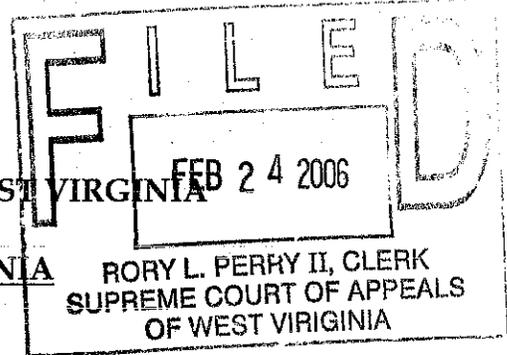


IN THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON, WEST VIRGINIA



NO. 32961

STATE OF WEST VIRGINIA,
Appellee,

v.

UNDERLYING PROCEEDING
CASE NO. 03-F-103
CABELL COUNTY CIRCUIT COURT
(Dan O'Hanlon, Judge)

JEFFREY L. FINLEY,
Appellant.

BRIEF ON BEHALF OF APPELLANT
JEFFREY L. FINLEY

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UNDERLYING PROCEEDING
CASE NO. 03-F-103
CABELL COUNTY CIRCUIT COURT
(Dan O'Hanlon, Judge)

JEFFREY L. FINLEY,
Appellant.

BRIEF ON BEHALF OF APPELLANT

INTRODUCTION

The appellant, Jeffrey L. Finley, was tried in the Circuit Court of Cabell County for first degree murder and two counts of sexual assault. The investigation and prosecution of this case was fraught with error.

During the course of the guilt phase of the trial¹, the appellant was attired in standard civilian clothing. (Mr. Finley was incarcerated at the time of his trial and had been in custody for over a year-and-a-half prior to his trial date). After the jury's finding of guilt on September 29, 2004, the trial court recessed the proceedings for nearly two weeks. On October 12, 2004, at the resumption of

¹ The appellant's trial was bifurcated in accordance with *State v. LaRock*, 196 W. Va. 294, 470 S.E. 2d 613 (1996).

proceedings for the guilt phase of Mr. Finley's trial, the trial judge announced that Mr. Finley would not be permitted to wear civilian clothes for the remainder of his trial. Finley's trial counsel requested that his client be permitted to dress more appropriately to the occasion, but the trial court denied this request. The Appellant's final appearances before his jury, who were determining whether to grant him the possibility of parole, was conducted in bright orange jail clothing and leg restraints.²

The trial court's *sua sponte* decision to require Appellant to wear clearly recognizable attire from a regional jail during the penalty phase of his trial violated his Due Process rights under the West Virginia and United States Constitutions.

² The record is somewhat unclear as to the use of leg shackles on Mr. Finley. Mr. Finley asserts that the shackles were utilized during the entirety of the penalty phase of his trial. The record notes that the trial court ordered that Mr. Finley's handcuffs be removed "in case he needs to testify or write notes." (Tr. 323).

I.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

In a criminal complaint dated March 13, 2003, Jeffrey L. Finley was charged with first degree murder in the March 22, 1999 death of Mabel Hetzer. Mr. Finley waived extradition from the State of Wisconsin and returned to Huntington to address the charge. Mr. Finley arrived in Huntington on March 20, 2003 and has remained in the custody since that date.

A preliminary hearing on this charge was conducted on April 10, 2003, and the case was bound over to the Cabell County grand jury. On May 16, 2003 the Grand Jury indicted the Appellant for first degree murder (Count I) and two counts of second degree sexual assault (Counts II & III).

On August 15, 2003, Mr. Finley appeared before the circuit court and waived his right to a speedy trial, based in part upon an agreement by the State to promptly provide bench and lab notes relating the to DNA testing. These materials were not forthcoming, resulting in a January 4, 2004 order compelling the lab to provide these materials.

Following various suppression hearings, trial on these charges began on September 20, 2004. The trial continued through September 21, 2004, but an illness on the part of Mr. Finley's counsel forced a recess of several days and the appointment of co-counsel.

The trial resumed on September 27, 2004. The State rested its case on September 28, 2004. The Defense began presenting his case on that date, and the

trial continued until the evening of September 29, 2004, when Mr. Finley was found guilty on all three charges in the indictment.

On October 12, 2004, the jury returned for the sentencing phase of the trial. The trial court denied a request from defense counsel that Mr. Finley be permitted to wear civilian clothing and required him to appear before the jury in bright orange, clearly identifiable "jail" clothing. The jury subsequently determined that Mr. Finley should not receive mercy for the first degree murder conviction. Based on this finding, and upon a "waiver" of Appellant's right to a presentence report, the trial court immediately sentenced Mr. Finley to life imprisonment with no chance for parole, and two consecutive sentences of ten to twenty five years on each of the sexual assault convictions.

On December 17, 2005 the trial court denied Appellant's post-trial motions. The trial court subsequently granted a two-month extension in which to file the appeal herein. The appeal was filed on June 28, 2005 and was presented on the Court's Motion Docket on January 9, 2006. The Honorable Court accepted the Petition on that date, but limited consideration of the Petition to the single issue presented herein.

II.

STATEMENT OF FACTS

On the evening of March 22, 1999, the body of Mabel Hetzer was found lying in her bed in her home in Huntington, West Virginia. When authorities arrived, they discovered a broken window in the residence and determined that the home was a potential crime scene.

At the time of this incident, Jeffrey L. Finley and his wife Libby resided next door to Ms. Hetzer. The police officers spoke briefly with Mr. Finley on the evening of March 22 only to request that he remove a dog from a common yard area shared between his home and Ms. Hetzer's house.

During the following week, the authorities briefly questioned Mr. Finley regarding the case. On March 30, 1999, Finley was approached near his home by two Huntington police officers and was questioned regarding his footwear. Mr. Appellant provided these shoes and a similar pair at his home to the officers for comparison with a footprint found on a piece of broken glass in the common yard between the Finley's home and the home of the decedent.

During the early summer of 1999, the investigation of Ms. Hetzer's death came to a halt, with no further questioning of Mr. Finley and no additional investigation into other suspects.

Two-and-one-half years later, a new supervisor in the Huntington police Department ordered that the investigation into Ms. Hetzer's death be reopened. Based on this directive, police officials examined a set of bedclothes found at the

scene with an alternative light source device.³ This examination revealed the presence of a number of hairs, which were retained and sent to the state police lab for processing.

For whatever reason, officials decided that it was now time to further question Mr. Finley and to take blood and hair samples for DNA comparison.⁴ Investigators traveled to Wisconsin on March 20, 2002, and met with Finley, who provided the requested samples and a lengthy statement to the officers.

Based upon an alleged DNA "match" between the appellant's blood and a miniscule amount of saliva retrieved from the scene, the police obtained an arrest warrant for Mr. Finley. Mr. Finley waived extradition and returned to West Virginia. He was denied bond on the charges and was indicted in May 2003.

Lengthy pretrial proceedings then followed, and Mr. Finley's trial did not begin until September 20, 2004. After two days of testimony, the trial was recessed for several days due to an illness suffered by Appellant's trial counsel.

The jury retired to consider its verdict on September 29, 2004 at 2:46 p.m. The jury returned with its guilty verdicts on all three counts of the indictment at 4:53 p.m., just over two hours after beginning deliberations and less than ten minutes after the trial judge conducted an off-the-record discussion with the jurors.

³ The police initially undertook this testing procedure when Ms. Hetzer's body was discovered, but the device "broke" and no further testing was attempted. (Tr. Transcript, Pg. 263).

⁴ The hairs retrieved from the bedclothes were not subjected to DNA testing and were in no manner ever connected with Jeffrey Finley.

The sentencing phase of Mr. Finley's trial began on October 12, 2004, nearly two weeks after the verdicts were handed down. Finley appeared at this proceeding in handcuffs, leg manacles and the standard issue jail attire, consisting of bright orange "scrub"-type shirt and pants. At this time, the following discussion ensued:

THE COURT: Prior to coming out on the bench, I was approached by the bailiff requesting how Mr. Finley was to be dressed for court. Also, his attorneys and the prosecutor came in my office to find out what the policy is.

I've inquired and my understanding here in Cabell County is that once he's been convicted, this jury already knows that he is a convict, they're the ones that convicted him, that he comes over not in a suit, but in his regular jail clothes.

And, so, I said that I would do that out here on the record in case you wanted to object to that.

[DEFENSE COUNSEL]: Your Honor, our client would request to the Court that he be permitted to dress in civilian clothes.

THE COURT: At this time I'm going to deny that request. And I've asked them to take his handcuffs off in case he needs to testify or write notes.

(Record Pg. 0323 - October 12, 2004 Hearing - Transcript, Pg. 2-3).

No evidence was presented by either party during this phase of the trial. Following statements from the parties and instructions from the trial court, the jury returned a recommendation of no mercy after twenty-five minutes of deliberation. Mr. Finley waived his right to a presentence investigation report,

and the trial court sentenced him to life without mercy and two ten-to-twenty-five year sentences, all to be served consecutively.

III.

ASSIGNMENT OF ERROR

THE APPELLANT WAS IMPROPERLY REQUIRED TO WEAR A JAIL UNIFORM DURING THE PENALTY PHASE OF HIS TRIAL, IN VIOLATION OF HIS DUE PROCESS RIGHTS UNDER THE WEST VIRGINIA AND UNITED STATES CONSTITUTIONS.

IV.

POINTS AND AUTHORITIES

A. Consistent with the Fourteenth Amendment, the State cannot compel an accused to stand trial before a jury while dressed in identifiable prison clothes.

Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976).

B. A criminal defendant has the right under the Due Process Clause of our State and Federal Constitutions not to be forced to trial in identifiable prison attire. However, where a criminal defendant is tried in identifiable prison attire without any initial objection, and the offense for which he is tried is prison-

related such that the jury necessarily knows from the evidence that he was in prison at the time of the commission of the offense, the error will be deemed not prejudicial under the doctrine of harmless constitutional error. Syllabus Point 2, State ex rel. McMannis.v Mohn, 163 W. Va. 129, 254 S.E. 2d 805 (1979).

C. The court should not permit a defendant or witness to appear at trial in the distinctive attire of a prisoner, unless waived by the defendant. American Bar Association, Standards for Criminal Justice, Trial By Jury, § 15-3.2(b).

D. The Constitution forbids the use of visible shackles during a capital trial's penalty phase, as it does during the guilt phase, unless that use is "justified by an essential state interest" – such as courtroom security – specific to the defendant on trial. Deck v. Missouri, 125 S. Ct. 2007, 2005 WL 1200394, May 23, 2005, citing Holbrook v. Flynn, 475 U.S. 560, 568-569 (1986).

V.

ARGUMENT

THE DEFENDANT WAS IMPROPERLY REQUIRED TO WEAR A JAIL UNIFORM DURING THE PENALTY PHASE OF HIS TRIAL, IN VIOLATION OF HIS DUE PROCESS RIGHTS UNDER THE WEST VIRGINIA AND UNITED STATES CONSTITUTIONS.

1. A Defendant Has the Constitutional Right Not to be Compelled to Wear Identifiable Jail Clothing During any Phase of His or Her Trial.

This Court has long held that a defendant has the constitutional right, under the Due Process Clauses of the State and Federal Constitutions, not to be forced to trial in identifiable prison attire.

The United States Supreme Court of Appeals initially addressed this issue in Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1692, 48 L. Ed. 2d 126 (1976). The respondent in Estelle was convicted of assault with intent to commit murder with malice. While determining that the issue had not been properly preserved, the Supreme Court nonetheless recognized the right of a defendant, under the Fourteenth Amendment to the United States Constitution, to be tried without being forced to don identifiable jail clothing.

The Estelle Court noted:

“Unlike physical restraints...compelling an accused to wear jail clothing furthers no essential state policy. That it may be more convenient for jail administrators, a factor quite unlike the substantial need to impose

physical restraints upon contumacious defendants, provides no justification for this practice." Estelle at 505, 96 S. Ct at 1693.

The Estelle Court also cited an additional rationale for the prohibition on the compulsory adornment of jail clothing: that "compelling the accused to stand trial in jail garb operates usually against only those who cannot post bail prior to trial. Persons who can secure release are not subject to this condition." Estelle at 505, 96 S. Ct. at 1694.

This Court adopted the rationale of Estelle and extended its holding to the Due Process Clause (Article III, § 10) of the West Virginia Constitution in State ex rel. McMannis v. Mohn, 163 W. Va. 129, 254 S.E. 2d 805 (1979.) While the Court in McMannis determined that Estelle was not violated due to the particular facts of the underlying offense (i.e., a sexual assault committed while the defendant was incarcerated in a correctional facility), the Court nonetheless adopted the basic rationale of Estelle and stated, in Syllabus Point 2:

"A criminal defendant has the right under the Due Process Clause of our State and Federal Constitutions not to be forced to trial in identifiable prison attire. However, where a criminal defendant is tried in identifiable prison attire without any initial objection, and the offense for which he is tried is prison-related such that the jury necessarily knows from the evidence that he was in prison at the time of the commission of the offense, the error will be deemed not prejudicial under the doctrine of harmless constitutional error."

Subsequently, in State v. Reedy, 177 W. Va. 406, 352 S.E. 2d 158 (1986), the Honorable Court extended the Estelle and McMannis prohibition to recidivist proceedings. The Reedy opinion notes:

"We realize that a jury in a recidivist proceeding will learn from other evidence that the appellant has in fact been convicted of the most recent felony. *We do not believe, however, that this diminishes the prejudice of requiring a defendant to appear at a recidivist proceeding in identifiable prison attire.*" [emphasis added]. Reedy at 417, 352 S.E. 2d at 169.

While the specific issue presented in Mr. Finley's case has not yet been addressed by this Court, the underlying rationale presented by Estelle, McMannis and Reedy remains solid: that while a defendant remains subject to a discretionary decision from his or her jury, the defendant should not be compelled by the trial judge to "look the part" of a prison inmate. Each of these decisions discusses the inherently prejudicial nature of a defendant's appearance in jail clothing and the resulting likelihood of unfavorable decisions based upon such an appearance.

One of the Court's more recent pronouncements on this issue bears examination. In State v. Rood, 188 W. Va. 39, 422 S.E. 2d 519 (1992), the Court determined that the appellant had not demonstrated that he had been compelled to stand trial in jail clothing. The Court noted that the trial court had made efforts to obtain proper clothing for Rood, and that only when these efforts had failed was the defendant made to appear before the jury.

Rood may be distinguished from the present case by one key fact: unlike Mr. Rood, Mr. Finley was not offered the opportunity to wear civilian clothing. No effort was made to procure appropriate attire for the penalty phase of the trial. Instead, the trial court invoked an unwritten local rule and expressly and

summarily declared that Mr. Finley would not be permitted to appear in civilian clothing. The trial court herein did not take the remedial steps attempted by the trial judge in Rood, thus depriving the appellant of the opportunity to face his jury without being clothed in identifiable jail clothing.

The American Bar Association has also criticized the forced wearing of jail attire during a criminal trial. The Association has stated that, "[t]he court should not permit a defendant or witness to appear at trial in the distinctive attire of a prisoner, unless waived by the defendant." ABA Criminal Justice Standards, § 15-3.2(b). Mr. Finley did not waive his right to appear in civilian clothing; in fact, he asserted this right at the beginning of the penalty phase.

The trial judge in this case based his decision to require Mr. Finley to dress in prison garb on an unwritten "policy" of the Cabell County court system. This "policy", as stated by the trial court, was that the jury already knew that Mr. Finley was a "convict" because "they're the ones that convicted him."

What is erroneous about this conclusion is **that the jury had not yet completed their sworn duties in regard to Mr. Finley.** The Appellant remained subject to a discretionary decision of the jury: the issue of whether to grant mercy on the underlying murder conviction remained to be decided.

This issue was, in fact, explicitly recognized by the trial court in a telling remark made at the conclusion of the guilt phase of the trial. The trial judge cautioned Mr. Finley about a statement made in the jury's presence and noted, "[d]on't say anything else. Mr. Finley, these people are going to come back here

and determine whether you serve life with mercy[.] I would suggest that you show a little more respect to this court and this jury than you already have." (Tr. Transcript, Pg. 807).

A recent decision of the United States Supreme Court addresses the issue of a defendant's physical appearance during the **penalty phase** of a trial, after the presumption of innocence addressed by *Estelle* has fallen away. In *Deck v. Missouri*, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (May 23, 2005), the Supreme Court declared that the United States Constitution "forbids the use of visible shackles during a capital trial's penalty phase, as it does during the guilt phase, unless that use is "justified by an essential state interest" - such as courtroom security - specific to the defendant on trial."

The Supreme Court's rationale in *Deck* was that while the defendant's presumption of innocence is no longer applicable at the sentencing phase of a capital trial, the defendant's appearance in shackles

"almost inevitably implies to a jury that court authorities consider him a danger to the community...; almost inevitably affects adversely the jury's perception of the defendant's character; and thereby inevitably undermines the jury's ability to weigh accurately all relevant considerations when determining whether the defendant deserves death." *Deck* at 2014.

The Court further stated:

"The considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases...Nonetheless, shackles at the penalty phase threaten related concerns. Although the jury is no longer deciding between guilt and innocence, it is deciding between life and death. That

decision, given the " 'severity' " and " 'finality' " of the sanction, is no less important than the decision about guilt." Deck, Id.

While Mr. Finley may have been visibly shackled during the penalty phase of his trial⁵, he unquestionably bore the distinct and unmistakable attire of a convict. In addition, while Appellant was not facing a death sentence, he was facing the possibility of life imprisonment without the possibility of parole, the harshest sentence which can be meted out under West Virginia law.

The appellant asserts that the forced wearing of jail clothing is analogous to the forced shackling addressed in Deck. A bright orange, clearly marked set of clothing from the Western Regional Jail conveys the same message as the shackles addressed in Deck; that the defendant is in custody, and that he is in custody because he is a dangerous person. Clearly identifiable jail attire implies a dangerous character, and indicates that a defendant is either too dangerous or too poor to be on bond. Under either circumstance, the message conveyed cannot pass constitutional muster.

If anything, the use of the jail garb at issue in this case may be more prejudicial than the utilization of a set of leg manacles or shackles. If a defendant is seated and is wearing street clothing, leg manacles or other devices may not be visible to a jury. In short, steps may be taken to minimize the appearance and visibility of manacles or other restraint devices. (See, e.g., State v. Youngblood, 217

⁵ It is impossible to determine this fact from the record, although the appellant asserts that he wore leg shackles throughout the penalty phase of the trial.

W. Va. 535, 618 S.E. 2d 544 (2005) (use of a "stun-belt" during voir dire that was not "readily apparent" to prospective jurors not error)).

The same cannot be said of a full set of jail clothing. Such attire cannot be minimized or made less apparent. A person cloaked in a bright orange shirt, matching bright orange pants and orange plastic shower shoes cannot be placed in the courtroom in such a way that the jury cannot discern his or her current custodial status.

It is also important to note the duration of the jury's exposure to Mr. Finley while he was garbed in this manner. Appellant's appearance in jail clothing was not a fleeting glimpse by the jury. In State v. Linkous, 177 W. Va. 621, 355 S.E. 2d 410 (1987), the Court held that a jury's view of a defendant in handcuffs for a "brief period of time prior to trial" was not prejudicial error. The entire penalty phase of Mr. Finley's trial was conducted while he was attired in jail clothing. This was not the brief pretrial period addressed in Linkous, nor the short period necessary for voir dire as noted in Youngblood.

What is missing from the case at bar was any valid reason to compel Mr. Finley to dress in the manner required by the trial court. Deck requires that the forced utilization of shackles during a penalty phase must be "justified by an essential state interest - such as courtroom security - specific to the defendant at trial." In the present case, no facts were cited as to why Mr. Finley was compelled to dress in jail clothing. A thin attempt at justification was made by citing a "policy" of the Cabell County courts. However, this "policy" has no basis

in law or fact, and serves no useful purpose. Permitting a defendant to wear civilian clothing during the penalty phase of a trial does not in any manner slow courtroom proceedings or otherwise effect the orderly administration of justice. Failing to permit a defendant to be clothed in such a manner, however, directly effects the constitutional rights of the accused.

2. Under W. Va. Code §62-3-15, The Proper Remedy for the Violation Herein is a New Trial, Not a Remand for Resentencing.

Assuming for the sake of argument that this Honorable Court accepts the Appellant's assertion that the sentencing proceeding was fatally flawed, the Appellant would argue that the West Virginia Code requires that a new trial be conducted.

Since State v. LaRock, supra, West Virginia courts have accepted bifurcated trials as a common practice in circuit courts. While the Court has addressed various issues regarding bifurcation, the Court has not yet decided the appropriate specific remedy for violations occurring during the penalty phase of a bifurcated proceeding.

The Court touched on a somewhat related issue in State v. Brown, 210 W. Va. 14, 552 S.E. 2d 390 (2001). In Brown, the Court addressed, *inter alia*, the trial court's failure to order the preparation of a presentence investigation report following the completion of a bifurcated homicide trial. The Brown Court determined that the failure to prepare the requested report was erroneous and

remanded the matter for the preparation of a report and a new sentencing hearing.

Brown, however, involved an error occurring *after* the completion of the penalty phase, when the jury had completed their assigned duties. In the present case, the error was inherent in the entire penalty phase and was intrinsic to the jury's determination on the issue of mercy.

West Virginia Code, § 62-3-15 (1994) provides that, "if *the jury* find in their verdict that [the defendant] is guilty of murder in the first degree... *the jury* may, in their discretion, recommend mercy, and if such recommendation is added to their verdict, such person shall be eligible for parole[.]". [emphasis added].

Thus, the language of § 62-3-15 mandates that "the jury" which determines guilt be "the jury" which determines the issue of mercy. The language of the statute is clear and unambiguous; it does not state that "a" jury may recommend mercy, but that "the" jury, being the same jury that made the initial finding of guilt, determine the issue of mercy. The statute simply does not provide for the convening of an alternate jury to decide the issue of mercy.

In State v. Doman, 204 W. Va. 289, 512 S.E. 2d 211 (1998), the Court discussed the remedy for an error in instructions which incorrectly advised the jury of the length of time that a defendant might serve before being eligible for parole. The Court remanded the case for a "retrial by a jury" solely upon the issue of the recommendation of mercy, declaring that, "it would be a waste of

judicial resources to require an entirely new trial, rather than to require a limited trial on the recommendation of mercy."

The Doman opinion fails, however, to address a key issue: the statutory language set forth in § 62-3-15 that "the jury" must determine the dual issues of guilt and mercy. The opinion contains no discussion whatsoever of the jury provisions of § 62-3-15, and cites no authority for the proposition that a separate jury, unaware of the evidence presented in the guilt phase of a trial, would be competent to pass sentence upon a defendant whose guilt was established by another jury some years earlier.

What is implicit in § 62-3-15 is that the Legislature clearly intended that "the jury" which heard all of the evidence regarding the facts of a case should be "the jury" which makes the recommendation regarding mercy. Facts adduced during testimony during the guilt phase would remain in the minds of the jurors, and whether these facts are aggravating or mitigating, would unquestionable be relevant in mercy determinations.

Convening a separate jury solely on the issue of mercy not only violates the spirit of § 62-3-15, but would not, as the Court indicated in Doman, save judicial resources. Because they are addressing a jury unfamiliar with the facts of the case, the prosecution and defense would unquestionably be compelled to put on as much evidence concerning the facts of the crime, and any defenses, so as to properly address the issue of mercy. Basically, the "shortened" sentencing retrial

would, by necessity, evolve into a full-scale trial, and the stated intention of saving "judicial resources" would be easily defeated.

CONCLUSION

Jeffrey Finley received a bifurcated trial in an effort to have his jury separate the issues of guilt and mercy at his trial. At the penalty phase, the jury was confronted with a defendant who looked every bit the part of an inmate, in clearly identifiable bright-orange jail attire. Mr. Finley's attendance in this clothing was not his decision, but was compelled by the trial court because "it's our policy in Cabell County."

As the United States Supreme Court held in *Deck v. Missouri*, a defendant's appearance in shackles at a penalty hearing inevitably effects the jury's perception of a defendant's character and thereby undermines the jury's ability to intelligently weigh all factors in deciding sentencing. The Appellant asserts that the compulsory donning of clearly identifiable jail clothing, which is more visible to a jury than manacles, equally undermines a jury's ability to rationally determine a particular sentence.

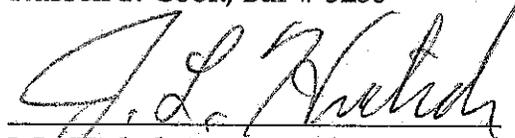
West Virginia law clearly requires that the same jury determine both guilt and mercy in a murder trial. Accordingly, if a particular sentencing proceeding is determined to be unlawful, it is necessary that the matter be remanded for a full trial to permit the same jury to determine all issues as provided by law.

Therefore, the Appellant would pray that the Honorable Court overturn the Appellant's first degree murder conviction and remand the matter to the circuit court for a new trial. In the alternative, the Appellant would request the the Honorable Court remand the matter for an evidentiary hearing regarding the issue of whether the Appellant was forced to wear shackles during the penalty phase of his trial, a practice expressly prohibited in Deck v. Missouri.

Respectfully Submitted,

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By Counsel


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IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

ORIGINAL

STATE OF WEST VIRGINIA

vs.

INDICTMENT NO. 03-F-103

JEFFREY LEE FINLEY,

Defendant.

Transcript of proceedings had in the trial of
the above-styled action before Honorable Dan O'Hanlon,
Judge, and a jury, on Tuesday, October 12, 2004.

APPEARANCES:

CHRISTOPHER D. CHILES, Esq., Prosecuting Attorney,
Counsel for the State.

GERALD O. HENDERSON, JR., Esq., Huntington, West
Virginia, Counsel for the Defendant.

NANCY S. FRALEY, Esq., and R. DAVID BROWN, Esq.,
Huntington, West Virginia, Co-Counsel for the
Defendant.

Defendant in person.

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BE IT REMEMBERED that heretofore, to wit, on Tuesday, October 12, 2004, on the trial of the above-styled action, the following proceedings were had:

THE COURT: Good morning, ladies and gentlemen.

MS. FRALEY: Good morning, Your Honor.

THE COURT: Prior to coming out on the bench, I was approached by the bailiff requesting how Mr. Finley was to be dressed for court. Also, his attorneys and the prosecutor came in my office to find out what the policy is.

I've inquired and my understanding here in Cabell County is that once he's been convicted, this jury already knows that he is a convict, they're the ones that convicted him, that he comes over not in a suit, but in his regular jail clothes.

And, so, I said that I would do that out here on the record in case you wanted to object to that.

MS. FRALEY: Your Honor, our client would request to the Court that he be permitted to dress in civilian clothes.

THE COURT: At this time I'm going to deny that request. And I've asked them to take his handcuffs off in case he needs to testify or write

1 notes.

2 Next I want to address myself to the people
3 -- looks like there's just one person in the
4 audience. There were several outbursts during the
5 trial. I didn't appreciate those. Those don't make
6 the jury's job or the Court's job any easier.

7 And I want to assure anybody that's in the
8 audience that if there are further outbursts that I
9 will have you removed from court, and if necessary,
10 hold a contempt hearing. So, let's control ourselves.
11 If you can't control yourself, get up and get out of my
12 courtroom. You're not welcome here.

13 MR. CHILES: She's an intern working up in
14 our office. I don't think that will be a problem.

15 THE COURT: Please tell any witnesses you
16 have or any people that are going to stay that you see
17 here. Otherwise, let's bring the jury in.

18 MR. CHILES: A procedural matter. Since Mrs.
19 Finley or Libby Finley is not here, I don't think I'm
20 going to have any witnesses. I don't want to run the
21 risk of putting in any hearsay stuff and running into a
22 problem with State vs. Crawford or possible --

23 THE COURT: Have you folks exchanged any
24 potential jury instructions?

25 MS. FRALEY: We have, Your Honor.

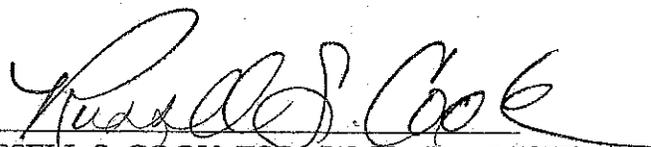
CERTIFICATE OF SERVICE

I, Russell S. Cook, do hereby certify that I have served this **BRIEF ON BEHALF OF APPELLANT, JEFFREY L. FINLEY** on the 24th day of February, 2006, by first-class United States mail, postage prepaid, to the following persons:

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