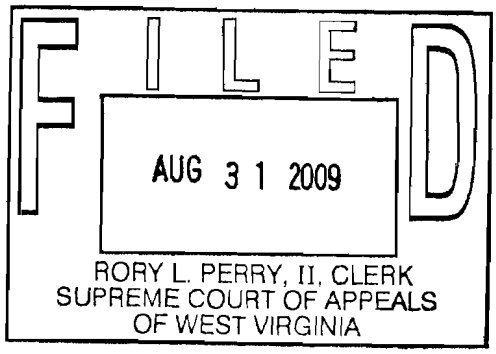
NO. 34860

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Appellee,

v.

BILLY RAY McLAUGHLIN,

Appellant.

BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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More than a decade ago, the Appellant, Billy Ray McLaughlin, was convicted and sentenced to life imprisonment without the possibility of parole for the shooting death of his wife. In a subsequent habeas corpus proceeding, the Appellant's sentence was reversed on the ground that the trial jury had received erroneous instructions with respect to the effect of a mercy recommendation.[1] Consistent with this Court's decision in *State v. Doman*, 204 W. Va. 289, 512 S.E.2d 211 (1998), the habeas court ordered that the Appellant be granted a new trial only on the issue of mercy.

The Appellant unsuccessfully appealed the limitation of habeas relief first to this Court, No. 050783, and then to the United States Supreme Court, *McLaughlin v. McBride*, 546 U.S. 1186, 126 S. Ct. 1366, 164 L. Ed.2d 75 (2006). He then returned to the trial court for a new trial on the issue

[1]The jury was instructed that if it recommended mercy, the Appellant would be eligible for parole in ten years; at that time, however, the law had changed and would have required the appellant to serve fifteen years before becoming eligible for parole.

of mercy, resulting in the trial court's certification of three questions whose answers, opined the court, ". . . will not only ensure due process and equitable treatment for all defendants but [they] would assist judges with clear rules and procedures in such matters." (Court's Opinion of 12/18/08, p. 5.) All three questions concern W. Va. Code § 62-3-15: its constitutionality, the meaning of its language, and the proper procedures for bifurcated proceedings thereunder.

I.

INTRODUCTION

West Virginia Code § 62-3-15 provides, in relevant part, that:

> . . . 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, 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 . . . .

As this court noted in *State ex rel. Leach v. Hamilton*, 280 S.E.2d 62, 64 (1980) and then again in *State v. Miller*, 178 W. Va. 618, 621, 363 S.E.2d 504 (1987), "[t]he West Virginia first degree murder statute leaves very little sentencing discretion to juries. *A finding of guilt automatically results in a life sentence* and a jury's only discretion is whether to grant parole eligibility by recommending mercy." (Emphasis supplied.)

The constitutionality of the statute has been upheld on numerous occasions. *Billotti v. Dodrill*, 183 W. Va. 48, 394 S.E.2d 32 (1990); *State ex rel. Leach v. Hamilton*, 280 S.E.2d 62 (1980); *Moore v. McKenzie*, 160 W. Va. 511, 236 S.E.2d 342 (1977); *State ex rel. Rasnake v.*

Narick, 159 W. Va. 542, 227 S.E.2d 203 (1976). Indeed, more than a decade ago the Court stated that "[f]urther inquiry and evaluation of the statute's constitutionality hardly would be worth the effort, resources, and costs." *State v. LaRock*, 196 W. Va. 294, 313, 470 S.E.2d 613, 632 (1996).

In *LaRock*, however, at Syllabus Point 4, the Court held for the first time that "[a] trial court has discretionary authority to bifurcate a trial and sentencing in any case where a jury is required to make a finding as to mercy."[2] Several years after *LaRock*, the Court provided guidance to the trial courts as to the procedural framework of a bifurcated mercy proceeding, *State v. Rygh*, 206 W. Va. 295, 296, 524 S.E.2d 447, 448 n. 1 (1999), albeit in dicta.

In formulating and answering the first and third certified questions, the court below appears to have completely misread *LaRock* and to have misapprehended *Rygh*. The second certified question has already been answered by this Court on three separate occasions.

---

[2]In Syllabus Point 6, the Court listed the factors to be considered when a party moves for bifurcation:

1. Whether limiting instructions to the jury would be effective;
2. Whether a party desires to introduce evidence solely for sentencing purposes but not on the merits;
3. Whether evidence would be admissible on sentencing but would not be admissible on the merits or vice versa;
4. Whether either party can demonstrate unfair prejudice or disadvantage by bifurcation;
5. Whether a unitary trial would cause the parties to forego introducing relevant evidence for sentencing purposes; and
6. Whether bifurcation unreasonably would lengthen the trial.

II.

ARGUMENT

A. Question No. 1.

Question No. 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)."

Answer No 1: 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.

The court's formulation of Question No. 1, and its answer thereto, appear to flow from its misreading of *State v. LaRock*, 196 W. Va. 294, 313, 470 S.E.2d 613, 632 (1996). In his Order of December 18, 2008, at p. 2, the court writes:

> In *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996), our Supreme Court indicated the (mercy) statute was unconstitutional, and they did so because they said insofar as the statute – and they quote it – shifts to a defendant, the burden of disproving a material element of the State's case, in violation of the due process clauses found in Article 3, Section 10, of the Constitution of West Virginia, and the 14th Amendment of the United States Constitution, that individual provision, severed from the remainder of the statute, is unconstitutional and unenforceable. Justice Davis in that case goes on to summarize due process, stating the due process requirement places on the defendant no burden of proving mitigation, excuse, or justification in a First Degree Murder Case.

(Parenthetical and aside in original.)

With respect to the court below, nothing remotely like this can be found in *LaRock*, an opinion authored by Justice Cleckley, not Justice Davis. To the contrary, in *LaRock* it was held that

"[t]he constitutionality of W. Va. Code, 62-3-15, has been confirmed . . . [and f]urther inquiry and evaluation of the statute's constitutionality hardly would be worth the effort, resources, and costs." 196 W. Va. at 313, 470 S.E.2d at 632 (citations omitted).

Further, "[a] bifurcated proceeding may be preferable (although we think not); but it is not constitutionally imperative. A unitary jury trial under W. Va. Code, 62-3-15, is constitutional." *Id.*, 196 W. Va. at 313, 470 S.E.2d at 632, summarizing precedents including *Schofield v. West Virginia Dept. of Corrections*, 185 W. Va. 199, 406 S.E.2d 425 (1991); *State ex rel. Leach v. Hamilton*, 280 S.E.2d 62 (1980); and *State ex rel. Rasnake v. Narick*, 159 W. Va. 542, 227 S.E.2d 203 (1976).

Finally, ". . . a trial court has *discretionary* authority to bifurcate a trial and sentencing in any case where the jury is required to make a finding as to mercy." *Id.*, 196 W. Va. at 314, 470 S.E.2d at 633 (emphasis supplied).

1. <u>Burden Shifting</u>

With this precedent in mind, we turn to the trial court's first conclusion, specifically, that W. Va. Code § 63-3-15 is unconstitutional if it permits a shifting of the burden to the defendant.

In *State v. Rygh*, 206 W. Va. 295, 296, 524 S.E.2d 447, 448 n.1 (1999), this Court outlined the procedure for a bifurcated mercy proceeding:

> *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. 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. We would anticipate that a defendant would ordinarily proceed first in any bifurcated mercy phase. We emphasize that the possibility of bifurcation of a mercy phase is not an open door to the expansion of the

> ambit of evidence that the prosecution may put on against a defendant, in the absence of the defendant opening that door to permit narrowly focused impeachment or rebuttal evidence from the prosecution.

(Emphasis supplied.)

All of this makes perfect sense in light of the statutory language and the Court's prior construction thereof.

First, "[t]he West Virginia first degree murder statute leaves very little sentencing discretion to juries. A finding of guilt *automatically* results in a life sentence and a jury's only discretion is whether to grant parole eligibility by recommending mercy." *State ex rel. Leach v. Hamilton*, 280 S.E.2d 62, 64 (1980) (emphasis supplied).

Second, in death penalty cases, ". . . sentencing statutes must provide specific guidelines for determining when the death penalty may be imposed, *in order to direct and limit the discretion of the ultimate sentencing authority*." *State v. Miller*, 178 W. Va. 618, 621-22 & n. 7, 363 S.E.2d 504, 508 & n. 7 (1987) (emphasis supplied), citing *Sumner v. Shuman*, 483 U.S.66, 107 S. Ct. 2716, 97 L. Ed.2d 56 (1987) and *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed.2d 340 (1984). In mercy/no mercy cases however, the rule is different, because any instruction could interfere with the jury's unfettered discretion to grant mercy. *Id.*, citing *Wilson v. State*, 268 Ind. 112, 374 N.E.2d 45 (1978); *State v. Smith*, 267 S.C. 527, 229 S.E.2d 851 (1976).

Thus, the State has nothing to prove other than the defendant's commission of the crime, because the conviction of first degree murder carries with it an automatic sentence of life without mercy. The defendant has nothing to prove, because the jury's decision to recommend mercy isn't based on proof that the defendant is a good guy, a bad guy or a misunderstood guy – the jury must consider all of the evidence, but its decision is purely discretionary.

In summary, this Court has already held, and both the State and the Appellant agree, that no one has the burden of proof in a bifurcated mercy proceeding. In either a unified or a bifurcated proceeding, the State believes that the standard jury instruction is sufficient:

> If you should recommend mercy, the defendant shall be confined in the penitentiary of this State for life abut would be eligible for consideration for parole after having served a minimum of fifteen years of such sentence. However, the fact that the defendant is eligible for consideration for parole does not guarantee his immediate release at that time. The defendant would be released on parole by the West Virginia Board of Probation and Parole, whenever it shall be of the opinion that the best interest of the State and the prisoner will be served thereby and after a thorough consideration by the board of the prisoner's records. The West Virginia Board of Parole in considering whether parole should or should not be granted to any inmate, may consider, among other matters, the following factors:
>
> (a) Whether the inmate has been found guilty of violating any institutional disciplinary rules; and
>
> (b) Whether the inmate has participated in institutional education, work or rehabilitative programs; and
>
> (c) Whether the inmate has previously been on parole or probation and, if so, how the inmate behaved thereon and the circumstances of his parole or probation revocation, and
>
> (d) The sentiment expressed by members of the community and of the criminal justice officials in the area where the inmate lived prior to his conviction, if any such expression by available; and
>
> (e) The facts and circumstances of the crime; and
>
> (f) The demeanor or the inmate during his interview and the attitudes expressed then with regard to his previous criminal behavior and to social morals and law; and
>
> (g) The inmate's prior criminal record, if any; and
>
> (h) The results of any available physical, mental or psychiatric examinations.

> The Board shall assess all factors together to determine whether (1) the inmate can and will conduct himself in a lawful manner if released and (ii) whether release is in the best interest of society.
>
> On the other hand, if you do not recommend mercy, the defendant shall be punished by confinement in the penitentiary for the rest of his natural life and shall not be eligible for consideration for parole.

2. <u>Unanimity of Mercy Recommendation</u>

We now turn to the trial court's second conclusion, specifically, that W. Va. Code § 63-3-15 is unconstitutional if the jury's mercy decision is not unanimous.

Issues like this remind us why the Court was so prescient in remarking that "[a] bifurcated proceeding may be preferable (although we think not). . . ." *State v. LaRock, supra*, 196 W. Va. at 313, 470 S.E.2d at 632. The default position in the statute, for lack of a better way to put it, is life in prison without possibility of parole; the only question for the jury to decide is whether it wants to exercise its discretion to add a recommendation of mercy to its verdict. Thus, if unanimity is required, then in the event of a hung jury in a bifurcated proceeding the result is compelled by statute:

> . . . 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, chapter sixty-two of this code, shall not be eligible for parole. . . .

W. Va. Code § 62-3-15.

In short, the requirement that a jury's mercy determination be unanimous is wholly disadvantageous to the defendant, because the jury isn't choosing between two optional sentences. Rather, the sentence – life without the possibility of parole – was chosen by statute the moment the

defendant was convicted, and the jury has only one question before it: do you recommend mercy?[3] If one single juror says no, then under the reasoning of the court below, the nays have it.

The issue of unanimity with respect to a mercy determination has been the elephant in the room for a long time, and now that its presence has been acknowledged, this Court must squarely confront some very complex issues.

First, if the statute is unconstitutional because it does not require a unanimous mercy recommendation, what's the remedy? If this Court strikes down the entire statute, then unless and until the Legislature enacts a replacement statute, the penalty for murder will be that penalty set out in W. Va. Code § 61-2-2: confinement in the penitentiary for life. If the Court strikes down only that part of the statute involving the jury's right to recommend mercy, then again, unless and until the Legislature enacts replacement language, all murders in West Virginia carry a sentence of confinement in the penitentiary for life, with no "Provided" clause allowing a recommendation of mercy.

On the other hand, if the Court finds that the statute is constitutional because it does require a unanimous recommendation of mercy, we have a host of new problems. If a jury is not unanimous with respect to mercy, what happens next? As set forth earlier in this brief, the State believes that the "default position" in the statute is life without the possibility of parole; absent a recommendation of mercy, life without is the sentence. A finding to the contrary has no support whatsoever in the language of W. Va. Code § 62-3-15 and is not constitutionally required. Additionally, since up until now juries have not been specifically instructed that a decision to grant mercy must be unanimous,

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[3]This is why the verdict form in a unitary proceeding has three lines (putting aside any consideration of lesser included offenses): ☐ guilty of murder in the first degree; or ☐ guilty of murder in the first degree with a recommendation of mercy; or ☐ not guilty.

are we going to tell them that now in unitary as well as bifurcated proceedings?[4] If so, the State would urge that they be instructed that the consequence of their failure to come to a unanimous yes answer will mean a sentence of life without the possibility of parole. This will in turn require a change in the standard verdict form in unitary proceedings: ☐ guilty of murder in the first degree; or ☐ guilty of murder in the first degree with a unanimous recommendation of mercy; or ☐ not guilty.

Does the defense bar actually want any of this? The Appellant acknowledges that in a case in Raleigh County, after the jury in a bifurcated trial indicated that it was hung with respect to the recommendation of mercy, the court sentenced the defendant to life without possibility of parole. (Appellant's Brief at 21-22.) The State believes that this was the correct result, since life without is the default position under W. Va. Code § 62-3-15.[5]

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[4]With respect to the necessity of a unanimity instruction, the State can think of no principled distinction between unitary and bifurcated proceedings.

[5]The Appellant doesn't squarely address the "default position" argument, although counsel imports a group of death penalty cases into his argument in an apparent attempt to suggest that mercy should be the default position in the case of a hung jury. This Court long ago cautioned that ". . . the availability of discretionary trial-management bifurcation in a West Virginia murder case does not mean that the body of case law that has developed in capital punishment jurisdictions around death-penalty/sentencing-phase proceedings is now applicable to the trial of West Virginia murder cases." *State v. Rygh, supra*, 206 W. Va. at 296 n. 1, 524 S.E.2d at 448 n. 1. Legally, conceptually and in every other way, Justice Thurgood Marshall had it right when he said "... that execution is the most irremediable and unfathomable of penalties; *that death is different*." *Ford v. Wainwright*, 477 U.S. 399, 411, 91 L.Ed.2d 335, 347, 106 S.Ct. 2595, __ (1986) (emphasis supplied), citing *Woodson v. North Carolina*, 428 U.S. 280, 305, 49 L.Ed.2d 944, 961, 96 S.Ct. 2978, __ (1976).

3. Lack of Standards

We now turn to a third argument made by the Appellant but not addressed by the court below: that W. Va. Code § 62-3-15 is unconstitutional because it does not contain any standards to guide the jury's exercise of its discretion.

At the outset, it should be noted that the Appellant's position on this issue is completely and irrevocably inconsistent with its argument that the State should not have the burden of proof in a bifurcated mercy proceeding, since this (says the Appellant) would interfere with the jury's unfettered discretion to grant mercy interfere with the jury's unfettered discretion to grant mercy. Absolutely the same thing can be said with respect to standards, and this Court has said it on more than one occasion. *State v. Miller*, 178 W. Va. 618, 622 & n. 8, 363 S.E.2d 504, 508 (1987); *Billotti v. Dodrill*, 183 W. Va. 48, 56-57, 394 S.E.2d 32, 40 (1990).

More fundamentally, the Court has already ruled on the no-guidelines issue:

> Consequently, we hold that an instruction outlining factors which a jury should consider in determining whether to grant mercy in a first degree murder case *should not be given*.

State v. Miller, supra, 178 W. Va. at 623, 363 S.E.2d at 509 (emphasis supplied). As the Court pointed out, factors in a "mercy instruction" may be directly related to possible defenses to the crime, leading to jury confusion; [6] factors in a "mercy instruction" may not relate to any evidence that was actually before the jury in a particular case, again leading to jury confusion;[7] and that the

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[6]Good examples are mental retardation, emotional disturbance, addiction and intoxication, any of which could negate specific intent.

[7]In *Miller*, the Court noted that the prosecuting attorney ". . . went through the factors listed in the mercy instruction and pointed out to the jury that none of them existed under the evidence." *Id.*, 178 W. Va. at 623 n. 9, 363 S.E.2d at 509.

enumeration of any factors in a "mercy instruction" takes aware the unfettered discretion of the jury to make its decision ". . . based solely on their impression of the defendant and the circumstances of the case." *Id.*, 178 W. Va. at 622, 363 S.E.2d at 509.

The only question which appears to have been left open in *Miller* was the propriety of a general instruction that advises the jury that the matter of mercy is within its sole discretion but that it must not be done out of sympathy and should be based on all of the circumstances of the case. *Id.* at 622 & n.8, 363 S.E.2d at 508 & n.8. The State does not believe that such an instruction should be given, since unfettered discretion to recommend mercy is just that: unfettered discretion.

B. Question No. 2

Question No. 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 a person shall be eligible for parole[.]"? (Emphasis and ellipses in original.)

Answer: The Court's answer to Question 2 is no.

In light of this Court's precedents, all of which were acknowledged by the court below, it is difficult to understand why the court certified Question 2.

In *State ex rel. Shelton v. Painter*, 221 W. Va. 578, 586, 655 S.E.2d 794, 802 (2007), the Court held that:

> In the present case, where the actions of trial counsel could not have affected the finding of guilt, we believe that it would be a waste of judicial resources to require an entirely new trial. Therefore, rather than require a new trial on the issues of guilt and penalty, we believe the more prudent course would be to require a limited new trial only on the penalty issue – whether or not the appellant should or should not receive mercy.

See also State v. Finley, 219 W. Va. 747, 753, 639 S.E.2d 839, 845 (2006) and *State v. Doman*, 204 W. Va. 289, 512 S.E.2d 211 (1998), both cited by the Court in *Shelton*.

Perhaps the court below agreed with the argument made in the Appellant's brief: that *Doman* was a per curiam opinion that overstepped its bounds and should be overruled; and that Finley and *Shelton* were bereft of ". . . any significant statutory analysis . . . or syllabus points . . .," and should therefore (presumably) be overruled as well.

Initially, the Appellant attempts to "constitutionalize" an argument of statutory construction by making the sweeping pronouncement that he ". . . 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." (Appellant's Brief at 34.) The first phrase is based upon death penalty jurisprudence, which this Court has already rejected as precedent in the analysis of § 62-3-15; and the second phrase reads something into the statute that just isn't there, i.e., a requirement that any decision as to mercy be part of a new trial on guilt/innocence. (The Appellant does not explain how this Court missed that requirement in *Doman*, *Finley* and *Shelton*.)

Next, the Appellant notes that in at least seventeen states,[8] state legislatures have specifically authorized the impaneling of another jury to determine the sentence if a judgment is reversed and remanded only for sentencing error. This proves, claims the Appellant, that if the West Virginia Legislature intended to permit such a procedure, it would have so provided in W. Va. Code § 62-3-15.

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[8]See Appellant's Brief at 33-34 n.2.

The problem with this argument is that it pits the weakest possible maxim of statutory construction[9] against the very practical considerations outlined by the Court in *Doman*, *Finley* and *Shelton*. Further, it fails to take into account that where a sentence is reversed solely on the basis of instructional error,[10] rather than admission of improper evidence, there is no argument that the error could have affected the validity of the conviction.

The Appellant's next argument is that where the same jury finds guilt and determines mercy, 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 v. McCree*, 476 U.S. 162, 180-81, 90 L. Ed.2d 137, 152-53, 106 S. Ct. 1758, 1769 (1986).

The Appellant's reliance on *Lockhart* is misplaced, to say the least. In the quoted language, the Court was merely summing up a party's argument – ironically, the State's argument, since the defendant was arguing that the Constitution requires a different jury to determine guilt and punishment. The Court did not find that the same jury was required to perform both functions; it simply held that this was constitutionally permissible.

It must be noted that the defendant's reliance on some notion of "residual doubts' is downright distasteful; if jurors have doubts about a defendant's guilt, the defendant is entitled to an acquittal, not a lighter sentence.

The Appellant's next argument is that there is no saving of judicial resources in remanding a case for a sentencing hearing, "... since a jury deciding only the question of mercy would have to

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[9]Since West Virginia does not maintain any records from which legislative intent can be reasonably inferred, all maxims involving such intent are a stretch.

[10] Here, as in *Doman*, the only basis for reversing the Appellant's sentence is the trial court's error in instructing the jury that parole eligibility would arise in ten years rather than fifteen.

receive essentially the same evidence as the jury that determined guilt." (Appellant's Brief at 38-39.) This argument gives no credit whatsoever to this state's trial judges, who are more than capable of determining that (a) evidence relevant to conviction is irrelevant to the issue of mercy; or (b) even if relevant, evidence should be excluded as cumulative, confusing or a waste of time; or (c) even if relevant, evidence is more prejudicial than probative with respect to the issue of mercy. The argument also gives no credit to the substantial interest of the State in the finality of a conviction, the integrity of which has been upheld on appeal. Where, as here, a defendant has been convicted of a crime

... after a fair trial,

... where he was represented by competent counsel,

... before an impartial judge,

... and a jury of his peers,

... based on properly admitted evidence,

... that proved guilt beyond a reasonable doubt,

the State and its citizens have a right to have that conviction stand.

The Appellant's final argument is that it is advantageous to a defendant to have the same jury decide guilt and then punishment, because ". . . [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 jury who has not." (Appellant's Brief at 37.)[11]

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[11]The Appellant cites *State v. LaRock*, 196 W. Va. 294, 314, 470 S.E.2d 613, 633 (1996) for this statement. *LaRock* says no such thing; the case dealt with the relative advantages and disadvantages of unitary and bifurcated proceedings.

At best, this argument is not supported by one shred of empirical evidence, and at worst, it is ridiculous. A jury that has just sat through your trial, rejected your testimony (if you testified), your witnesses' testimony (if any) and the arguments of your counsel, and then concluded beyond a reasonable doubt that you committed a crime so serious the statutory penalty therefor is life without possibility of parole, can hardly be said to be an ideal jury – from the defendant's point of view – to decide whether it wants to add a recommendation of mercy to its verdict of guilt.

C. Question No. 3

Question No. 3: 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?

Answer: This Court finds that the answer to this question depends in part on the determination on how the first two questions are answered. With respect to Question 3, it is this Court's position that since the burden is on the State, (based on the answer to Question 1), the State would be required to present its case first.

With respect to Question No. 3, the answer of the court below is no answer at all. The court seems to suggest that when a court grants discretionary bifurcation, the necessary procedure is that (a) the State is required to present its case first, but (b) is precluded from presenting any evidence that the jury didn't hear in the hours or days immediately preceding.

As set forth in an earlier section of this brief, this Court has already given the trial court precisely the guidance that the court below seeks. In *State v. Rygh*, 206 W. Va. 295, 296, 524 S.E.2d 447, 448 n. 1 (1999), the Court outlined the procedure for a bifurcated mercy proceeding and answered Question No 3:

> 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. 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. We would anticipate that a defendant would ordinarily proceed first in any bifurcated mercy phase. We emphasize that the possibility of bifurcation of a mercy phase is not an open door to the expansion of the ambit of evidence that the prosecution may put on against a defendant, in the absence of the defendant opening that door to permit narrowly focused impeachment or rebuttal evidence from the prosecution.

First, Justice Starcher wrote for a unanimous court, no one has the burden of persuasion or proof at this stage of the case. By proving the defendant's guilt beyond a reasonable doubt, the prosecution has already secured a life without mercy sentence pursuant to W. Va. Code § 62-3-15. The only issue now is whether the jury will, in its discretion, recommend mercy.

Second, logic dictates that the defendant will ordinarily go first, since the prosecution's mercy evidence, if any, will be "narrowly focused impeachment or rebuttal evidence."

Third, even impeachment or rebuttal evidence will have to be evaluated by the trial court to ensure that, even if relevant, its prejudicial impact does not outweigh its probative value. This is a task that trial judges undertake every day.

The only procedural wrinkle in all this – and perhaps the reason that Justice Starcher said the defendant would "ordinarily" go first in a bifurcated proceeding – is in the rare case where, as here, the jury deciding the mercy issue did not hear the trial evidence. In such a situation, the State respectfully suggests that the trial judge should have the discretion to decide how much, if any, trial evidence the State may re-present in order to demonstrate the circumstances of the crime, after which the defendant can present any evidence deemed relevant to mercy, after which the State can present "narrowly focused impeachment or rebuttal evidence." Alternatively, the trial judge could simply

instruct the jury, at the outset of the proceeding, that another jury has found the defendant guilty beyond a reasonable doubt of the crime, and that this trial is solely for the purpose of deciding whether the defendant will be eligible for parole.

The former procedure is more advantageous to the State, although it necessitates some re-invention of the wheel. The latter procedure is more advantageous to the defendant, although it will surely engender more vigorous argument as to what constitutes that "narrowly focused impeachment or rebuttal evidence." But again, which procedure to use is exactly the sort of decision that trial judges make everyday, based upon a whole host of factors that will differ from case to case.[12]

Once again, we get to the thorny issue of unanimity, and it seems apparent (now that the elephant's presence in the room has been acknowledged) that following the presentation of evidence, the jury should be instructed that its recommendation of mercy must be unanimous. To be silent – as judges have been for decades in unitary proceedings – is to invite confusion in a bifurcated proceeding.[13] And to hold that a less-than-unanimous recommendation of mercy is sufficient would defeat the legislative mandate that if a person is convicted of first degree murder, ". . . 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. . . ." W. Va. Code § 62-3-15. Although the Legislature saw fit to include a proviso that permits a recommendation of mercy, nothing in the statutory language indicates that fewer than all of the jurors

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[12]Some of those factors would logically be the same ones that would have guided the judge's discretionary call to bifurcate the proceedings in the first place. Syl. Pt. 6, *State v. LaRock*, 196 W. Va. 294, 313, 470 S.E.2d 613, 632 (1996).

[13]The State believes that if juries in bifurcated proceedings are instructed that their recommendation of mercy must be unanimous, then juries in unitary proceedings must be so instructed as well.

could make that recommendation. This Court would have to do much more than interpret the statute to arrive at this result; it would have to re-write the statute

III.

CONCLUSION

All of the certified questions in this case reflect the (apparent) belief of the court below that in a capital case, the State has to prove that a defendant is not entitled to mercy. As set forth herein, this is simply not the law; pursuant to W. Va. Code § 62-3-15, all the State has to prove is that the defendant is guilty of the charged crime and the sentence of life without mercy is automatic. *State ex rel. Leach v. Hamilton, supra,* 280 S.E.2d at 64; *State v. Miller, supra,* 178 W. Va. at 621, 363 S.E.2d at 508.

Further, the import of the certified questions is that when this Court made bifurcated mercy proceeding available as a matter of trial court discretion, the result was to make an otherwise constitutional statute unconstitutional. If the Court's decision in *State v. LaRock*, 196 W. Va. 294, 313, 470 S.E.2d 613, 632 (1996) has really had this effect – if procedures that have been upheld numerous times in unitary proceedings are unconstitutional in bifurcated proceedings – then the remedy should be to reverse *LaRock*, not to re-write W. Va. Code § 62-3-15.

Further, although a defendant may well seek to put on evidence that might lead a jury to recommend mercy (for example, demonstrating his or her youth, emotional or mental disability, remorse, and the like), and although the State may thereupon seek to rebut that evidence (for example, demonstrating that while the defendant is young in years, he or she is old in criminal experience, and the like), the jury's decision whether or not to recommend mercy remains completely discretionary. That discretion cannot be abused and is not reviewable, unless this Court wants to

accept the Appellant's invitation to develop "mercy standards," in which case the recommendation of mercy is no longer discretionary.

Finally, this Court has already held, and should continue to hold, that its earlier decision to permit bifurcation of mercy proceedings does not serve to incorporate death penalty jurisprudence into the mix. Death penalty cases are fundamentally different, in that:

Juries in death penalty cases are "death qualified" at the very outset, *Witherspoon v. Illinois*, 391 U.S. 570, 20 L.E.2d 776, 88 S.Ct. 1770 (1968), a procedure that has no corollary in life-with-or-without mercy proceedings; and

Juries in death penalty cases are instructed with respect to specific standards that are intended to direct and limit their discretion, whereas in life-with-or-without mercy proceedings a jury's decision to recommend mercy is purely discretionary; and

Juries in death penalty cases are instructed that they must assess whether certain aggravating factors and mitigating factors have been established by the evidence, whereas again, in life-with-or-without mercy proceedings a jury's decision to recommend mercy is purely discretionary and does not require an evidentiary basis; and

Juries in death penalty cases may only impose a sentence of death based on a determination that the aggravating factors outweigh the mitigating factors, whereas again, in life-with-or-without mercy proceedings a jury's decision to recommend mercy is purely discretionary; and

The decision of a jury in a death penalty case is always reviewable, since it can be evaluated after the fact in light of the precise standards directing and limiting its discretion, whereas in life-with-or-without mercy proceedings a jury's decision with respect to a recommendation of mercy is not reviewable.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By counsel

DARRELL V. McGRAW, JR.
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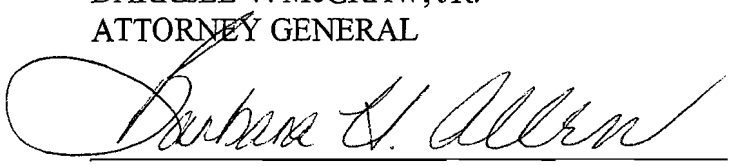

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CERTIFICATE OF SERVICE

I, Barbara H. Allen, hereby certify that a copy of the within "Brief of Appellee State of West Virginia" was served on the individuals set forth below, by first class mail addressed to their respective office addresses, on this the 31st day of August, 2009:

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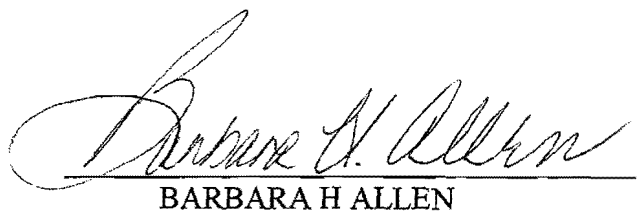

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