

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee,

v.

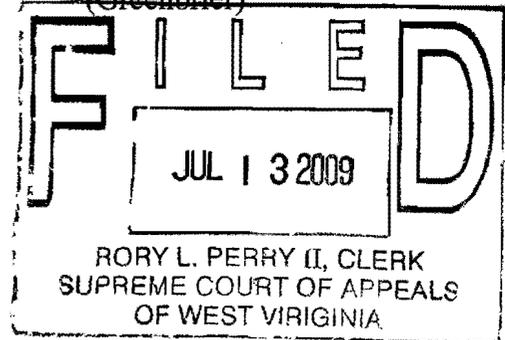
Supreme Court No. 34860

Circuit Court No. 96-F-42

(Greenbrier)

BILLY RAY MCLAUGHLIN,

Appellant.



BRIEF FOR APPELLANT
ON CERTIFIED QUESTIONS

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PROCEEDINGS AND RULINGS BELOW

Petitioner Billy Ray McLaughlin (McLaughlin) appeals three questions of law certified by the Greenbrier County Circuit Court, pursuant to West Virginia (W.Va.) Code § 58-5-2 (1998) (2005 Repl. Vol.), pertaining to the pending trial of the mercy phase of his first-degree murder case: (1) whether W.Va. Code § 62-3-15 (1994) (2005 Repl. Vol.) unconstitutionally shifts the burden of persuasion on the mercy issue to the defendant; (2) whether the jury that determines guilt must be the same jury that determines mercy; and (3) whether the prosecution is limited to presenting the evidence introduced at the guilt stage and rebuttal of evidence presented by the defendant. 12/18/08 Order Certifying Questions Pursuant To Chapter 58 Article 5 Section 2 Of The West Virginia Code (hereafter 12/18/08 Order), Supreme Court Record (SCR), Volume (Vol.) III 1128. The circuit court, with the concurrence of the prosecution, granted McLaughlin's motion to certify these questions because, in the words of the court, "[n]ot just this Court but every Circuit Court in the State is unsure of the application of the procedures in a trial on the issue of mercy." Id.

The trial court's answers to the three certified questions, with one exception, are inconsistent with current law. On Question One, the circuit court determined that since the language of W.Va. Code § 62-3-15 (1994) (2005 Repl. Vol.), the statute governing the verdict and sentence in a murder case, permits the burden of proving mercy to shift to the defendant, the statute must now be interpreted to mean that the State must bear the burden of proof beyond a reasonable doubt on the jury's mercy/no mercy determination. 12/18/08 Order, SCR, Vol. III 1128-29. This ruling conflicts with present West Virginia law that the jury can recommend mercy for any reason. Assuming current law is correct, the jury must be properly instructed so

that it understands it has complete discretion in deciding the mercy issue and neither the State nor the defendant has any burden of proof.

One, however, cannot discuss how a jury should be instructed with respect to mercy without recognizing that W.Va. Code § 62-3-15 (1994), is unconstitutional because it fails to provide standards for the jury's mercy decision, permitting the jury to make that decision arbitrarily and capriciously. That a West Virginia defendant may only receive a life sentence without the possibility of parole, as opposed to death, does not make the jury's standardless mercy decision any less arbitrary or capricious.

The trial court also found that the jury's mercy/no mercy decision must be unanimous to the extent the language of W.Va. Code § 62-3-15 (1994) could permit less than a unanimous verdict by the jury on the issue of mercy. *Id.* Typical jury instructions given by the circuit courts are silent on this issue and a reasonable juror could erroneously interpret the instructions to mean the jurors must be unanimous before they can recommend mercy rather than they must be unanimous with respect to the mercy/no mercy issue. Thus, the circuit court correctly determined that a court's jury instructions must require the jury's mercy/no mercy determination to be unanimous.

On Question Two, the trial court ruled the jury that determines guilt does not have to be the same jury that determines mercy, per this Court's *per curiam* decision in State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998). 12/18/08 Order, SCR, Vol. III 1130-31. The trial court previously denied McLaughlin's motion for a complete new trial on both guilt and mercy. (1/4/08 Hearing Transcript (Tr.) 10); 1/4/08 Order, SCR, Vol. III 867. In its December 18, 2008, Order, the circuit court noted this Court has not addressed this issue in a syllabus point. SCR, Vol. III 1130. McLaughlin further unsuccessfully argued to the trial court that the *per curiam*

Doman opinion represents a significant change in West Virginia law which is not supported by its syllabus point; that the plain language of W.Va. Code § 62-3-15 (1994) (2005 Repl. Vol.), and his rights to due process require the same jury make both findings of guilt and mercy and that Doman improperly rewrote the statute; and that the policy reasons underlying Doman are unsound.

As to certified Question Three, the trial court effectively ruled the prosecution is not limited to presenting the evidence introduced at the guilt stage of trial. The trial court did so when it ruled, over McLaughlin's objection, that the State may present two additional Rule 404(b), WVRE, witnesses who did not testify at McLaughlin's original trial. (3/20/08 Tr. 29-32). The Court's resolution of this certified question will let the trial court and all parties in this case and future cases know the scope of evidence that will be allowed in the mercy phase of a bifurcated murder trial.

After addressing these issues, the trial court indicated that the uncertainty of the procedures to be followed in a trial on the issue of mercy results in uneven application of the law to first-degree murder defendants facing life sentences in different counties. 12/18/08 Order, SCR, Vol. III 1132. According to the court, "[t]he answer to these questions will not only ensure due process and equitable treatment for all defendants but it would assist judges with clear rules and procedures in such matters." Id.

The court further stated that "[i]t is this courts belief that the Supreme Courts action in resolving these issues is necessary to the ultimate decision of the case at hand." Id.

Previous Proceedings In This Case

On April 4, 1995, McLaughlin was indicted by a Pocahontas County Grand Jury for the murder of his wife, Constance McLaughlin. After a change of venue to Greenbrier County

Circuit Court, McLaughlin was found guilty by a jury of first-degree murder without a recommendation of mercy. On May 2, 1996, McLaughlin was sentenced to life imprisonment without parole. McLaughlin's appeal to this Court was refused on September 3, 1997. See Case No. 963015.

On August 28, 1998, McLaughlin filed a petition for writ of habeas corpus in the Fayette County Circuit Court, and the court transferred it to Greenbrier County. McLaughlin's petition for writ of prohibition to prohibit this transfer was denied. State ex rel. McLaughlin v. Vickers, 207 W.Va. 405, 533 S.E.2d 38 (2000).

McLaughlin alleged, *inter alia*, in his petition that he was denied his right to due process of law under the Fourteenth Amendment to the United States Constitution and Article III, § 10 of the W.Va. Constitution when the trial court erroneously instructed the jury that if they recommended mercy, he would be eligible for parole in ten (10) years as the correct instruction would have required him to serve fifteen (15) years before becoming eligible for parole.

On November 19, 2004, the trial court / habeas court agreed this instruction regarding parole eligibility was erroneous. However, the circuit court followed this Court's decision in State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998), which found the same instructional error prejudiced the jury's decision as to sentence, i.e., the mercy recommendation, but was harmless as to its finding of guilt. Consistent with the relief ordered in Doman, the circuit court ordered that McLaughlin be granted a new trial, but limited to the sole question of whether he should receive a recommendation of mercy.

McLaughlin appealed the circuit court's order granting a new trial solely on the mercy issue to this Court. On September 14, 2005, McLaughlin's appeal was refused. See Case No. 050783. McLaughlin filed a petition for writ of certiorari in the Supreme Court of the United

States which was denied on February 21, 2006. McLaughlin v. McBride, 546 U.S. 1186, 126 S.Ct. 1366 (2006).

McLaughlin then returned to the trial court for a new trial on the mercy issue which resulted in the trial court's certification of the three questions in this appeal.

STATEMENT OF FACTS

On the evening of December 26, 1994, Petitioner Billy Ray McLaughlin (McLaughlin), and his wife Constance met friends and relatives at Hickson's Dairy Bar in Cass, West Virginia, exchanged Christmas gifts, and drank beer. (4/30/96 Trial Transcript (Tr.) 92-94). McLaughlin and his wife each had 4 or 5 beers and took two six packs of beer home with them. (4/30/96 Tr. 104-06). At some point after returning home, McLaughlin and his wife became intoxicated, had an argument and struggle which ultimately resulted in McLaughlin fatally shooting his wife.

McLaughlin's wife's blood alcohol level was .11 and the home was littered with beer cans and bottles, a liquor bottle, an empty bottle of Xanax and Lorcet. (5/1/96 Tr. 20, 56-58). McLaughlin called his brother, Ralph McLaughlin, at 1:30 a.m. on December 27, 1994, and Ralph's wife, Debra McLaughlin, said McLaughlin (petitioner) was drunk. (4/30/96 Tr. 109-10).

The physical evidence further indicated there was a struggle between McLaughlin and his wife. Dr. Sopher, the medical examiner, related that McLaughlin's wife had injuries consistent with a struggle around the time of death, i.e., bruises to her jaw, hand, nasal bridge; scratch on her wrist; and fingernail pulled away. (5/1/96 Tr. 96-97).

On December 27, 1994, around 1:15 p.m., McLaughlin and his wife were found lying on their living room couch. McLaughlin's wife was dead with four non-fatal gunshot wounds to her face and one fatal gunshot wound to her chest. (5/1/96 Tr. 86-94). McLaughlin had wrapped her up in blankets after the shooting. (5/1/96 Tr. 18). McLaughlin, an alcoholic, was unconscious. (4/30/96 Tr. 115-17, 122-24) (1/17/95 Preliminary Hearing Transcript (Prelim Tr.) 89, 91). When awakened, McLaughlin was still very much under the influence of alcohol or drugs as his speech was slurred and incoherent, he was unsteady on his feet, and he needed help

getting dressed. (4/30/96 Tr. 124, 181, 191, 208) (5/1/96 Tr. 52-54). Due to his condition, the magistrate was unable to arraign him. (4/30/96 Tr. 206).

In pre-trial proceedings for McLaughlin's mercy phase only trial, presently pending in the trial court, McLaughlin filed a motion requesting the trial court to give him a complete new trial on both guilt/innocence and mercy. The trial court denied this motion. 1/4/08 Order, SCR, Vol. III 867.

The trial court also held pre-trial hearings on the State's motion to present two additional Rule 404(b), WVRE, witnesses, Rick Moore and David Hill, who did not testify at McLaughlin's original trial. (1/4/08 Tr. 53) (3/20/08 Tr. 3). At the original trial, the State presented witnesses who said that several weeks before the homicide McLaughlin went to his wife's daughter's house, got into an argument with his wife, and as he was leaving, threatened his wife and the others present. The trial court ruled, over McLaughlin's objection (SCR, Vol. III 900), the State could present these two new witnesses at the mercy phase trial to testify to this incident. (3/20/08 Tr. 29-32).

McLaughlin subsequently filed a motion to certify the three questions relating to the trial of the mercy phase of a bifurcated murder trial which are the subject of this appeal. As indicated above, with the concurrence of the prosecution, the trial court granted the motion.

ASSIGNMENTS OF ERROR

- I. Absent Proper Instructions From The Court, W.Va. Code § 62-3-15 (1994) (2005 Repl. Vol.) Unconstitutionally (1) Shifts The Burden Of Persuasion On The Issue Of Mercy To The Defendant, (2) Provides No Standards For The Jury's Mercy Decision, and (3) Permits Less Than An Unanimous Verdict By The Jury On The Issue Of Mercy.
- II. The Plain Language Of W.Va. Code § 62-3-15 (1994) (2005 Rep. Vol.) Requires That The Jury Which Determines Guilt Be The Same Jury Which Determines The Issue Of Mercy In A First-Degree Murder Case. This Court's *Per Curiam* Opinion In State v. Doman, 204 W.Va. 289, 512 S.E.2d. 211 (1998), Upon Which The Circuit Court Relied To Rule That A Different Jury Could Decide The Issue Of Mercy, Should Be Reconsidered And Overruled.
- III. Due Process And Equal Protection Require That The Prosecution Be Limited In The Mercy Stage Of A Bifurcated Trial To The Presentation Of Evidence Introduced In The Guilt Stage Of Trial And Rebuttal Of Evidence Presented By The Defendant.

DISCUSSION OF LAW

I. Absent Proper Instructions From The Court, W.Va. Code § 62-3-15 (1994) (2005 Repl. Vol.) Unconstitutionally (1) Shifts The Burden Of Persuasion On The Issue Of Mercy To The Defendant, (2) Provides No Standards For The Jury's Mercy Decision, And (3) Permits Less Than An Unanimous Verdict By The Jury On The Issue Of Mercy.

The trial court below found W.Va. Code § 62-3-15 (1994) (2005 Repl. Vol.), the statute governing the verdict and sentence in a first degree murder case, unconstitutional to the extent (1) it shifts the burden of persuasion on the issue of mercy to the defendant in the penalty phase of the case, and (2) it permits a less than unanimous verdict on the issue of mercy. To remedy this situation, the court ruled the statute must be interpreted to mean the State has the burden of proof beyond a reasonable doubt on the issue of mercy and the jury's verdict must be unanimous. The trial court's ruling regarding the burden of proof conflicts with current West Virginia law which allows a jury to recommend mercy for any reason. More fundamentally, W.Va. Code § 62-3-15 is unconstitutional as it provides no standards for the jury's mercy decision. Finally, current circuit court jury instructions further do not require unanimity on the jury's mercy/no mercy decision. This unanimity is required for there to be a valid verdict.

Standard of Review

“This Court's review of a circuit court's answer to a certified question is *de novo*.” Smith v. State Consol. Public Retirement Bd., 222 W.Va. 345, 347, 664 S.E.2d 686, 688 (2008) (citing Syl. pt. 1, Gallapoo v. Wal-Mart Stores, Inc., 197 W.Va. 172, 475 S.E.2d 172 (1996)).

This standard of review is likewise applicable to Issues II and III discussed below.

Certified Question 1:

QUESTION 1

Whether or not Chapter 62 Article 3 section 15 of the West Virginia Code unconstitutionally shifts the burden of persuasion on the issue of mercy to the defendant in the penalty phase of a case? Specifically, the language of the statute indicates; “if a person indicted for murder pleads guilty to murder of the first degree, he or she shall be punished by imprisonment in the penitentiary for life, and he or she, notwithstanding the provisions of Article Twelve, Chapter Sixty Two of this code, shall not be eligible for parole: Provided, that the jury may, in their discretion, recommend mercy, and if such recommendation is added to their verdict, such person shall be eligible for parole in accordance with the provision of said Article Twelve. (W.Va. Code 62-3-15).” (Emphasis in original).

Trial Court’s Answer:

THE COURT’S ANSWER TO QUESTION 1 is yes, if the language of the statute permits the burden of proving mercy to shift to the Defendant or permits less than a unanimous verdict of the jury on the issue of mercy. (Emphasis in original).

12/18/08 Order, Supreme Court Record (SCR), Vol. III 1128.

Absent Proper Instructions, The Jury May Shift The Burden Of Proving Mercy To The Defendant

W.Va. Code § 62-3-15 (1994) (2005 Repl. Vol.) provides, in pertinent part:

§ 62-3-15. Verdict and sentence in murder cases.

If a person indicted for murder be found by the jury guilty thereof, they shall in their verdict find whether he or she is guilty of murder of the first degree or second degree. If the person indicted for murder is found by the jury guilty thereof, and if the jury find in their verdict that he or she is guilty of murder of the first degree, or if a person indicted for murder pleads guilty of murder of the first degree, he or she shall be punished by imprisonment in the penitentiary for life, and he or she, notwithstanding the provisions of article twelve [§§ 62-12-1 et seq.], chapter sixty-two of this code, shall not be eligible for parole: Provided, That the jury may, in their discretion, recommend mercy, and if such recommendation is added to their verdict, such person shall be eligible for parole in accordance with the provisions of said article twelve, except that, notwithstanding any other provision of this code to the contrary, such person shall not be eligible for parole until he or she has served fifteen years. * * * (Emphasis added).

* * *

Thus, a defendant found guilty of first-degree murder receives a sentence of life without parole unless the jury recommends mercy. As the trial court recognized, unless properly instructed, a jury may shift to the defendant the burden of proof or persuasion on the issue of mercy after finding him guilty of first-degree murder in violation of his due process rights. Fourteenth Amendment, U.S. Constitution; Article III, §10, W.Va. Constitution. For example, at McLaughlin's original trial the jury, after being instructed the State had to prove the elements of first-degree murder beyond a reasonable doubt, was instructed it could recommend mercy, but was not given any instruction regarding who had the burden of proof on the issue of mercy or how they were to determine whether to recommend mercy:

The Court further instructs the jury that murder in the first degree is punishable by confinement in the penitentiary for life. And the Defendant shall not be eligible for parole unless you, in your discretion, further find and add to your verdict a recommendation of mercy.

Should you find the Defendant guilty of murder in the first degree with a recommendation of mercy, he must serve ten (10) years in prison before he becomes eligible for parole, which may or may not be awarded then or at a later date by the State's Board of Parole. The board of Parole makes its decision based upon an investigation of the Defendant's complete criminal record, his prison record, including a report on conduct, work, and attitude in prison and complete physical, mental, and psychological examinations conducted within two (2) months preceding the evaluation.

(5/2/96 Tr., Vol. III 14-15).

A reasonable juror listening to this instruction could have interpreted it to mean McLaughlin should bear the burden of establishing or proving why he should receive mercy since he was the one to benefit from it. See State v. Stamm, 222 W.Va. 276, 283 n.10, 664 S.E.2d 161, 168 n. 10 (2008) (quoting State v. O'Connell, 163 W.Va. 366, 370, 256 S.E.2d 429, 431 (1979) (“Whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction,” and “[t]hat determination

requires careful attention to the words actually spoken to the jury.” (quoting Sandstrom v. Montana, 442 U.S. 510, 514, 99 S.Ct. 2450, 2454, 61 L.Ed.2d 39 (1979))).

This Court reached a similar conclusion in Stamm, 222 W.Va. at 279, 281, 664 S.E.2d at 164, 166, in which the defendant was convicted of failure to pay child support under a statute which made the defendant’s reasonable ability to provide support not only an element of the crime, but also an affirmative defense. Thus, even though the jury was instructed the defendant only had to raise a reasonable doubt about his ability to pay and the State had the burden to prove each element of the offense beyond a reasonable doubt, this Court held the instructions “could have misled the jury into believing that Mr. Stamm bore the burden of proof as to his ability to pay support.” Id. at 283, 664 S.E.2d at 168.

Likewise, a jury receiving the above mercy instruction given at McLaughlin’s original trial could easily be misled into believing that he bore the burden of proof on the issue of mercy, particularly since the jury was not instructed as to who had the burden of proof on the issue, and was not given any standards by which to decide the mercy issue.

While a recommendation of mercy is not an element of the crime, the jurors understand it is an important issue for them to decide as its resolution determines whether the defendant spends the rest of his natural life in prison or becomes eligible for parole in fifteen (15) years. In light of the jury not being instructed as to who bears the burden of proof on the issue of mercy and the defendant is the only party to benefit from this recommendation, a reasonable juror would likely shift the burden to the defendant to show why he should receive a recommendation of mercy. See State v. Rygh, 206 W.Va. 295, 299 n.1, 524 S.E.2d 447, 449 n.1 (1999) (“We would anticipate that a defendant would ordinarily proceed first in any bifurcated mercy phase.”).

To resolve this dilemma, which the circuit court found rendered W.Va. Code § 62-3-15 (1994) (2005 Repl. Vol.) unconstitutional, the court relied upon the following language in Rygh, id. at 297 n.1, 524 S.E.2d at 449 n.1. :

We do not believe that conceptually there is any separate or distinctive “burden of proof” or “burden of production” associated with the jury’s mercy/no-mercy determination in a bifurcated mercy phase of a murder trial, if the court in its discretion decides to bifurcate the proceeding.

The trial court therefore concluded this language requires that “the statute [W.Va. Code § 62-3-15 (1994)] would have to be interpreted to provide that the State has the burden of proof [on the jury’s mercy/no mercy determination], and that burden is beyond a reasonable doubt, and it has to be a[n] unanimous verdict.” 12/18/08 Order, SCR, Vol. III 1129. The trial court further stated its position was supported by Stamm, 222 W.Va. at 280 n.4, 664 S.E.2d at 165 n.4, which indicated “the due process requirement places on the defendant no burden of proving mitigation, excuse, or justification in a First Degree Murder Case.” 12/18/08 Order, SCR, Vol. III 1129-30.

Counsel for McLaughlin is aware of at least one other West Virginia circuit court that has similarly interpreted W.Va. Code § 62-3-15 (1994) and required the State in a bifurcated first-degree murder trial to bear the burden of proof on the issue of mercy beyond a reasonable doubt. See jury instructions regarding mercy in State v. Belcher, Case No. 03-F-128-S, Mercer County Circuit Court, attached to Petition for Appeal as Appendix A at A-2, SCR, Vol. I.

The Trial Court’s Ruling Conflicts With West Virginia Law On The Issue Of Mercy

In State v. Miller, 178 W.Va. 618, 363 S.E.2d 504 (1987), this Court held that “[a]n instruction outlining factors which a jury should consider in determining whether to grant mercy in a first-degree murder case should not be given.” Id. at Syl. pt 1. The Court cited McLendon v. State, 205 Ga. 55, 52 S.E.2d 294 (1949), in which the court responded to the same argument:

In *Hicks v. State*, 196 Ga. 671(2), 27 S.E.2d 307, 309, it was held: ‘The jury in determining whether or not to recommend mercy is not controlled by any rule of law, nor could the court under any circumstances instruct them as to when they should, or should not, make such a recommendation. They may do so with or without reason, and they may decline to do so with or without a reason. It is a matter wholly within their discretion.’

Miller, 178 W.Va. at 622, 363 S.E.2d at 508. Thus, “[t]he recommendation of mercy is a first degree murder case lies solely in the discretion of the jury.” Syl. pt. 1 (in part), State v. Triplett, 187 W.Va. 760, 421 S.E.2d 511 (1992).

The trial court’s ruling that the State has the burden of proof beyond a reasonable doubt on the mercy issue conflicts with the above current caselaw. A jury’s unlimited discretion to recommend mercy for any reason, or no reason, would be substantially changed by the trial court’s ruling that the State now has the burden of proving beyond a reasonable doubt that mercy should not be recommended by the jury. A jury could now recommend mercy only if it found the State had failed to prove beyond a reasonable doubt the defendant should not receive mercy or, in other words, found it had a reasonable doubt on the mercy/no mercy issue. The trial court’s ruling represents a substantial change in West Virginia law.

This particular change should not be made. How would the State prove beyond a reasonable doubt the jury should not recommend mercy? Mercy is not, like the elements of premeditation or malice, a concept that is objectively proved or ascertained. The federal Court of Appeals for the Tenth Circuit stated that “Webster’s Third International Dictionary (Unabridged ed. 1966) describes ‘mercy’ as ‘a compassion or forbearance shown to an offender,’ and ‘a kindly refraining from inflicting punishment or pain, often a refraining brought about by a genuinely felt *compassion* and *sympathy*.’ Id. at 1413 (emphasis added).” Parks v. Brown, 860 F.2d 1545, 1556 (10th Cir. 1988), *rev’d on other grounds sub nom.* Saffle v. Parks, 494 U.S. 484, 110 S.Ct. 1257 (1990).

Mercy is therefore something that often involves the subjective feelings of compassion and sympathy of the jurors which only they can determine. See Saffle, 494 U.S. at 493, 111 S.Ct. at 1262-63 (“Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror’s emotions than on the actual evidence regarding the crime and the defendant.”). Mercy is not susceptible to objective proof by the prosecution or arguments urging reasonable doubt by the defense. See Conner v. State, 303 S.E.2d 266, 274 (Ga. 1983). (“A statutory scheme giving the jury the absolute discretion to recommend mercy in any given [death penalty] case, [citation omitted], allows some arbitrariness because in factually similar cases one jury might recommend mercy while another might not.”). Thus, the “exercise [or refusal] of mercy. . . can never be a wholly rational, calculated, and logical process.” Id. at 275 (quoting Washington v. Watkins, 655 F.2d 1346, 1376 n.57 (5th Cir. 1981)).

Thus, it is not surprising that numerous courts have held that the beyond a reasonable doubt standard does not apply to the jury’s discretionary decision determining the punishment in a criminal case. See People v. Mardavich, 39 N.E.2d 906, 907 (N.Y. 1942); Grandsinger v. State, 73 N.W. 2d 632, 648 (Neb. 1955); People v. Krauser, 146 N.E. 593, 605 (Ill. 1925); State v. Tiedt, 229 S.W. 2d 582, 586 (Mo. 1950); Hart v. State, 44 N.E.2d 346, 354 (Ind. 1942); Garcia v. State, 901 S.W.2d 724, 731 (Tex. Ct. App. 1995). See also Harris v. Pulley, 692 F.2d 1189, 1195 (9th Cir. 1982), *rev’d on other grounds*, Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871 (1984) (“[W]e are not aware of any instance where the State must carry such a burden of proof [beyond a reasonable doubt] when attempting to convince a sentencing authority of the appropriate criminal sentence.”); Harris v. Alabama, 513 U.S. 504, 512, 115 S.Ct. 1031, 1035 (1995) (“the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer” in a capital proceeding).

That, of course, does not mean the jury should not be fully and properly informed regarding its responsibilities in deciding whether to recommend mercy. As quoted above, our current mercy instructions are, at a minimum, deficient in a couple respects. First, the jury is not told that neither the prosecution nor the defense has the burden of proof with respect to its mercy decision which risks that the jury will likely shift the burden of proof on that issue to the defendant since he is the one to benefit. Secondly, the jury is not told they have complete discretion in making the mercy decision and that “[t]hey may do so with or without reason, and they may decline to do so with or without reason. It is a matter wholly within their discretion.” Miller, 178 W.Va. at 622, 363 S.E.2d at 508, (quoting McLendon, 52 S.E.2d at 302). See Ross v. State, 326 S.E.2d 194, 203 (Ga. 1985) (Georgia Supreme Court found in death penalty case that trial court correctly instructed jury on its absolute discretion to recommend mercy by telling jury that “you may provide for a life sentence for the accused for any reason that is satisfactory to you, or without any reason, if you care to do so.”). Accord State v. Hughey, 529 S.E.2d 721, 731-32 (S.C. 2000). At the very least, these two deficiencies in our current mercy instructions must be corrected.

More Fundamentally, W.Va. Code § 62-3-15 (1994) (2005 Repl. Vol.) Is Unconstitutional Because It Fails To Provide Standards Or Guidelines For The Jury’s Mercy Decision, Permitting The Jury To Make That Decision Arbitrarily And Capriciously

Our current mercy instructions are even more fundamentally flawed as there are no standards to guide the jury in deciding the mercy issue. Modern jurisprudence requires that a jury be properly instructed and guided in any significant decision it must make. As the United States Supreme Court stated in Gregg v. Georgia, 428 U.S. 153, 192-93, 96 S.Ct. 2909, 2934 (1976):

The idea that a jury should be given guidance in its decisionmaking is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. (footnote and citations omitted) * * * It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations. (Emphasis added).

Because juries previously were not given any standards for choosing between imposition of the death penalty and a life sentence via the exercise of mercy, which resulted in arbitrary and capricious death sentences, the Supreme Court declared that longstanding system unconstitutional. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972). The same defect is inherent in the jury's present decision whether or not to recommend mercy in a first-degree murder case.

The only difference between the standardless jury discretion struck down in Furman and that exercised by West Virginia juries in making the mercy decision in first-degree murder cases is the penalty involved. While the penalty of death is different from that of life imprisonment, it cannot be doubted that (1) life imprisonment without possibility of parole is the most severe criminal penalty that may be imposed in West Virginia and (2) this penalty has an enormous impact on a defendant's freedom, life, and future. A federal district court opined that "[l]ife imprisonment without any hope of parole or other release is a particularly harsh sentence, thought by some to be a fate as bad as, or possibly even worse than, death itself. Holland v. Donnelly, 216 F.Supp.2d 227, 242 (S.D.N.Y. 2002) (citing Holman v. Page, 95 F.3d 481, 487 (7th Cir. 1996), and People v. Bloom, 48 Cal. 3d 1194, 1223 n. 7, 774 P.2d 698, 715 n.7 (1989)).

In any event, this Court and the Fourth Circuit have previously rejected the argument there are no standards for the jury's mercy decision simply because the defendant faces only a life sentence. Syl. pt. 1, Miller, 178 W.Va. 618, 363 S.E.2d 504; Syl. pt. 2, State ex rel. Rasnake

v. Narick, 159 W.Va. 542, 227 S.E.2d 203 (1976); State ex rel Leach v. Hamilton, 280 S.E.2d 62, 62-64 (1981); Billotti v. Dodrill, 183 W.Va. 48, 56-57, 394 S.E.2d 32, 40-41 (1990); Billotti v. Legursky, 975 F.2d 113, 117-18 (4th Cir. 1992).¹

Asserting that death is different, however, does not alter the fact that our juries are permitted to impose the most severe sentence provided by West Virginia law arbitrarily and capriciously as there are no standards to guide them. As pointed out above, the exercise of mercy often largely depends on the subjective feelings of the jurors (compassion and sympathy) and is not a rational or logical process. Conner, 303 S.E.2d at 275. See also Chambers v. State, 650 A.2d 727, 731 (Md. 1994) (“by instructing the jury on the right to consider mercy, the trial court would improperly inject emotion and pity into the deliberations.”); California v. Brown, 479 U.S. 538, 543, 107 S.Ct. 837, 840 (1987) (indicating that jury’s reliance on extraneous emotional factors would be far more likely to turn the jury against a capital defendant). See also State v. Lorraine, 613 N.E.2d 212, 216 (Ohio 1993) (“Permitting a jury to consider mercy. . . would violate the well-established principle that the death penalty must not be administered in an arbitrary, capricious, or unpredictable manner.”). The Fourteenth Amendment Due Process Clause’s “whole purpose is to prevent” arbitrary deprivations of liberty and property. Honda Motor Co v. Oberg, 512 U.S. 415, 434, 114 S.Ct. 2331, 2342 (1994). As demonstrated above, the jury’s exercise of standardless discretion when deciding the mercy issue is necessarily arbitrary, subjective, and capricious.

Moreover, without standards to guide jury deliberations on mercy, there is absolutely no way to cabin the jury’s exercise of unbounded discretion and prevent it from denying mercy in

¹ This argument was made in this Fourth Circuit case by former Supreme Court Justice Franklin D. Cleckley, recognized in our legal community as not only a legal scholar but probably the foremost authority on West Virginia criminal law and procedure.

an arbitrary, capricious, or discriminatory manner. For example, without proper standards, there is nothing to prevent jurors from denying mercy to a defendant because of his or her race, religion, national origin, sex, or other improper reason. A jury's denial of mercy on one of those grounds would certainly be illegal -- but the present system permits it. Cf. 18 U.S.C. § 3593(f) (2002) (requiring district court in federal death penalty case to instruct jury it shall not consider race, color, religious beliefs, national origin, or sex of the defendant or victim). Also, one jury may grant mercy on the same or similar set of facts while another jury may not. That denies similarly situated defendants their rights to equal protection of the law.

It is ironic that when juries are given the responsibility of deciding whether punitive damages are awarded in a civil case, this Court has required proper instructions from the court explaining the factors to be considered by the jury in awarding punitive damages, but does not in a first-degree murder case where a life sentence without possibility of parole is involved. See Syl. pt. 3, Garnes v. Fleming Landfill, Inc., 186 W.Va. 656, 413 S.E.2d 897 (1991). It is time that the harshest sentence imposed by juries under West Virginia law be based upon identifiable factors or standards rather than the subjective, arbitrary, and capricious emotions of the jury. The fate of West Virginia defendants in first-degree murder cases should not turn on the vagaries of particular jurors' emotional sensitivities if we expect sentences in these cases to be reliable, accurate, and nonarbitrary. Cf. Saffle, 494 U.S. at 493, 110 S.Ct. at 1263.

Absent Proper Instructions, The Jury's Verdict On The Issue Of Mercy May Be Less Than Unanimous

The trial court also found that a jury could improperly return a less than unanimous verdict on the mercy issue. 12/18/08 Order, SCR, Vol. III 1129-30. This is because the jury is told it has to be unanimous with respect to the guilty/not guilty verdict in a first-degree murder

case but is not given any instructions on its decision regarding a recommendation of mercy. For example, at McLaughlin's original trial the jury was instructed:

Upon a trial of a criminal case by a jury, the law contemplates the concurrence of twelve minds in any verdict returned by said jury, whether a verdict of guilty or not guilty. Each individual juror must be satisfied beyond a reasonable doubt of the Defendant's guilt before he or she can consent to a verdict of guilty. If each and every individual juror has a reasonable doubt of the Defendant's guilt, they must return a verdict of not guilty. In this connection however, the jury is instructed that the jury room is no place for unreasonable pride of opinion or stubbornness. No juror should yield a conscientious opinion deliberately formed after a full and fair investigation of the case. Nevertheless, it is the duty of every juror to consider all the evidence in the case, the instructions of the Court, the argument of counsel, and to discuss the evidence in the – in a spirit of fairness and candor with the other jurors with an open mind and to give careful consideration to the views of his or her fellow jurors, and if it can be done without a sacrifice of conscientious convictions agree upon a verdict.

(5/2/96 Tr., Vol. III 19-20).

The jury could have interpreted this instruction to mean that unless it could unanimously agree to recommend mercy, a recommendation could not be returned, as opposed to understanding that their mercy/no mercy decision was required to be unanimous. In other words, the jury could have reasonably understood from the above instruction that even though some of the jurors wanted to recommend mercy, they could not return a verdict recommending mercy unless they were unanimous on that issue.

The United States Supreme Court reached the same conclusion in Andres v. United States, 333 U.S. 740, 68 S.Ct. 880 (1948). In Andres, the Court considered a defendant's claim the trial court's instructions did not require a unanimous verdict with respect to both guilt and punishment. The Court reviewed a trial court's instructions regarding the jury's verdict in a federal death penalty case under a statute virtually identical to W.Va. Code § 62-3-15, where the jury could qualify its guilty verdict by adding the words "without capital punishment." Id. at 746, 68 S.Ct. at 883. The Court held that the "requirement of unanimity extends to all issues-

character or degree of the crime, guilt and punishment – which are left to the jury.” Id. at 748, 68 S.Ct. at 884. Thus, “the jury’s decision upon both guilt and whether the punishment of death should be imposed must be unanimous.” Andres, 333 U.S. at 749, 68 S.Ct. at 884; Accord Smith v. United States, 47 F.2d 518, 520 (9th Cir. 1931); State v. Reynolds, 195 A.2d 449, 462 (N.J. 1963); People v. Hicks, 38 N.E.2d 482, 485 (N.Y. 1941); People v. Hall, 249 P. 859, 860-61 (Cal. 1926).

Applying this principle, the Andres Court reversed the defendant’s conviction. The Court noted that the jury was only told their verdict must be unanimous with respect to guilt and the qualification of “without capital punishment,” and “the jury might reasonably conclude that, if they cannot all agree to grant mercy, the verdict of guilty must stand unqualified.” Andres, 333 U.S. at 752, 68 S.Ct. at 885-86. The Court noted that “the jury might have been [correctly] instructed that its conclusion on both guilt and punishment must be unanimous before any verdict could be found.” Id., 685 S.Ct. at 886. The same analysis is applicable to this case.

Like its federal counterpart, West Virginia law requires that “a [jury] verdict shall be unanimous.” Rule 31, W.Va.R.Crim.P.; Syl. pt. 1, State v. Tennant, 173 W.Va. 627, 319 S.E.2d 395 (1984); Syl. pt. 1, State v. Vandevender, 190 W.Va. 232, 438 S.E.2d 24 (1993). It is therefore critical the jury be properly instructed that its verdict as to both guilt and punishment must be unanimous. Otherwise, a defendant’s right to due process is violated. Fourteenth Amendment, U.S. Constitution; Article III, § 10, W.Va. Constitution.

As noted by the trial court and defense counsel below, at least one circuit court judge in Raleigh County has interpreted Rule 31, W.Va.R.Crim. P., differently. (10/16/08 Tr. 9-10). In that case, the jury returned a verdict finding the defendant guilty of kidnapping at a bifurcated trial, but after deliberating at the penalty phase indicated it was hung on the mercy issue. The

court nonetheless sentenced the defendant to life without mercy. See Orders, State v. Hester, Case No. 05-F-189-H, Raleigh County Circuit Court, attached to Petition for Appeal as Appendix B at A-8, SCR, Vol. I. Thus, it is quite possible that not only jurors but also judges can improperly interpret the unanimity requirement for a verdict involving a recommendation of mercy.

As with the above burden of proof issue, this Court must insure jurors are properly instructed that their decision as to whether to recommend mercy must be unanimous.

II. The Plain Language Of W.Va. Code § 62-3-15 (1994) (2005 Rep. Vol.) Requires That The Jury Which Determines Guilt Be The Same Jury Which Determines The Issue Of Mercy In A First-Degree Murder Case. This Court's *Per Curiam* Opinion In State v. Doman, 204 W.Va. 289, 512 S.E.2d. 211 (1998), Upon Which The Circuit Court Relied To Rule That A Different Jury Could Decide The Issue Of Mercy, Should Be Reconsidered And Overruled.

The second question the circuit court certified in this case, with accompanying answer, is:

QUESTION 2

Is it required that the jury, which determined guilt, be the same jury that determines the issue of mercy in a first degree murder case given the language of W.Va. Code 62-3-15 that provides: "if the jury find in their verdict that . . . [the accused] 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 as person shall be eligible for parole[.]"? (Emphasis added).

THE COURT'S ANSWER TO QUESTION 2 is no.

12/18/08 Order (Emphasis in original), SCR, Vol. III 1130.

In certifying this important question, the circuit court noted this Court has not addressed this issue in a syllabus point. Id. Instead, in State v. Doman, 204 W.Va. 289, 512 S.E.2d 211 (1998), the Court implicitly ruled that the jury that determines guilt does not have to be the same jury that determines the issue of mercy.

Doman was a first-degree murder case in which the trial court incorrectly instructed the jury the defendant would be eligible for parole in ten (10) years, instead of fifteen (15) years (the correct instruction), if the jury recommended mercy. This Court reversed the judgment but only remanded for a new trial by another jury on the issue of whether Doman should receive a recommendation of mercy because, in the Court's view, the error only affected the sentence. Id. at 292, 512 S.E.2d at 214.

This Court should reconsider and overrule Doman for the following reasons: (1) Doman is a *per curiam* opinion but it substantially changed West Virginia law regarding who decides the

mercy issue when there is a Doman error, and its syllabus does not support that substantial change; (2) the plain language of W.Va. Code § 62-3-15 (1994) (2005 Repl. Vol.) requires that the same jury make both findings regarding guilt and mercy; (3) this Court in Doman violated the constitutional doctrine of separation of powers as the Court does not have the authority to rewrite a substantive statute governing how punishment in a first-degree murder case is determined; (4) McLaughlin has a state and federal constitutional due process right under W.Va. Code § 62-3-15 to have his guilt and the issue of mercy decided by the same jury; and (5) the policy reasons underlying Doman are not sound.

Doman Is A Per Curiam Opinion That Announced A Significant Change In West Virginia Law

This Court stated in Walker v. Doe, 210 W.Va. 490, 558 S.E.2d 290 (2001), that it will use signed, not *per curiam*, opinions to announce new points of law:

This Court will use signed opinions when new points of law are announced and those points will be articulated through syllabus points as required by our state constitution.

Id. at Syl. pt. 2. Accord Syl. pt. 13, State ex rel. Medical Assurance of West Virginia, Inc. v. Recht, 213 W.Va. 457, 583 S.E.2d 80 (2003). The Court further stated that ““if rules of law or accepted ways of doing things are to be changed, then this Court will do so in a signed opinion, not a *per curiam* opinion,”” Walker, 210 W.Va. at 496 n.16, 558 S.E.2d at 296 n.16 (quoting Lieving v. Hadley, 188 W.Va. 197, 201 n.4, 423 S.E.2d 600, 604 n.4 (1992), *abrogated by Walker v. Doe*, 210 W.Va. 490, 558 S.E.2d 290 (2001)).

There can be little question this Court’s opinion in Doman makes two significant changes in West Virginia law when a judgment is reversed for an erroneous jury instruction on parole eligibility: (1) the type of new trial a first-degree murder defendant receives and (2) who makes the mercy decision. Prior to Doman, when this error occurred a defendant received an

entire new trial at which “the jury” would make decisions as to both guilt and, if necessary, mercy. See State v. Lindsey, 160 W.Va. 284, 233 S.E.2d 734 (1977); State v. Headley, 168 W.Va. 138, 282 S.E.2d 872 (1981). See also State v. Romine, 166 W.Va. 135, 272 S.E.2d 680 (1980) (new trial awarded on erroneous instruction regarding penalty for rape where jury could recommend mercy). Under Doman, a defendant only receives a new trial on the issue of mercy before a different jury than the one that found him guilty. “Consistent with [this Court’s] longstanding practice,” Walker, 210 W.Va. at 496, 558 S.E.2d at 296, this substantial change in West Virginia law deserves to be addressed in a signed opinion and an appropriate syllabus point.

Moreover, the syllabus point in Doman, from State v. Romine, 166 W.Va. 135, 272 S.E.2d 680, is not authority for the result the Doman Court reached:

1. “In a criminal trial, where it is clear that an erroneous instruction was given and this Court cannot confidently declare beyond a reasonable doubt that such instruction in no way contributed to the conviction or affected the outcome of the trial, the conviction must be reversed and a new trial granted.” Syllabus Point 2, State v. Romine, 166 W.Va. 135, 272 S.E.2d 680 (1980).

Syl. pt. 1, Doman, 204 W.Va. 289, 512 S.E.2d 211. Romine involved a similar erroneous instruction regarding the penalty for rape where the jury could recommend mercy and as the syllabus indicates, the Romine Court reversed the conviction and ordered an entire new trial. Thus, even though a syllabus is to be read in light of the opinion, Farley v. Worthy, 215 W.Va. 412, 426, 599 S.E.2d 835, 849 (2004), there are no extant syllabus points authorizing the result reached in Doman or in this case by the circuit court below.

The limited relief ordered in Doman must further be questioned because the Court did no statutory or constitutional analysis of the statute governing the verdict and sentence in a first-degree murder case, W.Va. Code § 62-3-15 (1994), which specifies who makes the mercy

decision. This Court noted in Walker, 210 W.Va. at 495, 558 S.E.2d at 295, “that the ‘value of any *per curiam* opinion . . . is in large measure a function of the quality of the opinion’s legal reasoning[.]” (citation omitted). See State v. Guthrie, 194 W.Va. 657, 679 n.28, 461 S.E.2d 163, 185 n.28 (1995) (“[A]s a practical matter, a precedent-creating opinion that contains no extrinsic analysis of an important issue is more vulnerable to be overruled[.]”).

Doman has been followed by this Court in two subsequent decisions, but neither contain any significant statutory analysis regarding legislative intent, the plain meaning of the language of W.Va. Code § 62-3-15 (1994), or syllabus points authorizing the result reached in Doman. See State v. Finley, 219 W.Va. 747, 639 S.E.2d 839 (2006); State ex rel. Shelton v. Painter, 221 W.Va. 578, 655 S.E.2d 794 (2007).

The Plain Meaning of W.Va. Code § 62-3-15 (1994) (2005 Repl. Vol.) Requires That The Same Jury Decide Both Issues of Guilt And Whether To Recommend Mercy

The statute governing the verdict and sentence in a first-degree murder case, W.Va. Code § 62-3-15 (1994) (2005 Repl. Vol.), provides in pertinent part:

If a person indicted for murder be found by a jury guilty thereof, they shall in their verdict find whether he or she is guilty of murder of the first degree or second degree. If the person indicted for murder is found by the jury guilty thereof, and if the jury find in their verdict that he or she is guilty of murder of the first degree, or if a person indicted for murder pleads guilty of murder of the first degree, or if a person indicted for murder pleads guilty of murder of the first degree, he or she shall be punished by imprisonment in the penitentiary for life, and he or she, notwithstanding the provisions of article twelve [§§ 62-12-1 et seq.], chapter sixty-two of this code, shall not be eligible for parole: Provided, That the jury may, in their discretion, recommend mercy, and if such recommendation is added to their verdict, such person shall be eligible for parole in accordance with the provisions of said article twelve, except that, notwithstanding any other provision of this code to the contrary, such person shall not be eligible for parole until he or she has served fifteen years. (Emphasis added).

* * *

In construing a statute, this Court's primary object "is to ascertain and give effect to the intent of the Legislature." Rohrbaugh v. State, 216 W.Va. 298, 305, 607 S.E.2d 404, 411 (2004) (citation omitted). Thus, the Court "look[s] first to the statute's language [] [and] [i]f the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." Id. (quoting Appalachian Power Co. v. State Tax Dep't, 195 W.Va. 573, 587, 466 S.E.2d 424, 438 (1995)).

In other words, "[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. pt. 2, State v. Elder, 152 W.Va. 571, 165 S.E.2d 108 (1968). Accord Syl. pt. 2, Crockett v. Andrews, 153 W.Va. 714, 172 S.E.2d 384 (1970) ("Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation."); Syl. pt. 2, State v. Epperly, 135 W.Va. 877, 65 S.E.2d 488 (1951) ("A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect."). Hence, "[a] statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning." Sizemore v. State Farm Gen. Ins. Co., 202 W.Va. 591, 596, 505 S.E.2d 654, 659 (1998) (internal quotations and citation omitted).

Id. In addition, a penal statute must be strictly construed against the State and liberally in favor of the accused. Syl. pt. 3, State ex rel. Carson v. Wood, 154 W.Va. 397, 175 S.E.2d 482 (1970); State v. Cain, 178 W.Va. 353, 357, 359 S.E.2d 581, 585 (1987).

Applying these rules of construction to W.Va. Code § 62-3-15, it is evident the statute states that if "the jury finds in their verdict that [the defendant] is guilty of murder of the first degree. . . the jury may, in their discretion, recommend mercy []" by adding it to their verdict. (Emphasis added). Thus, the plain meaning of the language in the statute is that "the jury" that finds the defendant guilty is "the jury" that decides whether to recommend mercy. "The jury" means "the jury," not another jury. See Syl. pt. 3, Meadows v. Wal-Mart Stores Inc., 207 W.Va.

203, 530 S.E.2d 676 (1999) (“A cardinal rule of statutory constitution is that significance and effect must, if possible, be given to every section, clause, word or part of the statute.”). See e.g., Butcher v. Miller, 212 W.Va. 13, 21, 569 S.E.2d 89, 97 (2002) (Albright, J., concurring) (“...the legislature’s use in West Virginia Code § 17C-5-7(a) [1986] of the term “will” is dispositive. In other words, “will” means “will,” and this Court will apply the plain meaning of the statute.”). There is obviously no provision or language permitting the impaneling of another jury to decide whether to recommend mercy, as Doman requires.

In Jones v. People, 393 P.2d 366, 367 (Colo. 1964), the Colorado Supreme Court considered this issue and reached the same conclusion where a death penalty defendant was granted a new trial because he was not permitted to present mitigating evidence. The trial court however, determined that the issue of guilt need not be retried and only permitted a trial as to penalty before a new jury. Id. The Supreme Court reversed because the same jury did not determine both guilt and punishment:

A jury selected pursuant to law shall hear the case and *that jury*, if it determines the defendant is guilty of murder in the first degree, shall fix the penalty. This is the clear meaning and mandate of the statute. (citations omitted) (emphasis in original).

Id. at 368.

Support for this interpretation of W.Va. Code § 62-3-15 is further found in United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209 (1968), in which the United States Supreme Court construed the meaning of “the jury” in a similar provision of the federal kidnapping statute. In Jackson, the Supreme Court declared unconstitutional the penalty section of the federal kidnapping statute which provided for the death penalty “if the verdict of the jury shall so recommend.” Id. at 570-72, 88 S.Ct. at 1210-11. The Court held that because the kidnapping “statute sets forth no procedure for imposing the death penalty upon a defendant who waives the

right to jury trial or upon one who pleads guilty[,]" the death penalty provision imposes an unpermissible burden upon a defendant who exercises his constitutional right to jury trial. Id. at 572, 88 S.Ct. at 1211.

Significantly, the Supreme Court rejected the Government's argument that the trial court, where a defendant pleads guilty or waives a jury trial, could impanel a jury to determine whether the death penalty should be recommended. The Court reasoned:

But the statute does not say 'a jury.' It says 'the jury.' At least when the defendant demands trial by jury on the issue of guilt, the Government concedes that 'the verdict of the jury' means what those words naturally suggest: the general verdict of conviction or acquittal returned by the jury that passes upon guilt or innocence. Thus, when such a jury has been convened, the statutory reference is to that jury alone, not to a jury impaneled after conviction for the limited purpose of determining punishment. (footnote omitted). (emphasis added).

Jackson, 390 U.S. at 577, 88 S.Ct. at 1214.

The same statutory interpretation is applicable to this case. West Virginia's first-degree murder statute, W.Va. Code § 62-3-15, specifies that "the jury" shall decide whether to recommend mercy as part of the guilty verdict. As the Supreme Court noted in Jackson, "the statutory reference is to that jury alone, not to a jury impaneled after conviction for the limited purpose of determining punishment." Id.

The Jackson Court further recognized the impropriety of the courts fashioning the remedy of bringing in a new jury just to determine penalty, and the difficulties a court would face in doing so.

Any attempt to do so would be fraught with the gravest difficulties: If a special jury were convened to recommend a sentence, how would the penalty hearing proceed? What would each side be required to show? What standard of proof would govern? To what extent would conventional rules of evidence be abrogated? What privileges would the accused enjoy? Congress, unlike the state legislatures that have authorized jury proceedings to determine the penalty in

capital cases, [footnote omitted] has addressed itself to none of these questions. [footnote omitted].

Id. at 579, 88 S.Ct. at 1215. As demonstrated by the certified questions, the trial court in this case would face similar difficulties if required to conduct a limited trial on the issue of mercy.

The Doman Court's reliance on State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1996), to order a limited trial on the issue of mercy is misplaced. In LaRock, the Court held the trial court in a first-degree murder case has discretionary authority to bifurcate the guilt and recommendation of mercy decisions of the jury. Id. at Syl. pt. 4. However, the bifurcated trial authorized in LaRock differs greatly from that required by Doman in two major respects: (1) unlike Doman, a LaRock jury makes both guilt and mercy decisions; and unlike Doman, a LaRock jury is the same jury in both phases. LaRock addressed a matter of procedure in terms of bifurcating or splitting up the jury's decisions as to guilt and mercy. The LaRock bifurcation procedure is therefore consistent with W.Va. Code § 62-3-15 (1994) (2005 Repl. Vol.) which only requires that the same jury make both decisions relating to guilt and mercy.

On the other hand, the limited trial required by Doman is inconsistent with both LaRock and W.Va. Code § 62-3-15 as the same jury does not make both guilt and mercy decisions. This Court's opinion in Doman effectively rewrote W.Va. Code § 62-3-15 by permitting a different jury from the one that determined guilt to make the mercy decision.

Doman Violated The Separation Of Powers Clause Of The W.Va. Constitution As This Court Cannot Rewrite W.Va. Code § 62-3-15 (1994) (2005 Repl. Vol.), A Substantive Statute Governing How Punishment In A First-Degree Murder Case Is Determined

The Separation of Powers Clause of the West Virginia Constitution provides that “the legislative, executive, and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others [.]” Article V, § 1, W.Va.

Constitution. This Clause “is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed.” State ex rel. Barker v. Manchin, 167 W.Va. 155, 279 S.E.2d 622 (1981). This constitutional provision was violated by the Doman Court’s rewriting of W.Va. Code § 62-3-15 (1994).

It is well-settled that “the substantive power to prescribe crimes and determine punishments is vested with the legislature[.]” State v. Gill, 187 W.Va. 136, 141, 416 S.E.2d 253, 258 (1992) (citations omitted). In W.Va. Code § 62-3-15 the legislature prescribed the length of punishment and how it is to be determined in first-degree murder cases. Thus, under § 62-3-15, the legislature specified the punishment to be a life sentence, but provided that a defendant could receive mercy, i.e., parole eligibility after fifteen (15) years, if the jury added that recommendation to their guilty verdict. In doing so the legislature clearly exercised its prerogative to determine how the punishment (life or life with parole eligibility) is to be determined -- by the trial jury that decides guilt. This Court cannot abrogate that legislative decision regarding how punishment is to be determined in first-degree murder cases. By permitting a jury, other than the trial jury, to determine the punishment in Doman, this Court violated that principle and effectively rewrote the statute.

This Court’s decisions prohibit it from rewriting a statute under the guise of interpretation:

“[I]t is not for [courts] arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, *we are obliged not to add to statutes something the Legislature purposely omitted.*” (citations omitted) Moreover, “[a] statute, or an administrative rule, may not, under the guise of “interpretation,” be modified, revised, amended or rewritten.” (citations omitted).”

Perito v. The County of Brooke, 215 W.Va. 178, 184, 597 S.E.2d 311, 317 (2004) (quoting Longwell v. Board of Educ. Of County of Marshall, 213 W.Va. 486, 491, 583 S.E.2d 109, 114

(2003)). See also State v. Richards, 206 W.Va. 573, 577, 526 S.E.2d 539, 543 (1999) (“Courts must presume that the legislature says in a statute what it means and means in a statute what it says there.” (citation omitted)).

Spencer v. Whyte, 167 W.Va. 772, 280 S.E.2d 591 (1981), *superseded by statute as stated in State v. White*, 188 W.Va. 534, 425 S.E.2d 210 (1992), illustrates this point. In Spencer, the prosecutor contended the trial court had authority to impose incarceration as a condition of probation. This Court rejected the State’s argument, finding no statutory authority for it. Id. at 777, 280 S.E.2d at 594. In reaching this conclusion, the Court reasoned that it is within the province of the legislature, not the courts, to determine the conditions under which the punishment of a prison sentence can be suspended.

It is because of the legislative primacy in this area that we consider the right to determine the conditions under which a sentence can be suspended and a person placed on probation to be a legislative prerogative. Probation is inextricably tied to the setting of punishment, which is the legislature’s domain.

Id. at 775, 280 S.E.2d at 593.

This analysis is applicable here as it is the legislature’s prerogative to determine the conditions under which the punishment of a life sentence can be lessened, i.e., via mercy or parole eligibility. The legislature clearly did so in W.Va. Code § 62-3-15 by allowing the trial jury that finds guilt to add a recommendation of mercy to their verdict. Thus, because mercy “is inextricably tied to the setting of punishment, which is the legislature’s domain[,]” id., it can only be granted pursuant to the statutory requirements of W.Va. Code § 62-3-15, i.e., by the jury that decides guilt.

In State v. Penix, 513 N.E.2d 744 (Ohio 1987), the Ohio Supreme Court confronted a very similar situation in a death penalty case where it affirmed the conviction, but reversed the death sentence. The Court held that because the Ohio statute required that the death sentence

recommendation be made by the same trial jury that convicted the defendant at the guilt phase of the trial, the State on remand could not impanel a new jury and seek the death penalty. Id. at 747-48.

Thus, the decisions leading to a death sentence must be made by the same jury that convicted the offender in the guilt phase. There are simply no statutory provisions for another jury to make these crucial determinations. [footnote omitted] Since there is not statutory authority allowing the imposition of the death penalty upon resentencing, we may not create such a procedure out of whole cloth. (Emphasis added).

Id. at 748.

The same reasoning applies in this case. Because W.Va. Code § 62-3-15 requires the mercy decision to be made by the trial jury, this Court may not create another process for another jury to make this decision. See Chubb v. South Carolina, 401 S.E.2d 159, 161 (S.C. 1991) (Since a bifurcated proceeding was not required in a non-capital burglary case, the determination of guilt and whether mercy should be recommended should be made in one proceeding by the same jury; thus, counsel's ineffectiveness in failing to argue for mercy required new trial rather than remand for sentencing proceeding only).

There are statutes in the federal system and many states, particularly death penalty jurisdictions, that authorize the impaneling of another jury to determine the sentence if a judgment is reversed and remanded only for a sentencing error.² This is further evidence that it is the legislature's province to determine punishments and how they will be imposed.

² See, e.g., 18 U.S.C. § 3593(b)(2)(C) (2002) (provides that a new jury shall be impaneled for a new sentencing hearing if the guilt phase jury is discharged for "good cause"); **Alabama**: Ala. Code §13A-5-46(b) (1975) (** "If it is impossible or impracticable for the trial jury to sit at the sentence hearing, or if the case on appeal is remanded for a new sentence hearing before a jury, a new jury shall be impaneled to sit at the sentence hearing." **); **Arizona**: Ariz. Rev. Stat. Ann. §13-703.01(N) (2003). ("If the sentence of a person who was sentenced to death is overturned, the person shall be resentenced pursuant to this section by a jury that is specifically impaneled for this purpose as if the original sentencing had not occurred."); **Ohio**: Ohio Rev. Code Ann.

W.Va. Code § 62-3-15 (1994) (2005 Repl. Vol.) Gives McLaughlin A Due Process Right To Have His Guilt And The Issue Of Mercy Decided By The Same Jury

W.Va. Code § 62-3-15 (1994) (2005 Repl. Vol.) only specifies one way for a jury to make a recommendation of mercy in a first degree murder case, i.e., as part of a guilty verdict: “. . . the jury may in their discretion recommend mercy, and if such recommendation is added to their verdict. . .” Therefore, McLaughlin has a state and federal constitutional due process right to be sentenced according to the statutory procedure of W.Va. Code § 62-3-15, which requires that any decision as to mercy be part of a new trial on guilt/innocence. Fourteenth Amendment, U.S. Constitution; Article III, § 10, W.Va. Constitution.

In Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227 (1980), the Supreme Court held that where a State has provided for the imposition of criminal punishment at the discretion of the trial jury, a defendant has a due process right to be deprived of his liberty only to the extent determined by the jury:

§2929.06(B) (2004) (“Whenever any court of this state or any federal court sets aside, nullifies, or vacates a sentence of death imposed upon an offender because of error that occurred in the sentencing phase of the trial . . .the trial court that sentenced the offender shall conduct a new hearing to resentence the offender. If the offender was tried by a jury, the trial court shall impanel a new jury for the hearing.” ***); **South Carolina**: S.C. Code Ann. §16-3-25(E)(2) (1977) (***) “If the court finds error prejudicial to the defendant in the sentencing proceeding conducted by the trial judge before the trial jury. . .the court may set the sentence aside and remand the case for a resentencing proceeding to be conducted by the same or a different trial judge and by a new jury impaneled for such purpose.”***); **Virginia**: Va. Code Ann. §19.2-264.3(C) (1994). (***) “If the sentence of death is subsequently set aside or found invalid, and the defendant or the Commonwealth requests a jury for purposes of resentencing, the court shall impanel a different jury on the issue of penalty.”); **Arkansas**: Ark. Code Ann. §5-4-616(a)(1)(B)(2) (2004); **New Mexico**: N.M. Stat. Ann. §31-20A-4(D)(E)(1) (2004); **Utah**: Utah Code Ann. §76-3-207 (6)(a) (2003); **Tennessee**: Tenn. Code Ann. §39-13-204(k) (2002); **Mississippi**: Miss. Code Ann. §99-19-101(1) (1994); **Pennsylvania**: 42 Pa. Cons. Stat. §9711(h)(4) (1978); **Oregon**: Or. Rev. Stat. §138.012 (2)(a)(B) (2001); **Texas**: Tex. Code Crim. Proc. Ann., art. 44.29(b)(c) (1993); **Maryland**: Md. Code Ann., [Criminal Law] §2-303(c)(2)(iv) (2003); **North Carolina**: N.C. Gen. Stat. §15A-2000(a)(2)(d)(3) (2001); **Delaware**: Del. Code Ann. Tit. 11, §4209(b) (2003); **Illinois**: 720 Ill. Comp. Stat. Ann. 5/9-1(d)(2) (2003); **Florida**: Fla. Stat. § 921.141 (1) (2008) (statutes with similar provisions).

It is argued that all that is involved in this case is the denial of a procedural right of exclusively state concern. Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, Cf. Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 99 S.Ct. 2100, 60 L.E.2d 668 (1979), and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. See Vitek v. Jones, 445 U.S. 480, 488-489, 100 S.Ct. 1254, 1261, 63 L.Ed.2d 552, citing Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.E.2d 935; Greenholz v. Nebraska Penal Inmates, *supra*; Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484. (Emphasis added).

Id. at 346, 100 S.Ct. at 2229. See also Cabana v. Bullock, 474 U.S. 376, 387 n.4, 106 S.Ct. 689, 697 n.4 (1986), *overruled on other grounds by Pope v. Illinois*, 481 U.S. 497, 503, 107 S.Ct. 1918, 1922 (1987); Mabry v. Klimas, 448 U.S. 444, 446-47, 100 S.Ct. 2755, 2757 (1980). Subsequent cases “have interpreted the liberty interest recognized in Hicks as entitling the state criminal defendant to a sentencing decision by the sentencing authority designated under state law (usually judge or jury). (footnote omitted).” (Emphasis in original); Depuy v. Butler, 837 F.2d 699, 703 (5th Cir. 1988).

Since West Virginia statutory law requires that McLaughlin be sentenced by the trial jury that determines guilt, Hicks requires that he be granted an entire new trial. Cf. Brady v. Maryland, 373 U.S. 83, 88-89, 83 S.Ct. 1194, 1197-98 (1963) (Court found no due process violation in state court decision to remand for new trial on punishment only when state court found prosecution's failure to disclose favorable evidence did not affect guilt).

The Policy Reasons Underlying Doman Should Be Reconsidered

The Doman Court ordered only a limited trial on the recommendation of mercy for two reasons: (1) the erroneous jury instruction on parole eligibility did not affect the finding of guilt,

and (2) “it would be a waste of judicial resources to require an entirely new trial[.]” Doman, 204 W.Va. at 292, 512 S.E.2d at 214. This reasoning should be reconsidered as it is unsound.

While the erroneous instruction may not have affected the jury’s determination of guilt, a limited trial on the question of mercy will deprive McLaughlin of the recognized benefits of having the same jury decide both issues of guilt and mercy.

In Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758 (1986), the Court upheld the use of the same jury in both the guilt and sentencing phases of a bifurcated capital trial. The Supreme Court quoted a decision of the Arkansas Supreme Court upholding the unitary jury system in a bifurcated trial and recognizing that the issues of guilt and punishment are necessarily interwoven:

The Arkansas Supreme Court recently explained the State’s legislative choice to require unitary juries in capital cases:

“It has always been the law in Arkansas, except when the punishment is mandatory, that the same jurors who have the responsibility for determining guilt or innocence must also shoulder the burden of fixing the punishment. That is as it should be, for the two questions are necessarily interwoven.”

Id. at 180-81, 106 S.Ct. at 1769 (quoting Rector v. State, 659 S.W.2d 168, 173 (Ark. 1983)). Accord State v. Hutton, 559 N.E.2d 432, 444 (Ohio 1990). See also Andres, 333 U.S. at 766, 68 S.Ct. at 892 (Frankfurter, J., concurring) (noting “that the verdict as to both guilt and punishment is single and indivisible[.]”).

Even though the above cases are death penalty cases, the same reasoning applies to a first-degree murder case in West Virginia where the jury makes the weighty decisions of guilt and, if necessary, whether to sentence the defendant to life without parole or grant mercy. It is unrealistic to think that jurors in their deliberations consider and discuss each issue in a vacuum or separately. As indicated above, these two issues are “necessarily interwoven.” A juror that has heard and seen all of the witnesses and evidence and that has gone through the give and take

of deliberations with their fellow jurors in deciding guilt is in a much better position to determine whether mercy should be extended than a juror who has not. See LaRock, 196 W.Va. at 314, 470 S.E.2d at 633 (“ . . . consolidation of the issues of guilt and sentencing also is capable of producing, with efficiency. . . a fairer, more rational, and evenhanded delivery of justice.”).

The Supreme Court in Lockhart further recognized another legitimate state interest in having a unitary jury decide guilt and punishment: “the defendant might benefit at the sentencing phase of the trial from the jury’s “residual doubts” about the evidence presented at the guilt phase.” Lockhart, 476 U.S. at 181, 106 S.Ct. at 1769. The Court then quoted the following dissenting opinion in the court of appeals which agreed:

“[A]s several courts have observed, jurors who decide both guilt and penalty are likely to form residual doubts or ‘whimsical’ doubts . . . about the evidence so as to bend them to decide against the death penalty. Such residual doubt has been recognized as an extremely effective argument for defendants in capital cases. To divide the responsibility . . . to some degree would eliminate the influence of such doubts.” 758 F.2d, at 247-248 (J. Gibson, J., dissenting) (citations omitted).

Id. (citation omitted). Accord State v. Hughes, 721 P.2d 902, 908 (Wash. 1986) (“If a new jury sits in the sentencing phase, it will harbor no such doubts and may be more likely to vote for the death penalty.” (footnote omitted)); Hutton, 559 N.E.2d at 443; Smith v. Balkcom, 660 F.2d 573, 580-81 (5th Cir. 1981), *modified on other grounds*, 671 F.2d 858 (5th Cir. 1982), cert. denied, 459 U.S. 882, 103 S.Ct. 181 (1982) (use of different juries to determine guilt and fix punishment “would deprive the capital defendant of important benefits which the current system affords him.” (footnote omitted)). The Smith opinion further notes that even though a Georgia capital jury is instructed at the penalty phase to decide the penalty on the basis of aggravating and mitigating circumstances, compromise may play a role in the jury’s deliberations. Id. at 581 n.23.

These concerns regarding the benefits of “residual doubt” in the jury’s decision as to punishment are even more applicable in West Virginia’s statutory scheme where the jury decides whether to recommend mercy without following any statutory guidelines or considering aggravating or mitigating factors as required in death penalty cases. As this Court has held, the mercy decision is entirely within the “unfettered” discretion” of the jury. State v. Miller, 178 W.Va. 618, 622, 363 S.E.2d 504, 508 (1987). The jury may therefore grant mercy on a “whim.” See Smith, 660 F.2d at 581 n.23 (noting that Georgia’s death penalty statute “expressly permits the jury to recommend mercy . . . [w]himsical doubt, therefore may play an important role.”).

A limited trial only on the question of mercy will deprive McLaughlin of that legitimate benefit.

Regarding Doman’s second reason for a limited trial, giving McLaughlin an entire new trial would not be a waste of judicial resources. As the Supreme Court recognized in Lockhart, the same evidence the jury must consider to determine guilt is also relevant to the determination of punishment:

Finally, it seems obvious to us that in most, if not all, capital cases much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase; if two different juries were to be required such testimony would have to be presented twice, once to each jury. (Emphasis added).

Lockhart, 476 U.S. at 181, 106 S.Ct. at 1769. See State v. Rygh, 206 W.Va. 295, 297, 524 S.E.2d 447, 449 (1999) (recognizing that jury decisions as to guilt and mercy in first-degree murder cases are “based on all of the evidence presented to them at the time of their determination.”).

Otherwise, as this Court stated in LaRock, 196 W.Va. at 314, 470 S.E.2d at 633, “the ends of criminal justice would be defeated if mercy decisions were to be founded on a partial or speculative presentation of the facts.” Thus, in a West Virginia capital case, it is only reasonable

to conclude that a jury deciding only the question of mercy would have to receive essentially the same evidence as the jury that determined guilt. Contrary to Doman, there would not be a saving of judicial resources. This Court inasmuch recognized this in LaRock:

The waste of time and expense involved in empanelling separate juries or even permitting the same jury to hear separately the same facts offered at the guilt phase over and over again is staggering.

Id. Accordingly, the policy reasons underlying the Doman decision are not sound and should be reconsidered.

For all of the above reasons, this Court should reconsider and overrule Doman and order the circuit court to grant McLaughlin a complete new trial.

III. Due Process And Equal Protection Require That The Prosecution Be Limited In The Mercy Stage Of A Bifurcated Trial To The Presentation Of Evidence Introduced In The Guilt Stage Of Trial And Rebuttal Of Evidence Presented By The Defendant.

The third question certified by the trial court states:

Is the prosecution limited in the mercy stage of a bifurcated trial to the presentation of evidence introduced in the guilt stage of trial and rebuttal of evidence presented by the defendant? (Emphasis in original).

12/18/08 Order, SCR, Vol. III 1131.

In responding to this question, the trial court said its answer “depends in part on how the first two questions are answered[;]” and “since the burden is on the State, (based on the answer to Question 1), the State would be required to present its case first.” Id. The trial court has, however, effectively answered the question in the negative by its ruling that the State may present additional Rule 404(b), WVRE, witnesses that did not testify at McLaughlin’s original trial. The trial court erred as the State should not be permitted to introduce additional evidence at the mercy stage relating to guilt that was not presented at the guilt stage unless it is to rebut evidence presented by the defense. The Court’s answer to this important question will determine the scope or type of evidence that may be presented in the mercy phase of a bifurcated murder trial.

State v. Rygh Indicates The Jury Should Consider The Same Evidence Of Guilt At A Retrial Of Only The Mercy Stage

In State v. Rygh, 206 W.Va. 295, 524 S.E.2d 447 (1999), this Court indicated that a jury deciding the mercy issue should consider the same evidence of guilt whether the trial is unitary or bifurcated:

In making its overall verdict, in a unitary trial or a bifurcated trial, the jury looks at all of the evidence that the defendant and the prosecution have put on-and if the jury concludes that an offense punishable by life imprisonment was committed,

then the jury determines the mercy/no-mercy portion of its verdict, again based on all of the evidence presented to them at the time of their determination.

Id. at 297 n.1, 524 S.E.2d at 449 n.1. Otherwise, if the State is permitted to introduce new, additional evidence of guilt at a bifurcated mercy phase, the defendant would be penalized for moving to bifurcate and treated much differently than a defendant at a unitary trial. Equal protection of the law and the due process principle of fairness require that similarly situated defendants in first-degree murder cases be treated the same by the State in terms of the evidence of guilt that may be used to convince a jury not to recommend mercy, regardless of whether the defendant is tried at a unitary trial or a bifurcated one. Fourteenth Amendment, U.S. Constitution; Article III, § 10, W.Va. Constitution.

In this case, the trial court ruled, over McLaughlin's objection, that the State could present two new, additional Rule 404 (b), WVRE, witnesses at his mercy phase retrial to establish that McLaughlin previously threatened to kill his wife. (3/20/08 Tr. 29-32).³ Allowing the prosecution to do so is fundamentally at odds with Rygh's pronouncement that the jury's mercy decision will be based on the same evidence it considered in determining guilt. This is especially prejudicial to McLaughlin because he originally chose to have a unitary trial and have his guilt/innocence and the issue of mercy determined in a unitary proceeding. He is now forced into a bifurcated proceeding which is not of his choosing and made to defend against additional evidence of guilt not presented at his original trial.

This Court approved the bifurcation procedure for first-degree murder trials in State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1996), because a defendant's presentation of

³ The trial court also initially ruled that a statement McLaughlin made at the time of his arrest, which was not admitted at his original trial, could be admitted at his mercy phase trial, (3/20/08 Tr. 32-35), but later reversed its ruling after hearing additional evidence regarding the statement. From these rulings, it is evident the trial court believes the State may present additional new evidence of guilt at a mercy phase retrial.

mitigation evidence on the issue of mercy might adversely influence the jury's decision on guilt. Whether to bifurcate, however, is a matter of trial strategy for a defendant and some defendants, like McLaughlin, choose to have their guilt/innocence and the issue of mercy decided at a unitary trial. In doing so, a defendant considers the evidentiary consequences of such a choice. By requiring a bifurcation, and here, a retrial only on the issue of mercy, as opposed to allowing an election by the defendant, removes from the defendant his right to choose a trial strategy with respect to the issue of mercy. Simply put, McLaughlin is denied the right to choose his trial strategy with respect to the issue of mercy afforded to every other similarly situated first-degree murder defendant.

By refusing to give McLaughlin a new trial on guilt and forcing him to have only the mercy issue retried, the trial court binds him to the strategy he originally selected but changes the process by which the jury makes its mercy decision. This mandated bifurcation on the mercy issue after the presentation of evidence by the defendant in a unitary trial substantially prejudices his due process right to a fair trial and denies him the equal protection of the law afforded other first-degree murder defendants.

Since McLaughlin chose not to bifurcate his trial, but to have his guilt and the issue of mercy decided in a unitary trial, the prosecution should not be permitted to do at a retrial of the mercy issue what it would not have been permitted to do at his initial trial, i.e., re-open the State's case to present more Rule 404 (b), WVRE, evidence on the premise that it could affect the jury's decision as to mercy. Just as McLaughlin's jury at his initial trial decided the issue of mercy on the evidence of guilt the State presented, the jury at the retrial of the mercy phase should be limited to the same evidence as that was the evidence upon which the guilty verdict was returned and the original decision as to mercy was based. To now change the evidence upon

which the jury relied to find McLaughlin guilty, substantially changes the guilty verdict upon which the mercy decision must be made.

If McLaughlin is now denied a new trial on the issue of his guilt, there should be no further need for the State to present additional evidence of guilt. If the State wants to re-open the evidence of guilt, McLaughlin should be given a new trial on that issue.

McLaughlin, however, does not disagree with the trial court's statement that the State should proceed first in a bifurcated mercy phase, particularly where, as here, a new jury is hearing the evidence about the case for the first time. Of course, that conflicts with the Rygh Court's statement that "[w]e would anticipate that a defendant would ordinarily proceed first in any bifurcated mercy phase. Rygh, 206 W.Va. at 297 n.1, 524 S.E.2d at 449 n.1. In Rygh, however, the same jury had already heard the State's evidence. Id. at 297, 524 S.E.2d at 449. In that situation, there would be nothing wrong with allowing, but not requiring, the defendant to proceed first.

RELIEF REQUESTED

For the above reasons, Appellant McLaughlin requests the Court to answer the certified questions as follows: (1) that W.Va. Code § 62-3-15 (1994) (2005 Repl. Vol.) is unconstitutional because there are no standards for the jury's mercy decision, requiring the case to be remanded to the trial court for imposition of a life with mercy sentence; alternatively, that the jury in a first-degree murder trial must be instructed that neither the State nor the defendant has any burden of proof with respect to the mercy issue, that the mercy decision is a matter wholly within its discretion, and that it may recommend mercy with or without reason and may decline to do so with or without reason; and further that the jury's decision to recommend or not recommend mercy must be unanimous; (2) that W.Va. Code § 62-3-15 (1994) requires the same jury to decide both issues of guilt and whether to recommend mercy, requiring a complete new trial in this case; and (3) that the prosecution be limited in the mercy stage of a bifurcated trial to the presentation of evidence introduced in the guilt stage of trial and rebuttal of evidence presented by the defendant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gregory L. Ayers, hereby certify that on the 13 day of July, 2009, I mailed a copy of the foregoing Brief For Appellant On Certified Questions to Barbara H. Allen, Managing Deputy Attorney General, 1900 Kanawha Boulevard, East, Room E-26, Charleston, West Virginia 25305.


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