case examples do not arise for consideration in the context of the circumstances of the present case. The note is an insecure foundation to impeach the verdict or to ground an inquiry.

The note is an inadequate foundation upon which to ground an inquiry

64. The note of a single unknown juror, articulating with sufficient cogency what occurred, giving rise to speculation about its meaning, cannot form the foundation for any inquiry even if an exception to the exclusionary rule is recognised.[84]

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[81] ***R v Myles*** [1997] 1 Qd R 199; ***R v Wilton*** [2013] SASCFC 60.
[82] ***R v Myles*** (208).
[83] ***R v Myles*** (205).
[84] In this context see ***R v Mirza*** [117]-[119].

65. The appellant's submissions overstate the conclusions that may be properly drawn from the text of the note. Implicit in the appellant's submissions is an assertion that the very existence of the note is cogent and credible evidence that one juror assaulted or threatened another juror with violence and that this is evidence of a crime having being committed, such as 'coercion of a juror' contrary to section 123 of the *Criminal Code* (WA).

66. As observed by Martin CJ in the court below, the circumstances leading to the discovery of the note are, 'so replete with uncertainty and ambiguity that any conclusions of fact drawn from it must necessarily be speculative.'[85]

67. Although the author is unknown, it is assumed that it was written by one of the 12 jurors. It is unknown at what time the note was found. It is not known whether the note was written before or after the verdict, although given the jury was discharged immediately after the delivery of the verdict it is most likely to be the former. If written before the verdict was delivered, it is not known whether the juror still held the view suggested by the note (whatever that might actually be) when the verdict was delivered. The fact the second sentence was incomplete and the note left unsigned supports the inference that the juror may well have thought better of his or her position prior to the verdict's delivery.[86] The incomplete nature of the note, together with the fact it was found in the jury room rather than handed directly to the sheriff's officer, casts doubt on the proposition that the author ultimately intended the note to make its way to the trial judge.

68. The first sentence of the note is expressed as a conclusion and not as a statement of fact. The author may simply have been referring to pressure or intimidation that may have formed part of the 'robust interchange of views which must be accepted as forming an appropriate part of jury deliberations.'[87] Jurors, drawn from varying walks of life, may be unaccustomed to discussing an issue in company in such a structured way. Their deliberations, 'may be stormy requiring the reconciliation of strongly held views.'[88]

69. It is highly improbable that one juror would assault another in the jury room and that the remaining 10 individuals would not have intervened or brought the matter to the attention of the sheriff's officer immediately after. Neither the complaining juror nor any of the other 10 jurors have reported any irregularity to the court or other authority since the verdict was delivered. There has been no communication from the complaining juror.

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[85] ***Smith v The State of Western Australia*** [34].
[86] ***Smith v The State of Western Australia*** [35]-[36].
[87] ***Smith v The State of Western Australia*** [37].
[88] ***R v Mirza*** [143] (Lord Hobhouse).

Impediments to an inquiry in the present case

70. If a court considers that there has been a material irregularity concerning the jury then it has the power to make inquiries of its own volition,[89] although any inquiry cannot infringe upon the exclusionary rule.[90] To that extent the respondent agrees with paragraphs [67] to [69] of the appellant's submissions.

71. It is further agreed that a trial Judge could make inquiries if a juror identifies themselves to the sheriff's officer with a complaint. The inquiry of the juror, may be conducted in the absence of the jury, without the trial Judge inquiring into the deliberations. The appellant's contention that the trial judge failed to conduct an inquiry disregards a number of practical and legal impediments to such an inquiry being conducted in this case.

72. Firstly, by the time that the note was discovered, the jury had already been discharged. This is not a case where the trial was still ongoing (and thus permitting individual jurors to be questioned in open court) or where the jurors, despite being discharged, had been held back in the court building and not permitted to leave by the Sheriff's officer.[91] Having been discharged, the trial judge lacked any power at either statute or common law to compel jurors to attend to be interrogated.

73. Secondly, as noted by Martin CJ in the court below, the note itself provides an insecure foundation for the authorisation of what would be wide-ranging and intrusive inquiries into the deliberations of the jury, requiring the interrogation of all 12 jurors, and would 'fly squarely in the face' of the public policy reasons for the exclusionary rule.[92] Even if this Court were to conclude that the note fell outside the exclusionary rule or was an exception to it, it does not follow that principles concerning jury secrecy should be disregarded unless there is clear and cogent evidence justifying such an inquiry. The note does not meet that threshold.

74. Given the vagaries of the note, questions would need to be asked about the circumstances and context in which the alleged 'physical coercion' occurred. The note may simply be nothing more than a complaint about a robust discussion in the jury room that was

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[89] ***Smith v The State of Western Australia*** [16].
[90] ***R v Skaf*** [212] (Mason P, Wood at CL and Sully J).
[91] ***Biggs v The Director of Public Prosecutions*** (1997) 17 WAR 534 involved a jury, despite being discharged, recalled into court after 15 to 25 minutes for an inquiry as to the correct verdict. Although those proceedings were ultimately determined on the basis of the accused being able to raise a plea of *autrefois acquit*, the court did not call into question the procedure of recalling the jury in this manner.
[92] ***Smith v The State of Western Australia*** [48].

misinterpreted by the note's author in the heat of the moment. Questioning designed to elicit the truth of what occurred would inevitably touch upon the deliberations of the jury. In fairness to both parties, all 12 jurors would need to be questioned and cross-examined as to what occurred in the jury room during their deliberations. All of this evidence, whether favourable or adverse to the appellant's position, would be inadmissible under the exclusionary rule.

75. This may be distinguished from such cases where extrinsic material has entered the jury room, where the fact that such material was present was sufficient to establish an irregularity without touching upon the impact such material had during the deliberative process and thus breaching the exclusionary rule. Where an irregularity has occurred in the sense that the jury has been subjected to improper extraneous influence, an appellate court will not inquire into the actual effect of that influence upon the jury's verdict but will determine the materiality of the influence. An inquiry in the present case, on the other hand, would be focused only on interactions between jurors within the jury room.

76. Even if the inquiry conducted by the trial judge were to elicit evidence favourable to the appellant, the trial judge would have been powerless to set aside the conviction as the court was then *functus officio*.[93] This was correctly noted by the trial judge in describing the judgment as 'perfected' and that any issue 'could only be an appeal point.'[94] Other than, potentially, placing on record evidence that might be utilised by an appellate court, the inquiry would have served no useful purpose.

77. The appellant contends that the 'practicality of an inquiry' requires answers to arbitrary questions posed by the appellant that are erroneously said to be 'matters within the knowledge of the State.'[95] The appellant implies that there is a burden upon the respondent to provide answers to these queries. These assertions are incorrect.

78. Section 156 of the *Supreme Court Act 1935* (WA) provides that the Sheriff is an officer of the Supreme Court of Western Australia and the District Court of Western Australia. Correspondence from the Sheriff reproduced in the appeal book[96] confirms that the Sheriff will not act upon any direction other than a lawful order of the Court. As a party to the proceedings the respondent does not know, and is in no better position than the appellant to solicit, the answers to the questions posed by the Appellant at paragraph [76] of his

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[93] ***Biggs v Director of Public Prosecutions.*** See also: *Jury Irregularities in the Crown Court: A Protocol issued by the President of the Queen's Bench Division* [2013] 1 Cr. App. R 22 [16]-[17].
[94] Trial transcript p 187.30.
[95] Appellant's submissions [76].
[96] Letter from the Sheriff of Western Australia to the Legal Aid Commission dated 10 July 2012, AB 57.

written submissions. The respondent has invited the appellant, with its support, to solicit this information directly from the Sheriff's Office.

79. In this context, the proposed order that appears at paragraph [118] of the appellant's submissions has an inherently speculative foundation, in that there is no basis to conclude that an inquiry is no longer practical. There is no reason to conclude that a public officer such as the Sheriff has not retained records of the type necessary to facilitate an inquiry.

80. The appellant's contention at paragraph [75] (read with paragraph [39]) that the convictions be quashed should an inquiry be considered necessary but unable to be conducted due to the lapse in time is without foundation. The contention that a unanimous verdict of a jury should be set aside, without inquiry, on the untested say so of one juror whether by note or orally, particularly so when the note is ambiguous or replete with uncertainty, is not tenable. In such circumstances, as Lord Slynn observed in ***R v Mirza***:

'An inquiry would be needed to assess whether the facts alleged were true and what was the response of the other jurors. If the jurors disagree, the inquiry might become complex and lengthy. If such allegations have to be investigated and this could lead to considerable controversy between one or more jurors. At the very least it could involve a long inquiry and if the issue is only raised at a late stage jurors may well have forgotten what happened.'[97]

Should this court modify the exclusionary rule?

81. As noted by Martin CJ in the court below, whilst some of the rationales for the exclusionary rule are stronger than others the exclusionary rule is 'so well established that any significant modification to the rule should be undertaken by the legislature or the ultimate appellate court.'[98] It is accepted that the application of the exclusionary rule may result in harsh or unjust outcomes where cogent and relevant (if not decisive) evidence is rendered otherwise inadmissible. However, modification of the law would require the fine balancing of competing public policy considerations, such that reform in this area of the law is a matter best left to the legislatures rather than this Court.[99]

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[97] ***R v Mirza*** [54].
[98] ***Smith v The State of Western Australia*** [29].
[99] ***State Government Insurance Commission v Trigwell*** (1979) 142 CLR 617.

82. If there is to be greater scrutiny of what occurs within a jury room in order to avoid injustices of the type of which ***Nanan*** is an example, the common law exclusionary rule will need to be modified. The sanctity of what occurs between jurors within the jury room is such an entrenched and fundamental principle of the criminal justice system that it ought not to be amended lightly. If the rule is to be modified, a balancing of competing public interests would need to be achieved. The House of Lords in ***R v Mirza*** declined to modify the rule, given the competing policy tensions and issues that would arise if jury deliberations are subject to greater scrutiny. The New Zealand Parliament has modified the exclusionary rule by legislation.

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Part VIII – Estimate of length of oral argument

83. The respondent estimates it will require one and a half hours for the presentation of oral argument.

DATED this 7th day of November 2013

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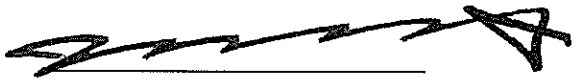

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IN THE HIGH COURT OF AUSTRALIA **No P51 of 2013**

PERTH OFFICE OF THE REGISTRY

BETWEEN **MARK SHARNE SMITH**

Appellant

and

THE STATE OF WESTERN AUSTRALIA

Respondent

ANNEXURE 'A' – APPLICABLE STATUTES IN ADDITION TO THOSE CITED BY THE APPELLANT

1. *Criminal Law Consolidation Act* (SA) (Reprint no. 23), s 246.
2. *Juries Act 2006* (New Zealand) (Reprint as at 7 July 2010), s 76.
3. *Contempt of Court Act 1981* (United Kingdom) (as enacted), s 8.