

and asked him to leave, the Petitioner walked back to his car and produced a .22 caliber rifle from the trunk. Though the rifle was not actually loaded, the Petitioner began threatening the young men and women, all unaware that the Petitioner had no ammunition. He initially approached one of the young men, striking him with the barrel of the gun. The young man deflected the blow, and the Petitioner next turned the gun to one of the young women. He turned away only after she pled and promised to leave the company of the young men. The Petitioner then walked back to his car and left the scene. Five to ten minutes later, however, the Petitioner returned, this time driving a pick-up truck and armed with a slug-loaded, twelve-gauge shotgun. Recognizing the Petitioner, the group tried to flee as he opened fire from the window of his truck. The blast struck one of the young women, eighteen-year-old Krystal Peterson, in the back of the head, killing her instantly. The Petitioner fled the scene, but was apprehended by the Fairmont police later that morning.

II. Pre-Trial Proceedings

2. On August 18, 2005, a Marion County grand jury indicted the Petitioner for Murder of the First Degree under W. Va. Code § 61-2-1.
3. Before the Petitioner's trial, the State moved to bifurcate the trial into a "guilt phase" and a "mercy phase," thereby allowing the introduction of evidence in the mercy phase relevant for sentencing purposes but otherwise inadmissible in its case in chief. The Petitioner opposed the motion, fearing that the State was attempting to expand the scope of admissible evidence to include "sympathy witnesses." According to the defense, such witnesses were prohibited under State v. Rygh, 206 W. Va. 295 (1999) (opining in footnote that "bifurcation does not itself alter or expand the scope of admissible prosecutorial evidence to include evidence . . . historically inadmissible in murder cases"). Over the Petitioner's objection, the Court granted the motion to bifurcate. The Court denied the Petitioner's subsequent motion to preclude testimony from the victim's family during the mercy phase.

III. The Trial

4. The Petitioner's trial began in earnest on Tuesday, April 25, 2006. After the parties conducted voir dire, the Court empaneled a petit jury of twelve principal jurors and two alternates.
5. Throughout the course of the trial, three notable jury issues arose.
 - a. On Thursday, April 27, Juror Number Two, Benjamin Banks, informed the bailiff that he was an acquaintance of a defense witness who had recently testified. Juror Banks claimed that he did not recognize the witness's name when called during voir dire because he knew the witness only by his nickname, "Bumper." The Court questioned Juror Banks on the record:

THE COURT: Juror Number 2, would you please come forward?

(Whereupon, Juror Number 2, Benjamin Banks, approached the bench, and the proceedings continued out of the hearing of the other jurors as follows)

THE COURT: First of all, Mr. Banks let me explain this is not your fault. I very much appreciate you giving this information to the Bailiff. This is the exact right thing to do. I'm sure that they maybe didn't refer to him as "Bumper" when they were going through the names of the list of witnesses and that's what you knew him by. The Bailiff said that you said you and he ran around together.

JUROR BANKS: I've hung around with him a few times. Not real close, but I know who he is.

THE COURT: Would that cause you to favor or disfavor his evidence for his side of the case?

JUROR BANKS: No.

THE COURT: Okay. Stand over there for a minute please

(Whereupon, Juror Banks stepped away from the bench, and the proceedings were resumed out of the hearing of all jurors as follows)

THE COURT: In this situation, if it were the State's witness, I would ask defense counsel whether they wanted to disqualify him. I will give you the same option.

MR. WILSON: Could you give me just a second?

THE COURT: Sure.

(Whereupon, there was a discussion held off the record between Mr. Wilson and Ms. Hawkins)

MR. WILSON: Your Honor, the State would move to disqualify the juror.

MR. ZIMAROWSKI: I would oppose that. There's no basis. He's answered the questions properly. He's been here for three and a half days.

THE COURT: Overrule the objection. I'll—I'm going to excuse him.

Tr. at 770-772. The Court dismissed Juror Banks, replacing him with Alternate Juror Number One.

- b. Later that afternoon, another juror reported to the bailiff that Juror Number Six, Eileen Tennant, had shared opinions about the evidence with the panel. Juror Tennant allegedly indicated that, based on the medical and psychiatric evidence then before the jury, she "would never vote for first degree murder in this case." The Court similarly questioned Juror Tennant on the record:

THE COURT: Ms. Tennant, would you come up please?

(Whereupon, Juror Number 6, Eileen Tennant, approached the bench, and the proceedings continued out of the hearing of the jury as follows)

THE COURT: It's been reported by one of the members of the jury that you expressed an opinion as to what kind of verdict—

JUROR TENNANT: We've all expressed opinions.

THE COURT: Did you express an opinion about what kind of verdict you—

JUROR TENNANT: Express an opinion in what way?

THE COURT: Did you say that there was no way the State would get a first degree conviction?

JUROR TENNANT: I didn't say the State. I did not say that.

THE COURT: Okay. What did you say?

JUROR TENNANT: I said I don't believe that it would be first degree murder.

THE COURT: Okay, you're excused, ma'am.

JUROR TENNANT: Thank you.

MR. ZIMAROWSKI: Your Honor, we voice our objection to the dismissal of the juror.

THE COURT: Objection's noted. That's all.

Tr. at 860-861. After questioning Juror Tennant, the trial judge later remarked that the Juror's tone in responding to his questions was "irate" and accusatory, undermining his confidence in her impartiality. See Order Denying Defendant's Motion for New Trial (hereinafter "Post-Trial Order") at 3. As such, the Court dismissed Juror Tennant, replacing her with the remaining Alternate Juror Number Two.

- c. On Friday, April 28—the final day of the trial—Juror Number Three, Shannon Larry, expressed to the bailiff her concerns over a remark she overheard while at a convenience store the night before. She told the bailiff that she had discussed the incident in question with other members of the jury and that they encouraged her to bring it to the attention of the Court. The bailiff then advised the trial judge that Juror Larry wished to disclose something on the record. Notably, however, the bailiff did not inform the Judge that Juror Larry had discussed the incident with her fellow jurors.^[4] The Court questioned Juror Larry on the record:

JUROR LARRY: After I left here yesterday, I stopped at the Dairy Mart, and my son and I were—my son was in the car, and we had the windows down because it was hot. I just went into the Dairy Mart for a few minutes. It was crowded, and there were a lot of cars in the parking lot. I was in line, and there were a lot of people that were lined up behind me. I had my hands full. Behind me, I heard someone say, "There's one of those bitch jurors." It was a male voice. I did not turn around. I did not look. I did not want them to know I heard what they said. I paid for my stuff quickly, and as I was paying, I heard him say, "If we take a few of those out, Scoot^[5] will go free." I did not turn around. I was afraid for my son. I didn't want them—I didn't want to acknowledge that I heard them. I took off and left. I got in my car and I left. That's all.

THE COURT: Okay, let me ask you this. Do you feel that you can continue to sit on this jury and render a fair and impartial verdict?

JUROR LARRY: Oh, absolutely.

THE COURT: Do you think that would affect your deliberations in any manner whatsoever?

JUROR LARRY: No. No, not at all.

THE COURT: Do you want to ask her any questions?

MR. WILSON: No, sir.

THE COURT: Mr. Zimarowski?

MR. ZIMAROWSKI: Are you telling this Court that you have no bias against the defendant or in favor of the State because you were a subject of that kind of a verbal assault?

JUROR LARRY: No. I don't feel that way at all. I mean, people were—it could have been anybody. I don't know who it was. No, I did not feel—

MR. ZIMAROWSKI: You don't—

JUROR LARRY: No, I don't.

MR. ZIMAROWSKI: You aren't going to blame Mr. Lister, his family, his friends for that?

JUROR LARRY: I'm sure it wasn't him behind me.

MR. ZIMAROWSKI: It obviously wasn't him.

JUROR LARRY: No. No. No. I did not see them. It was just a comment that could have been made by anybody.

MR. ZIMAROWSKI: Okay.

THE COURT: Okay. You may have a seat.

Tr. at 905-906. Defense counsel moved to disqualify Juror Larry and consequently declare a mistrial on the basis of manifest necessity. Tr. at 907. The Court denied the motion, explaining on the record:

THE COURT: I will reserve an objection to the defense for my refusal to declare a mistrial and to refuse—my refusal to excuse the juror, which would require me declaring a mistrial. And my reason basically is: 1) This woman was very, very sincere when she said it would not affect her at all. Secondly, I don't want to establish a precedent whereby defendants or parties in cases can get jurors disqualified by yelling or screaming at them in public. She says that is not going to affect her.

MR. ZIMAROWSKI: Your Honor, just so the record is clear, we would again move for a mistrial on the basis of manifest necessity. Second, this Court has dismissed two jurors. The first juror that the Court dismissed was an individual who made similar representations that he could sit fairly and impartially when he recognized one of the defense witnesses. At that point, this Court—

THE COURT: I believe it was more than recognized. He ran around with him.

MR. ZIMAROWSKI: But he also stated unequivocally that he could sit fairly and impartially and decide this case, and the Court dismissed that juror.

The second juror apparently made a comment in the jury room questioning—expressing agreement with another defense witness who was a psychologist or psychiatrist who testified, and the Court dismissed that juror.

THE COURT: What's that again? She expressed what?

MR. ZIMAROWSKI: She expressed agreement with the—

THE COURT: She didn't express agreement with anything. She simply said she would not give a conviction of first degree murder. That's not an agreement with anybody.

MR. ZIMAROWSKI: Well, Your Honor, that was a witness favorable to the defense, and you dismissed that witness. We would suggest that this is a witness that is favorable to the State and you are not applying the same standards in keeping this witness, and I would move for a mistrial on the basis of manifest necessity and due process.

THE COURT: Okay. That's denied.

Tr. at 907-908. The trial proceeded.

6. Closing arguments concluded shortly before noon on April 28. The jury began deliberations upon returning from lunch and, after

deliberating for three hours, returned a guilty verdict for first-degree murder.

7. The trial proceeded to the mercy phase. Defense counsel again voiced objection to the introduction of testimony about the victim herself. The trial judge noted the objection and limited the State's evidence to "four short witnesses." See Tr. at 1019.
8. During the mercy phase, the State called (1) Regina Uvanni, Krystal Peterson's stepmother; (2) Jessica Kanno, Ms. Peterson's "best friend;" (3) Robert Lee Peterson, Jr., Ms. Peterson's father; and (4) Mary Ann Lavadiere, Ms. Peterson's mother. Each testified about the impact of Krystal Peterson's death on their respective lives and the lives of her broader family. Ms. Uvanni, Mr. Peterson, and Ms. Lavadiere were also asked by the State "what they have to say to the jury" with respect to mercy. See Tr. at 1023, 1026, 1028. All three witnesses asked the jury to withhold mercy. See Tr. at 1023, 1026, 1028-29.
9. Following this testimony, the State and the Petitioner gave closing arguments on the question of mercy, and the Court instructed the jury on the legal significance of its recommendation. See Tr. at 1032-34. After deliberating for approximately one hour, the jury returned a recommendation of no mercy. Tr. at 1035.

IV. Post-Trial Proceedings

10. The Petitioner filed a Motion for New Trial on May 8, 2006. The Motion challenged, in relevant part, the Court's failure to dismiss Juror Larry and its bifurcation of the trial.^[6]
11. The Motion was fully briefed by both parties, and the Court held a hearing on the Motion on June 26, 2006. There, the Court explained on the record that it had not learned of Juror Larry's disclosure to her fellow jurors until after the trial had concluded:

THE COURT: I have discussed this matter with counsel in chambers and we—counsel and myself discussed it with the bailiff and with regard to the juror on the last day of trial that reported having heard a threat in a Go Mart or Dairy Mart, the issue was whether or not she told the other members of the jury. She—when she reported it to the bailiff, she said, "I've talked to the other members of the jury about this, and they said I should tell the Judge." So she did in fact discuss it with other members of the jury.

Tr. at 1041-42. At the close of the hearing, the Court indicated that it would take the matter under advisement.

12. On August 24, 2006, the Court entered an Order Denying Defendant's Motion for a New Trial. In this Post-Trial Order, the Court explained its reasoning for denying the Motion:
 - a. As to its refusal to dismiss Juror Larry, the Court found that Juror Larry "clearly" did not believe that she had been threatened because "she did not report the incident to the store security or police, and she appeared for jury duty the following morning." Post-Trial Order at 6. The Court also found that because the comment was unrelated to the subject matter of the jury's deliberations,"—unlike the comment, the Court noted, at issue in Stockton v. Virginia, 852 F.2d 740 (4th Cir. 1988), a case on which the Motion heavily relied—it did not pose a significant threat of prejudice. Post-Trial Order at 6-7. Moreover, the Court quoted Stockton for its warning that "jury verdicts are not to be lightly cast aside,"

lest a court undermine the finality of the verdict or encourage harassment of jurors. 852 F.2d at 744 (citing Tanner v. United States, 483 U.S. 107 (1987), and Smith v. Phillips, 455 U.S. 209 (1982)). The Court also remarked that this was not a case of juror misconduct, and thus State v. Sutphin, 195 W. Va. 555 (1995), and its progeny did not govern its decision. Post-Trial Order at 7-8. Finally, the Court expressed concern for the “deleterious precedent” that the dismissal of Juror Larry might entail. Post-Trial Order at 8. Litigants, the Court reasoned, could easily delay a trial or undermine the finality of a verdict by commissioning a friend to anonymously threaten a juror. Id.

- b. The Court further explained that while it “considered the option of interrogating the entire jury panel . . . as to the [e]ffect the knowledge of the veiled threat might have upon those jurors with whom Juror [Larry] had discussed the incident,” it ultimately “decided not to do so.” Id. at 8. The Court believed such an inquiry would be fruitless as Rule 606(b) of the West Virginia Rules of Evidence precluded the jurors from so-testifying. Post-Trial Order at 9. In the absence of allegations of actual juror misconduct, the Court held that “no reason exists to set aside the jury verdict.” Id.
- c. The Court then proceeded to address the Petitioner’s objections to bifurcation. The Court that bifurcating the trial was within its “broad discretion” under State v. LaRock, 196 W. Va. 294 (1996). See Post-Trial Order at 10. The Court also noted that the West Virginia Rules of Evidence do not, by their own terms, apply to sentencing hearings, see Rule 1101 (providing that the rules “apply to all actions and proceedings” except “miscellaneous proceedings,” including those involving “sentencing”), and thus did not proscribe the consideration of victim impact evidence—an integral part of judicial sentencing procedure in non-homicide cases. See Post-Trial Order at 13-14. “It would be inconceivable,” the Court wrote, “that the law should be interpreted to provide that victims have the right to testify to the sentencing body in every felony case save the most serious felony—murder in the first degree; that in the most devastating and destructive of all crimes, the victims, the loved ones of the deceased, may be totally disregarded.” Id. at 15.

V. Appeals to the High Courts

13. The Petitioner filed a Petition for Appeal in the West Virginia Supreme Court of Appeals on February 6, 2007, arguing that the trial Court erred by:
 - a. refusing to declare a mistrial after learning of Juror Larry’s experience at the convenience store;
 - b. refusing to question the other jurors about the effect, if any, those remarks had on their deliberations;
 - c. granting the State’s motion to bifurcate the trial; and
 - d. allowing the State to put on testimony centering around Ms. Peterson during the mercy stage.^[7]
14. The Supreme Court of Appeals denied the Petition for Appeal by an Order dated June 5, 2007. See State v. Lister, No. 070358 (W. Va. 2007). Two opinions accompanied the Order. Justices Starcher and Albright dissented from the denial, arguing that the Supreme Court of Appeals should, as a rule, review all cases resulting in a sentence of life in imprisonment without parole. Chief Justice Davis and Justice Maynard filed an opinion concurring in the denial, noting that the constitutionality of that high Court’s

discretionary review has been upheld by the federal courts. Neither opinion addressed the merits of the Petition.

15. The Petitioner next filed a Petition for Writ of Certiorari in the United States Supreme Court on August 21, 2007. The Petition for Writ of Certiorari presented one question: "Whether the Sixth Amendment guarantee to a trial by an impartial jury is violated where a juror is verbally threatened by unknown individuals the night before closing argument, the threat is communicated to the entire jury panel, and, after denial of a Motion for Mistrial, the jury panel deliberates on both the guilty and sentencing phases of a capital case."
16. The United States Supreme Court denied certiorari without opinion on October 29, 2007. See Lister v. West Virginia, 552 U.S. 991 (2007).

VI. Collateral Proceedings

17. Petitioner filed this Petition for Writ of Habeas Corpus on May 20, 2014. The Petition revisits the objections raised in previous proceedings: the refusal to excuse Juror Larry, the refusal to inquire into the effect of the threatening remark on her fellow jurors following the trial, the bifurcation of the trial, and the admission of testimony from Ms. Peterson's friends and family during the mercy phase.
18. Finding probable cause to believe the Petitioner may be entitled to some form of relief, this Court granted the Petition and commenced omnibus proceedings by an Order dated May 30, 2014.

CONCLUSIONS OF LAW

1. No evidentiary hearing is necessary under Rule 9(b) of the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings. The parties agreed at the September 19, 2014 omnibus hearing that such a hearing would be superfluous.
2. Pursuant to Rule 9(c) of the West Virginia Rules Governing Post-Conviction Habeas Corpus Proceedings, the Court makes the following findings:
 - a. the Petitioner invokes both state and federal rights in his Petition; and
 - b. the Petitioner was advised concerning his obligation to raise all grounds for post-conviction relief in this proceeding.
3. The Petitioner is entitled to no relief on his claims regarding the court's management of jurors during the underlying trial.
 - a. As the issue of Juror Larry's qualification to remain on the panel was an issue "fully and fairly litigated" in the underlying proceedings, the Petitioner is entitled to relief only if the Court's decision was "clearly wrong." See W. Va. Code § 53-4A-1(b).
 - i. West Virginia's habeas statute "contemplates that every person convicted of a crime shall have a fair trial in the circuit

court, an opportunity to apply for an appeal to the [Supreme Court of Appeals], and one omnibus post-conviction habeas corpus hearing.” Losh v. McKenzie, 166 W. Va. 762, 764 (1981). This final safeguard, the habeas corpus proceeding, is a vehicle to “raise any collateral issues which have not previously been fully and fairly litigated.” Id. at 764. Accordingly, the statute permits collateral review “if and only if” the issues raised by the petition “have not been previously and finally adjudicated or waived in the proceedings which resulted in the conviction and sentence.” W. Va. Code § 53-4A-1(a). Stated otherwise, a petitioner is not entitled to “collateral review of evidentiary or constitutional questions . . . when those issues were fully and fairly litigated during the trial and a record of the proceedings is available.” Losh, 166 W. Va. at 765. Where a habeas petition invites a court to engage in this sort of review, “a court may apply rules of res judicata in habeas corpus because the issue has actually been fully litigated.” Id. (citing Call v. McKenzie, 159 W. Va. 191 (1975)).

- ii. In this case, the qualification of Juror Larry to remain on the panel was extensively litigated: first in real time during the trial, then on a post-trial motion for a new trial, next on a petition for appeal to the state supreme court, and finally on a petition for certiorari to the United States Supreme Court. To be sure, the denials of appellate review certainly lack the binding authority of res judicata.^[8] See Syl. Pt. 1, Smith v. Hedrick, 181 W. Va. 394 (1989) (“a rejection of a petition for appeal is not a decision on the merits precluding all future consideration on the issues raised therein”); see also Boumediene v. Bush, 550 U.S. 1301 (2007) (“order denying certiorari . . . is plainly not a judgment or decision on the merits”). But the very fact that the petitions were filed with and considered by the high Courts demonstrates that the Petitioner availed himself of every right of review guaranteed by the state constitution, the federal constitution, and then-existing law.^[9] See Billotti v. Dodrill, 183 W. Va. 48, 55 (1990) (due process clause of state and federal constitutions guarantees “right to petition for appeal [not] right to full appellate review”); see also Billotti v. Legursky, 975 F.2d 113 (4th Cir. 1992) (affirming constitutionality of West Virginia’s then-discretionary review), cert. denied, 507 U.S. 984 (1993). In sum, the issue of Juror Larry’s qualification satisfies the three elements of a “previously and finally adjudicated” issue under the habeas statute: (1) it was “previously and finally adjudicated . . . in the proceedings which resulted in the [Petitioner’s] conviction and sentence;” (2) it was settled by “a decision on the merits thereof after a full and fair hearing thereon;” and (3) “right of appeal with respect to such decision [was] exhausted.” See W. Va. Code § 53-4A-1(b). As such, principles of res judicata apply in full force.
 - iii. Generally, res judicata applies even when there is reason to question the soundness of the previous decision. See State ex rel. Richey v. Hill, 216 W. Va. 155, 162 (2004) (“An erroneous ruling of the court will not prevent the matter from being res judicata”). Section 53-4A-1 does provide one statutory exception to this rule in habeas proceedings: collateral review of a previously-adjudicated matter is permitted if the “decision upon the merits is clearly wrong.” W. Va. Code § 53-4A-1(b).
- b. The decision to retain Juror Larry was not clearly wrong.
- i. Though not extensively defined by existing law, “clearly wrong” is a standard of considerable deference. Moreover, any review under this standard must proceed against the backdrop of the “long-held rule” that the management of an

empaneled jury is within the “sound discretion” of the presiding judge. State v. Brown, 210 W. Va. 14, 21 (2001); see also State v. Oldaker, 172 W. Va. 258, 265 (1983) (“A trial court’s decision about a mistrial” related to an allegedly biased juror “will only be reversed for abuse of discretion”). In short, the Court’s review today is constrained on two ends: first by the “ample discretion” that even a direct review would accord the trial judge, and second by the deferential standard mandated by the habeas corpus statute.

- ii. This deference to the trial court is more than a mere exercise in judicial restraint. Rather, it is justified by the limitations of a post-hoc review of the record. In Thompson v. Keohane, 516 U.S. 99, 111 (1995), the Supreme Court explained that juror impartiality is a “factual issue” that “depends heavily on the trial court’s appraisal of [the challenged juror’s] credibility and demeanor.” Elsewhere, the Supreme Court has maintained that “only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener’s understanding of and belief in what is said.” Anderson v. City of Bessemer, 470 U.S. 564, 575 (1985). It is the trial judge who “was on the spot,” and is thus “better able than [a reviewing] court to decide wh[at] affected the substantial rights of the parties.” In re Tiffany Marie S., 196 W. Va. 223, 231 (1996). Disregarding the trial judge’s determination would reduce subsequent review to a combing of the record for “magic words”—that is, unadorned promises by the juror to be fair and impartial. See Black v. CSX Transp., 220 W. Va. 623, 629 (2007). But “[t]here are many critical aspects of [a] hearing which cannot be reduced to a writing and placed in a record.” Michael D.C. v. Wanda L.C., 201 W. Va. 381, 388 (1997). In this respect, the trial judge’s determination is invaluable and must be accorded “presumptive weight.” Thompson, 516 U.S. at 111.
- iii. Given this limited scope of review, the Court today is unable to find clear error below. Upon learning of the incident at the convenience store, the Court properly held a Remmer^[10] hearing and allowed the defense an opportunity to cross-examine Juror Larry. The juror stated in no uncertain terms that she could “absolutely” render a fair and impartial verdict and that the incident would “not at all” affect her deliberations in any manner. See Tr. at 906. Furthermore, she assured the trial court that she would not “blame Mr. Lister, his family, [or] his friends.” Id. The Court today need not accept these as mere “magic words,” as the trial judge later remarked on the record that Juror Larry appeared “very, very sincere when she said it would not affect her at all.”^[11] Tr. at 907. On review, the Court must give this determination presumptive weight and decline to second-guess the decision based on mere speculation about ulterior motives.^[12]
- iv. Similarly, the trial judge remarked that it “was clear to [him] that the juror did not believe that she had been threatened.” Post-Trial Order at 6. While the Court today may well consider Juror Larry’s allegations quite serious, it will not substitute its judgment for that of the trial judge who, it must be remembered, discussed the matter face-to-face with the juror herself. See Thompson, 516 U.S. at 111. If the trial judge found the comment to be relatively innocuous, this finding cannot be idly disregarded.
- v. The trial judge also expressed serious concerns about “deleterious precedent” that dismissing Juror Larry might establish, fearing that:

[a]ny defendant could commission a friend or stranger to anonymously threaten a juror to delay his or her trial or reverse the verdict therein. This could lead to a slippery slope, for it would inevitably become common knowledge that such behaviors would result in the dismissal of jurors or the reversal of convictions. Juror threats would become more frequent and this, in turn, would further discourage the public from participating in jury service. The integrity of the judicial system mandates strong response to such an attenuating and potentially incapacitating course of events.

Post-Trial Order at 8. The Court today is no less troubled by the potential dangers of such a precedent. As the Fourth Circuit recognized in Stockton v. Virginia, our justice system must vigilantly guard against the harassment of jurors. 852 F.2d at 745. As such, “jury verdicts are not to be lightly cast aside” in these instances. Id.

c. Likewise, the Court was not clearly wrong in denying the Petitioner’s motion for a new trial based on the effect, if any, that Juror Larry’s account had on her fellow jurors.

- i. To be clear, the Court today does not review a considered refusal to inquire into the effect of Juror Larry’s experience on her fellow jurors before the jury began deliberations. Nor does it review such a refusal before a verdict was rendered. Neither counsel nor the Court knew that Juror Larry had shared her experience with the other jurors until after a verdict was returned—she did not disclose this fact when questioned by the Court, nor did the defense elicit this information during cross-examination. In other words, this is not a case of information about potential prejudice arising “during a trial.” Cf. Syl. Pt. 2, State v. Sutphin, 195 W. Va. 551 (1995). Therefore, the Court today considers only whether it was clearly wrong to refuse such an inquiry after the verdict was returned, as requested in the Petitioner’s post-trial Motion.
- ii. The scope of review is limited on multiple fronts here as well. Not only is review under the habeas corpus limited to clear errors—see Conclusion of Law Number 3.a., supra—the Supreme Court of Appeals has held that, even on direct appeal, a “motion for a new trial on the ground of the misconduct^[13] of a juror is addressed to the sound discretion of the court.” State v. Daugherty, 221 W. Va. 15, 17 (2006) (quoting Syl. Pt. 1, Sutphin, 195 W. Va. 551)).
- iii. Furthermore, “the question as to whether or not a juror has been subjected to improper influence affecting the verdict is a fact primarily to be determined by the trial judge from the circumstances, which must be clear and convincing to require a new trial, proof of mere opportunity to influence the jury being insufficient.” Id. (emphasis added). This demanding standard serves to protect the integrity of the jury’s deliberations. While the right of a criminal defendant to a “fair trial by a panel of impartial, indifferent jurors” is a “priceless safeguard of individual liberty,” Irvin v. Dowd, 366 U.S. 717, 721-22 (1961), it must be balanced “against the dangers inherent in unfettered attempts to delve into the deliberating mind” after a verdict has been returned. Franklin D. Cleckley, Handbook on West Virginia Criminal Procedure at p. II-270. These dangers include the potential for “attempt[s] to influence or tamper with individual jurors after the verdict has been rendered,” and the need for finality in verdicts. State v. Scotchel, 168 W. Va. 545 (1981). As the trial judge intimated in his denial of Petitioner’s post-trial motion, it is a far greater thing to inquire into a final verdict than it is to, during the course of the trial itself, inquire into or otherwise mitigate the effect of irregularities. Accordingly, once a verdict has been returned, jurors “are entitled to the benefits of a presumption that they have done

their duty in accordance with their oath.” Cleckley, *supra*, at II-270 (citing United States v. Sorcey, 151 F.2d 899 (7th Cir. 1945), and United States v. Brown, 99 F. Supp. 527 (D.C. Alaska 1951), *aff’d*, 1201 F.2d 767 (9th Cir. 1953)).

- iv. In the instant Petition and in the underlying proceedings, the Petitioner argues that knowledge of the convenience store incident may have prejudiced the jury against him. Granted. It may have inflamed the jurors with a sense of indignation, or it may have suggested that the Petitioner associated with violent cohorts. But the “mere opportunity” that such information influenced the jury is insufficient. *See* Syl. Pt. 1, Sutphin, 195 W. Va. 551.^[14] Jurors are presumed to have executed their duties according to their oath: their promise to be fair and impartial, to consider only the evidence presented at the trial, to render a verdict based on the law and the particular factual circumstances described at trial. The Court today finds no “clear and convincing” evidence that the jury abnegated this oath, only circumstance and speculation. As such, it cannot conclude that the trial judge was “clearly wrong” in denying the Petitioner a new trial.
- v. Even if speculations about the effect of Juror Larry’s account were sufficient, the Petitioner would be entitled to no relief under State ex rel. Trump v. Hott and its progeny. The Trump Court held that “even where extraneous information adverse to the defendant has been revealed during jury deliberations, reversible error may not exist if the evidence of the defendant’s guilt is overwhelming. Moreover, the statements made against the defendant may be found sufficiently innocuous not to have prejudiced the defendant regardless of the evidence.” 187 W. Va. at 754. The Court recently revisited this exception in State v. Daugherty, again directing circuit courts to engage in this analysis before granting a new trial. 221 W. Va. at 18. Here, the only serious question left open at trial was whether the Petitioner’s capacity was so diminished as to preclude the mental state required for first degree murder.^[15] To assume the jury considered Juror Larry’s account in answering this question is to assume the jury approached their deliberations irrationally; as the trial judge noted in his Post-Trial Order, the comment at the convenience store was simply “not related to the subject matter of the jury’s deliberations.” *See* Post-Trial Order at 6; *cf.* Stockton v. Virginia, 852 F.2d 740 (1988) (jurors should not have remained on mercy panel after being told by community member that “they ought to fry the son of a bitch” defendant). The Court today does not believe that the trial judge was clearly wrong in concluding Juror Larry’s account did not “pose a reasonable possibility of prejudice” and thus did not necessitate a new trial under Trump. *See* 187 W. Va. at 753. This is especially true given the trial judge’s finding that the comment at the convenience store was innocuous, at least in its effect on the Juror actually threatened thereby. *See* Conclusion of Law 3.b.iii, *supra*.

4. Similarly, the Petitioner is entitled to no relief related to the mercy phase of the bifurcated trial.
 - a. As with the jury issues discussed above, all issues related to the mercy phase of the trial were “fully and fairly litigated” in the underlying trial and are thus reviewable only for “clear error.” W. Va. Code § 53-4A-1(b).
 - b. Binding authority from the Supreme Court of Appeals controls here: 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.” Syl. Pt. 6, State v. Juntilla, 227 W. Va. 492

(2011) (quoting Syl. Pt. 1, State v. Miller, 178 W. Va. 618 (1987)) (emphasis added). Although Petitioner's arguments to the contrary are well-taken, the trial judge was certainly not "clearly wrong" in refusing such an instruction.

c. Likewise, the Court today finds no clear error in allowing Ms. Peterson's friends and family to testify. The trial judge ensured that the State was limited to "four short witnesses," and the State asked each witness only a few questions. Tr. 1019-1029. The Court today believes, as it did immediately following the trial, that the quantum and quality of evidence was analogous to victim impact information customarily considered in a judicial sentencing proceeding. See Post-Trial Order at 13-14; see also State v. Tyler, 211 W. Va. 246 (2002) (recognizing statutory right of the "immediate family of a victim . . . to petition the [sentencing] court to consider facts that may have a bearing on the court's decision . . . to set a particular sentence"). The testimony may have roved somewhat beyond the scope of "evidence that would be admissible in a unitary trial." See State v. Rygh, 206 W. Va. 295, 296 n.1 (1999). But this limitation—mentioned only in a footnote in Rygh—must be read in light of the more recent State v. McLaughlin, 226 W. Va. 229 (2010). The McLaughlin Court unequivocally recognized that "[t]he type of evidence that is admissible in the mercy phase of a bifurcated first degree murder proceeding is much broader than the evidence admissible for purposes of determining a defendant's guilt or innocence." Syl. Pt. 7, 226 W. Va. 229 (emphasis added). Evidence need only be relevant to the question of sentencing and not unduly prejudicial. Id. Given the trial judge's broad discretion in evidentiary matters such as this, the Court is unwilling to conclude that the trial judge committed a clear, reversible error by allowing the jury to hear the same type of victim impact evidence typically considered by a sentencing judge. See Payne v. Tennessee, 501 U.S. 808, 827 (1991) (recognizing that "evidence about the victim and about the impact of the murder on the victim's family" may be legitimately relevant "to the jury's decision as to whether or not the death penalty should be imposed"). Absent authority from the Supreme Court of Appeals holding that victim impact evidence is inadmissible in mercy proceedings, the Court can perceive of "no reason to treat such evidence differently than other relevant evidence is treated." Payne, 501 U.S. at 827.

Accordingly, it is **ORDERED** that the Petition for Writ of Habeas Corpus be **DISMISSED** and that this matter be removed from the docket of this Court.

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ENTERED this 23rd day of December, 2014.

/s/Judge Michael J. Aloï

CIRCUIT JUDGE

* The Court apologizes for any irregularities in the formatting of this Order. Pursuant to an Administrative Order of the West Virginia Supreme Court of Appeals dated November 24, 2014, this Court is required to participate in a pilot program for the Court's e-filing system. As of now, this system does not recognize many of the word processing features utilized in preparing this Order. The Court has done everything in its power to approximate the original formatting of the Order, but has been told that until e-filing incorporates a more sophisticated word processing engine, it must accept the limitations herein.

[1] Though before this Court, the trial was presided over by my predecessor, Judge Fred L. Fox, who was then the circuit judge for this Division.

[2] As indicated at the September 19, 2014 hearing, the Court takes judicial notice of the entire record of the underlying criminal action, State v. Dayton Scott Lister, Criminal Case No. 05-F-90.

[3] One of the young men did, however, recognize the Petitioner. A few days earlier, John Goode was walking to the campus library when an individual in a red pickup truck called out to him. The driver of the truck incessantly asked Goode whether he "knew Billy" before remarking that he was "going to kill that fuckin' nigger." Tr. at 646-47. Goode testified to recognizing the Petitioner as the same individual driving the pickup truck several days prior. Tr. at 646.

[4] As Juror Number 3's initial disclosure to the Court did not touch on the fact that she had discussed the matter with her fellow jurors, this nuance was not

clearly addressed on the record until a later hearing on post-trial motions. See Finding of Fact No. 11, *infra*.

[5] “Scooter” is the Petitioner’s nickname. See Tr. at 276.

[6] The Motion for New Trial also raised two instructional errors. The Petitioner does not revisit those arguments in the Petition at bar.

[7] The Petition for Appeal also raised two additional grounds for relief, both related to jury instructions. The Petitioner does not revive these arguments in the instant Petition for Writ of Habeas Corpus.

[8] Indeed, in an opinion dissenting from the refusal of the underlying appeal to the Supreme Court of Appeals, Justices Starcher and Albright specifically bemoaned the fact that, “without full state Court appellate review, such criminal convictions do not have any sort of ‘stamp of approval’ or presumption of correctness in any subsequent or collateral proceedings—for example, in federal or state habeas corpus.” State v. Lister, No. 070358 (W. Va. 2007) (Starcher & Albright, J.J., dissenting).

[9] The Supreme Court of Appeals has since revised the West Virginia Rules of Appellate Procedure, pursuant to its quasi-legislative authority under Article VIII, Section 3 of the West Virginia Constitution. See Games-Neely ex rel. W. Va. State Police v. Real Property, 211 W. Va. 236 (2002) (discussing “plenary” authority of Supreme Court of Appeals to develop rules of process, practice, and procedure “which shall have the force and effect of law”). The Rules now require each appeal be considered and decided on the merits. See West Virginia Rule of Appellate Procedure 5(h).

[10] Remmer v. United States, 347 U.S. 227 (1954) (holding that in a criminal case, “any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial . . . The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant”).

[11] Although the Petitioner appears to argue that the trial court unfairly declined to “rehabilitate” Juror Tennant in the same manner it later rehabilitated Juror Larry, the trial court characterized the entire tenor of its conversation with Juror Tennant quite differently. In its August 24, 2006 order denying a new trial, the Court observed that Juror Tennant reacted to questioning by becoming “highly irate and accus[ing] all other jurors of like conduct.” Post-Trial Order at 3.

[12] By drawing the Court’s attention to the trial judge’s earlier decisions to excuse Jurors Banks and Tennant, the Petitioner appears to imply that the trial judge applied a more demanding standard of disqualification to Juror Larry—presumably to avoid mistrial. This implication is supported only by circumstantial evidence and is belied by a record suggesting all decisions were made on their respective merits. However, even if the trial judge effectively demanded a higher standard of disqualification for Juror Larry than it had earlier applied to Jurors Banks and Tennant, the Court today is not prepared to hold that this constitutes clear error per se. Rule 24(c) of the West Virginia Rules of Criminal Procedure provides that alternate jurors shall “replace jurors who . . . become or are found to be unable or disqualified to perform their duties.” Other courts have concluded that this same standard—inability or disqualification to perform juror duties—contemplates “a somewhat more flexible standard for such substitutions,” a flexibility “appropriate precisely because the alternate juror remedy is designed to avoid mistrials.” Hinton v. United States, 979 A.2d 663, 680 (D.C. 2009) (en banc) (emphasis added). This is not to say, of course, that a trial court can replace an empaneled juror with an alternate “inadvertently and for no reason.” Id. at 679-680 n.61 (citing United States v. Merrill, 513 F.3d 1293, 1308 (11th Cir. 2008)). But a trial court does not abuse its discretion by “find[ing] an empaneled juror ‘unable or disqualified to perform juror duties’ under circumstances that might not amount to ‘manifest necessity’ for a mistrial where an alternate juror is unavailable.” Id. As the Ninth Circuit has recognized, declaring mistrial “is by far a weightier decision than substituting one of the alternates for one of the empaneled jurors.” United States v. Bonas, 344 F.3d 946, 950 n.6 (9th Cir. 2003). Thus, a “court might reasonably . . . permit substitution of an alternate under [federal] Rule 24(c) in circumstances where a finding of manifest necessity could not be sustained.” Id.

This flexible approach comports with common experience. As it stands, a trial judge may properly err on the side of caution if moved to excuse a potentially-biased juror early in the proceedings. To require that the full weight of mistrial hang on every decision about juror qualification may ultimately produce a perverse result: a trial court may fear excusing jurors whose biases are not readily manifest but whose impartiality remains somewhat suspect. Even if panels were not plagued by actual bias, such a result would certainly undermine public trust in the jury system at large. See United States v. Gianakos, 415 F.3d 912, 935 (8th Cir. 2005) (Bright, J., dissenting) (encouraging liberal replacement of jurors with alternates in order to avoid appearance of “tainted jury verdict[s]”).

[13] In denying the post-trial motion for a new trial, the trial judge “note[d] that this is not a case of juror misconduct. The jurors complied with the Court’s instructions and reported the suspicious incident to the bailiff upon returning to the courthouse.” See Post-Trial Order at 7. While the Court today agrees that this is not a case of serious juror misconduct, Juror Larry’s sharing of her experience at the convenience store likely had an impact analogous (albeit likely less prejudicial) to cases of actual juror misconduct. Compare State v. Daughtery, 221 W. Va. 15 (2006) (juror knew the defendant and explained to his fellow jurors that “he was afraid that something could happen to his children if [the defendant] was not convicted”); State ex rel. Trump v. Hott, 187 W. Va. 749 (1992) (juror “told the entire panel that she knew that the defendant had either been accused of or convicted of wife beating and child molestation”).

[14] In fact, at the time of the disclosure, it may have appeared equally probable that a jury would acquit out of fear of reprisal. The existence of this counter-theory highlights the importance of a demanding standard. The “mere opportunity” for prejudice is simply too ephemeral—it may attach to all manner of irregularities, often in contradictory ways.

[15] As the Petitioner’s trial counsel admitted during closing arguments, the Petitioner “never once denie[d] the act. He denies the mental state, but not [the] act . . .” See Tr. at 1031.