

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee,

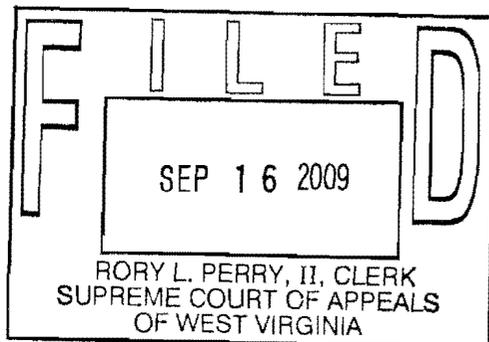
v.

Supreme Court No. 34860
Circuit Court No. 96-F-42
(Greenbrier)

BILLY RAY MCLAUGHLIN,

Appellant.

REPLY BRIEF FOR APPELLANT
ON CERTIFIED QUESTIONS



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REPLY ARGUMENT

- 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. (Responding to State's Brief, pages 4-12).**

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

Both the State and McLaughlin agree the circuit court erred in concluding the State has the burden of proof beyond a reasonable doubt on the mercy issue. See State's Brief 6-7. The parties further agree that current law places the burden of proof on neither party. The State, however, believes that the standard jury instruction on mercy, quoted at pages 7-8 of the State's Brief, is sufficient. McLaughlin disagrees. As pointed out in McLaughlin's opening brief, pages 11-12, a reasonable juror could interpret current mercy instructions to place the burden of proof on that issue on the defendant. See, e.g., State v. Stamm, 222 W.Va. 276, 283 n.10, 664 S.E.2d 161, 168 n.10 (2008). That concern led the circuit court to put the burden of proof on the State, albeit incorrectly. Thus, the standard jury instruction on mercy promoted by the State is not sufficient.

Furthermore, the State did not address or dispute two deficiencies in the current mercy instructions identified by McLaughlin: (1) the jury is not told that neither party has the burden of proof; and (2) the jury is not told they have complete discretion in making the mercy decision and they may grant or deny mercy with or without reason. See Appellant's Brief 16. These two deficiencies in our current mercy instructions should be corrected. See proposed instruction, attached in Appendix.

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

The State does not actually address in this section of its brief (pages 8-10) whether the law requires the jury's mercy decision to be unanimous, the issue the circuit court decided.¹ Instead, the State diverts the Court's attention to "a host of new problems," State's Brief 9, which may occur if the jury cannot reach a unanimous verdict, which McLaughlin will address below.

The State further fails to cite or acknowledge the controlling West Virginia law on this issue, Rule 31, W.Va.R.Crim.P., which requires that a jury's verdict "shall be unanimous." Because the mercy decision is part of the jury's verdict, the only reasonable interpretation is that the jury's verdict with respect to the mercy decision must be unanimous.

The State claims "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." State's Brief 8. On the contrary, the jury is deciding whether the defendant will spend the rest of his natural life in prison or whether he will be eligible for parole in 15 years, two very different sentences. The problem the circuit court recognized, and apparently the State does not, is that one juror voting no on mercy could prevent the return of a recommendation of mercy despite 11 other jurors voting to recommend mercy. This cannot happen if the jury is told its mercy decision must be unanimous. See proposed instruction, attached in Appendix.

The State further contends the jury's verdict of guilt and mercy decision can be split up or separated if the jury cannot agree on the mercy issue. In other words, if the jury is not

¹ The State does say, in regard to Certified Question 3, that the jury's mercy recommendation must be unanimous. State's Brief 18-19. However, as argued in McLaughlin's initial brief, pages 19-22, and pointed out below, such an instruction is inadequate unless the jury is told their decision as to mercy must be unanimous.

unanimous on the mercy issue, the jury could still return a partial verdict of guilty and the trial court would be required to sentence the defendant to life without mercy. See State's Brief 9. Again, the State's analysis is wrong. Unlike the typical criminal case, in a first-degree murder case, the jury not only determines guilt but also the sentence. Thus, the mercy decision is an essential part of the jury's verdict as it is a prerequisite to the jury's sentencing the defendant to either life with or without parole. The State's "default position" argument, i.e., if the jury "hangs" on the mercy issue, effectively takes that sentencing authority away from the jury and gives it to the trial court. That is contrary to the sentencing authority vested in the jury by W.Va. Code § 62-3-15 (1994). In other words, absent a unanimous verdict on whether to recommend mercy, the jury's obligation and therefore the procedure required by the statute is not complete. Moreover, since the jury determines the sentence under West Virginia law, the defendant has a substantive due process right to have his sentence determined by that body, not the trial judge. See Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S.Ct. 2227, 2229 (1980), discussed in Appellant's Brief 34-35 (Where state law provides for imposition of punishment at discretion of the jury, the defendant 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.").

The State further fails to address the Supreme Court's decision in Andres v. United States, 333 U.S. 740, 746-49, 68 S.Ct. 880, 883-86 (1948), discussed in McLaughlin's initial brief at 20-21, in which the Court rejected the same arguments the State is making in interpreting the provisions of a federal death penalty statute virtually identical to W.Va. Code § 62-3-15 (1994).² The Supreme Court held that "[a] verdict embodies in a single finding the conclusions

² The federal statute, 18 U.S.C. § 567 (1940), provided, in pertinent part, "[i]n all cases where the accused is found guilty of the crime of murder in the first degree. . . the jury may qualify their verdict by adding thereto 'without capital punishment.'" Id. at 746, 68 S.Ct. at 883.

by the jury upon all the questions submitted to it []. . . the jury's decision upon both guilt and whether the punishment of death should be imposed must be unanimous." *Id.* at 748-49, 68 S.Ct. at 884. See also the concurring opinion of Justice Frankfurter, in which he states the jury should be instructed, *inter alia*, "that a verdict involves a determination not only of guilt but also of punishment that is to follow upon a finding of guilt; that the verdict as to both guilt and punishment is single and indivisible; that if they cannot reach [unanimous] agreement regarding the sentence that should follow a finding of guilt, they cannot render a verdict[.]" *Andres*, 333 U.S. at 766, 68 S.Ct. at 892.

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

The State does not dispute McLaughlin's argument that it is "a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." *Gregg v. Georgia*, 428 U.S. 153, 192-93, 96 S.Ct. 2909, 2934 (1976). The State, however, in effect argues this principle doesn't apply to a decision by the jury to deny mercy and require the defendant to spend the rest of his natural life in prison, the harshest punishment under West Virginia law.

The State correctly observes that standards for deciding the mercy issue would interfere with the jury's unfettered discretion. State's Brief 11.³ That unfettered discretion is, of course, the problem. The jury can now make the extremely weighty and consequential mercy decision, or whether the defendant will be eligible for parole after 15 years, arbitrarily, subjectively, and capriciously. As demonstrated in McLaughlin's initial brief, page 18, several courts have

³ The State incorrectly notes that McLaughlin's lack of standards argument is inconsistent with his first argument that the State should not have the burden of proof on mercy as he was merely pointing out the trial court's ruling was inconsistent with current law on the issue of mercy, not that current law is constitutionally valid.

recognized that because the exercise of mercy depends on the emotions and subjective feelings of jurors, it is not a rational or logical decision-making process. Do we really want West Virginia juries imposing the most severe sentence under West Virginia law pursuant to such a process? The State does not deny that the jury's mercy decision under our current system can be arbitrary – but nevertheless defends it. If a judge makes an arbitrary decision and imposes an excessive sentence, it is an abuse of discretion and can be corrected. If a jury arbitrarily sentences a defendant to prison for the rest of his life, for example, because he is a minority, physically unattractive, or is a homosexual, somehow that is permissible. Because the jury's discretion has no bounds as the mercy decision can be made for any reason, and depends to a large extent on subjective feelings and emotions, without proper instructions there is no way to insure the jury's decision will be made within recognized legal bounds. See proposed instruction which would at least eliminate discriminatory decisions, attached in Appendix.

The State further notes that State v. Miller, 178 W.Va. 618, 363 S.E.2d 504 (1987), which rejected standards, pointed out that factors in a mercy instruction may be directly related to possible defenses and may confuse the jury. State's Brief 11. That argument would not be applicable to a bifurcated hearing where the jury had already found guilt. At a unitary trial, any possible jury confusion could be avoided by clear jury instructions regarding the possible defense or element involving that factor and that it could be considered as a mitigating circumstance only if the jury first determined the defense was not applicable.

II. The Plain Language Of W.Va. Code § 62-3-15 (1994) (2005 Repl. 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 Court Decide The Issue Of

Mercy, Should Be Reconsidered And Overruled. (Responding to State's Brief, pages 12-16).

The State relies on State ex rel. Shelton v. Painter, 221 W.Va. 578, 586, 655 S.E.2d 794, 802 (2007), 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), to support its argument that a different jury than the one that finds guilt may determine the mercy issue. State's Brief 12-13. However, none of those cases, nor the State in its brief, address the plain language of W.Va. Code § 62-3-15 (1994) (2005 Repl. Vol.) which is clear, without ambiguity, and must be accepted without resort to interpretation. See Rohrbaugh v. State, 216 W.Va. 298, 305, 607 S.E.2d 404, 411 (2004).

The plain meaning of the words in the statute is that “the jury” that decides guilt is “the jury” that may make a recommendation of mercy. The statutory reference to the jury’s authority to recommend mercy is obviously to the same jury that decides guilt, not another, different jury assembled at some time in the future. See Jones v. People, 393 P.2d 366, 367 (Colo. 1964), United States v. Jackson, 390 U.S. 570, 577, 88 S.Ct. 1209, 1214 (1968), State v. Penix, 513 N.E.2d 744, 748 (Ohio 1987), and Chubb v. South Carolina, 401 S.E.2d 159, 161 (S.C. 1991), discussed at pages 28-30, and 32-33 of McLaughlin’s initial brief, cases which, in principle, reach the same conclusion, and are not mentioned in the State’s brief. As noted by the Ohio Supreme Court in Penix, 513 N.E.2d at 748, “[t]here are simply no statutory provisions for another jury to make these crucial determinations. . . we may not create such a procedure out of whole cloth.” This Court may not rewrite W.Va. Code § 62-3-15 (1994) simply because it believes it would be a waste of judicial resources to require a complete new trial. See Perito v. The County of Brooke, 215 W.Va. 178, 184, 597 S.E.2d 311, 317 (2004) (a statute may not be rewritten by court). See also Eastham v. City of Huntington, et al., 222 W.Va. 661, 668, 671 S.E.2d 666, 673 (2008) (Benjamin, J., concurring) (“Justice is defined by a court’s measured

application of the rule of law. It should not be the ambition of judges to elevate their own personal policy preferences over the rule of law. When judges advance their own notions of what they believe the law should be rather than what the law is, such judges engage in a judicial activism which is disrespectful to our constitutional system of governance and which is ultimately destructive to public confidence in the judiciary.”). The language and plain meaning of the statute must control.

The State further claims that McLaughlin attempts to “constitutionalize” his statutory construction argument by using death penalty jurisprudence to assert he has a constitutional due process right to be sentenced according to the statutory procedure of W.Va. Code § 62-3-15, which in this case requires the mercy decision to be made at a new trial on guilt/innocence. State’s Brief 13. The State’s claim is incorrect. McLaughlin’s constitutional claim is based on Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227 (1980), which is not a death penalty case. As discussed at page 34-35 of his initial brief, and at page 3 above, Hicks held that where a defendant is sentenced by a jury, he has a substantive due process right to the jury’s decision as to sentence. In this case, under W.Va. Code § 62-3-15 (1994), that means the jury that decides guilt.

Next, the State asserts McLaughlin cited statutes in 17 (actually 18) states authorizing the impaneling of a new jury to determine sentence if the judgment is reversed only for sentencing error to support his claim that if the West Virginia Legislature intended to permit such a procedure, it would have so provided in W.Va. Code § 62-3-15. State’s Brief 13. The State misconstrues McLaughlin’s argument. McLaughlin did not cite those statutes for the purpose of showing legislative intent but to demonstrate that it is the legislature’s, not the Court’s, province to determine punishments and how they will be imposed. The legislature made that

determination in W.Va. Code § 62-3-15 and that's the procedure to be followed, not another involving impaneling a different jury.

The State further dismisses McLaughlin's argument that a defendant may benefit at the sentencing phase from the jury's residual doubts about guilt; and that his reliance on Lockhart v. McCree, 476 U.S. 162, 180-81, 106 S.Ct. 1758, 1769 (1986), is misplaced. State's Brief 14. First, the State does not address McLaughlin's argument, page 36 of his brief, acknowledged by the Supreme Court in Lockhart, that questions of guilt and punishment are "necessarily interwoven," since "much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase[.]" Lockhart, 476 U.S. at 181, 106 S.Ct. at 1769. Further, "residual doubt" was an argument the State made in Lockhart to support its use of a unitary trial and was clearly recognized by the Lockhart Court as it even quoted the opinion of the dissenting circuit judge which noted the importance of residual doubt in capital cases. See state and circuit cases recognizing residual doubt at page 37 of McLaughlin's initial brief.

The State also does not really dispute McLaughlin's contention that a jury just deciding the mercy issue will have to receive essentially the same evidence as the jury that determined guilt. Instead, the State says McLaughlin's argument gives no credit to our state trial judges who are capable of determining what evidence is relevant, cumulative, etc. State's Brief 15. However, that response does not answer this argument because, as noted by the Supreme Court in Lockhart, "much of the evidence addressed 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." Lockhart, 476 U.S. at 181, 106 S.Ct. at 1769. Thus, as a practical matter there will not be a waste of judicial resources in requiring a new trial.

To the contrary, it will be much easier to conduct a complete new trial than to listen and rule on the arguments by both parties as to whether each piece of evidence admitted at the original trial should be admitted at the mercy trial, whether new evidence should be admitted, and how the trial on the limited issue of mercy should proceed. That is precisely why the Finley and Shelton cases, which were reversed by this Court in 2006 and 2007, respectively, have still not had the limited trial on mercy – neither the courts nor counsel really know how to proceed. See amicus brief of Shane Shelton. The circuit court in this case even stated in its certification order that “[n]ot just this Court but every circuit court is unsure of the application of the procedures in a trial on the issue of mercy.” 12/18/08 Order, Supreme Court Record (SCR) 1131-32. The circuit court further stated this Court’s answers would “assist judges with clear rules and procedures in such matters.” Id. at SCR 1132.

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. (Responding to State’s Brief, pages 16-19).

The State apparently agrees with McLaughlin that the prosecution is limited in the mercy stage of a bifurcated trial to the presentation of evidence introduced at the guilt stage of trial and rebuttal of evidence presented by the defendant. State’s Brief 16-17. The State is incorrect, however, in stating that the circuit court suggested in its answer to the certified question that the prosecution is precluded from presenting any evidence not previously presented to the jury at the guilt stage. Id. at 16. As explained in McLaughlin’s initial brief, pages 40-41, the circuit court below held to the contrary by ruling that the prosecution may present additional Rule 404(b), WVRE, witnesses that did not testify at McLaughlin’s original trial. (3/20/08 Tr. 29-32). Although the State did not address this ruling in its brief, the State would apparently disagree

with it based on this Court's ruling in State v. Rygh, 206 W.Va. 295, 297 n.1, 524 S.E.2d 447, 449 n.1 (1999), upon which McLaughlin likewise relies.

Finally, the State asserts that at the conclusion of the mercy trial "the jury should be instructed that its recommendation of mercy must be unanimous." State's Brief 18. As stated at pages 2-3 above, and in McLaughlin's initial brief, pages 19-22, without additional instructions this is an inadequate instruction because jurors could vote 11-1 to recommend mercy and would likely understand from this instruction they could not recommend mercy because they were not unanimous. That is why the Supreme Court in Andres found such an instruction inadequate and held that the jury must be instructed that their decision whether to impose or not to impose the death penalty must be unanimous. Andres, 333 U.S. at 752, 68 S.Ct. at 868.

CONCLUSION AND RELIEF REQUESTED

The State argues the Court should not incorporate death penalty jurisprudence into first-degree murder trials or bifurcated mercy proceedings. State's Brief 20. While that is generally true because the statutory schemes for determining guilt and punishment in death penalty cases are typically different, where there are similar statutes or principles involved, our jurisprudence can benefit. For example, in State v. Williams, 172 W.Va. 295, 307, 305 S.E.2d 251, 263 (1983), the Court cited death penalty cases in recognizing a defendant has a right to question jurors as to the sentence or whether they were unalterably opposed to recommending mercy in a first-degree murder case. See also the Andres, Jones, Jackson, and Penix death penalty cases, cited at pages 3 and 6 above, which involved similar statutory analysis applicable to this case.

Finally, the State is correct that the jury's discretion regarding mercy under current law can neither be abused nor reviewed because it is without bounds or standards. State's Brief 19.

The same cannot be said for practically every other judge or jury decision of such great consequence. This is another reason why the current statute's lack of standards render it unconstitutional.

Even if the Court disagrees, the Court should nonetheless insure the jury is properly instructed under current law. Attached in the Appendix is a proposed instruction which would do that.

For these reasons, McLaughlin respectfully requests the Court to grant the relief previously requested at page 44 of his initial brief.

Respectfully submitted,

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APPENDIX

Proposed Mercy Instruction (Assuming Current Law Is Constitutional)

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.

Neither the State of West Virginia nor the Defendant has any burden of proof with respect to your decision whether to recommend mercy. This means the State does not have to prove the defendant is not entitled to mercy and the Defendant does not have to prove he is entitled to mercy. Your decision whether to recommend mercy or not recommend mercy is a matter totally within your discretion and you may recommend mercy with or without reason, or you may decline to recommend mercy with or without reason. It is a matter wholly within your discretion, with the following exception. You are further instructed that in considering whether or not to recommend mercy, you shall not consider the race, color, religious beliefs, national origin, sex, or sexual orientation of the Defendant or any victim, and you should not withhold a recommendation of mercy unless you conclude that you would do so for the crime in question no matter what the race, color, religious belief, national origin, sex, or sexual orientation of the Defendant, or any victim, may be. The verdict form will contain a certification to this effect which each of you must sign.*

You are further instructed that just as your decision as to guilt must be unanimous, your decision whether to recommend mercy must likewise be unanimous. This means all twelve jurors must unanimously agree to recommend mercy or unanimously agree to not recommend

* This instruction prohibiting discrimination is patterned after a similar instruction required to be given in federal death penalty cases by 18 U.S.C § 3593(f) (2002), cited in McLaughlin's initial brief, page 19.

mercy. Thus, you must unanimously agree on both the issue of guilt and whether to recommend mercy before you may return a verdict.

If you should recommend mercy, the Defendant shall be confined in the penitentiary of this State for life but 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 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 be available; and
- (e) The facts and circumstances of the crime; and
- (f) The demeanor of 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 (i) 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.

CERTIFICATE OF SERVICE

I, Gregory L. Ayers, hereby certify that on the 16th day of September, 2009, I mailed a copy of the foregoing Reply Brief For Appellant On Certified Questions to Counsel for Appellee, Barbara H. Allen, Managing Deputy Attorney General, 1900 Kanawha Boulevard, East, Room E-26, Charleston, West Virginia 25305, and to the following Counsel for *Amicus Curiae*: Gina M. Stanley, Cabell County Public Defender Office, 320 Ninth Street, Huntington, WV 25705, and Timothy F. Cogan, Myers, Cogan, & Voegelin, L.C., 1413 Eoff Street, Wheeling, WV 26003.


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