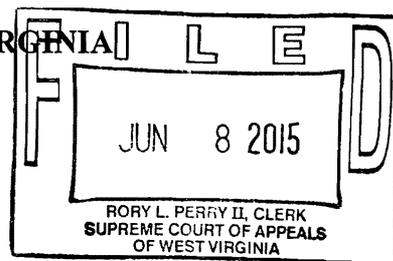


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0028



**DAYTON SCOTT LISTER,**

*Petitioner Below, Petitioner,*

**vs.**

**DAVID BALLARD, WARDEN,  
MOUNT OLIVE CORRECTIONAL COMPLEX,**

*Respondent Below, Respondent.*

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**RESPONDENT'S BRIEF**

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**PATRICK MORRISEY  
ATTORNEY GENERAL**

**DAVID A. STACKPOLE  
ASSISTANT ATTORNEY GENERAL  
812 Quarrier Street, 6th Floor  
Charleston, West Virginia 25301  
Telephone: (304) 558-5830  
State Bar No. 11082  
Email: David.A.Stackpole@wvago.gov**

*Counsel for Respondent*

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RESPONDENT'S BRIEF

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COMES NOW, Respondent, David Ballard, Warden, Mount Olive Correctional Complex, by counsel, David A. Stackpole, Assistant Attorney General and responds to Petitioner's Brief. Petitioner was convicted, following a jury trial, of Murder of the First Degree. He was sentenced to life without mercy. This Court should affirm the *Habeas* Court's denial of Petitioner's claims.

I.

STATEMENT OF THE CASE

On August 9, 2005, four (4) friends got together: Lauren Ludovici (hereinafter "Ms. Ludovici"), John Goode (hereinafter "Mr. Goode"), Semaj Lowery (hereinafter "Mr. Lowery"), and Brandon Mitchell (hereinafter "Mr. Mitchell"). (App. at 720-21, 818-20.) The three (3) males are all African American and the female is white. (App. at 442.) Ms. Ludovici went outside of the apartment to smoke. (App. at 722, 820.) A burgundy Ford Tarus drove past and

someone yelled out, “[w]here are all the niggers at, they all deserve to fucking die.” (App. at 820-21.) Ms. Ludovici went inside and told the others what occurred. (App. at 821.)

Ms. Ludovici, Mr. Mitchell, Mr. Goode, and Mr. Lowery went outside. (App. at 723, 821.) Krystal Peterson (hereinafter Ms. Peterson”) joined the group outside a few minutes later. (App. at 723, 821-22.) Ms. Peterson was white. (App. at 442.) Mr. Mitchell and Mr. Goode got into a car to listen to music. (App. at 723, 823.) Ms. Peterson and Mr. Lowery went around the side of the apartment to try on each other’s jeans “because [Ms. Peterson] thought it would be funny to wear a big pair of baggy jeans and it would be funny for -- to see [Mr. Lowery] in a pair of girl’s jeans.” (App. at 725, 823.) Ms. Peterson and Mr. Lowery came back out from the side of the apartment, wearing each other’s jeans. (App. at 823.) That is when “the same Ford Tarus pulled back up and [Petitioner] jumped out of the car.” (App. at 727, 823.) Petitioner ran toward Mr. Lowery and wanted to fight for some unknown reason. (App. at 728, 824.) Mr. Mitchell stepped out of the car and tried to diffuse the situation by telling Petitioner that he had been drinking and should go back to his car and go about his business. *Id.* Petitioner responded by saying, “everything’s cool, everything’s cool.” (App. at 728.) Then Mr. Goode got out of the other side of the car. *Id.*

Mr. Lowery and Ms. Peterson went back around the side of the building to switch pants back. (App. at 729.) At that time, Petitioner got into the trunk of his vehicle and pulled out a gun. (App. at 728-29, 826.) Petitioner aimed the gun at Mr. Goode and Mr. Goode ran into the house. (App. at 729.) Petitioner then approached Mr. Mitchell and tried to hit Mr. Mitchell in the face with the gun, but Mr. Mitchell blocked it and ran into the house. *Id.* Petitioner yelled at Ms. Ludovici telling her to “get the hell out of the (sic) there.” (App. at 827.) Ms. Ludovici held

up her keys and told him that she would get in her car and leave. *Id.* Petitioner put the gun back in his trunk and drove off. *Id.*

Ms. Ludovici and Ms. Peterson got into a car to leave, but went around the block and came back to check on Mr. Mitchell. (App. at 828-29.) They stayed because they were told the police were coming. (App. at 829.) The police were only there for a couple of minutes and had to leave for another unrelated shooting that took place that night. (App. at 731, 829.) However, it was not known that the other situation was unrelated, as the police told them to wait and that they would return. *Id.*

Shortly after the police left, they heard a “loud muffler rev up” and a truck driven by Petitioner came down the hill and stopped with a shotgun aimed out the window. (App. at 732-33, 829-30.) Everyone started running to go inside of the apartment. (App. at 733, 830.) Ms. Peterson was running behind Ms. Ludovici when Petitioner fired the gun. *Id.* Ms. Ludovici described the scene:

In the corner of my eye, I saw Krystal and Jay getting up and then when I, like, went to jump to run up the stairs, I heard the gunshot, and I kind of like ducked down, and I saw what I thought were wood chips. It was blood. It hit the back of my hand, but, really, it was pieces of her skull and her brain and her blood and her hair. I heard her hit the banister and hit the floor.

*Id.* Petitioner drove off. (App. at 831.)

The Marion County Medical Examiner was called to the scene that night. (App. at 380-82.) She examined the victim, Ms. Peterson. (App. at 383.) She described the victim as having “a massive head wound to the back of her head.”

Yes, it was just -- the whole back of her head was completely gone. The brain matter was completely outside of her body laying next to her. There was (sic) multiple bone fragments all over where she was at, just almost her entire blood volume was out beside her.

(App. at 384.)

Petitioner agreed to go to the police station and give a statement. (App. at 622.) Petitioner was informed of his *Miranda* rights and waived them. (App. at 623-24.) Petitioner initially denied any involvement regarding the shooting. (App. at 625-28.) When Petitioner was advised that he was under arrest for murder, Petitioner then admitted to the shooting:

I told him that we were not getting anywhere with this and at this time he was going to be placed under arrest for murder. He stated, she died? I stated, yes, she did. [Petitioner] then stated, I shot her, but it was an accident. You want to know what happened, here's the truth. I'll tell you the whole story. At that point in time, I asked him to put it on tape and he did not allow me to put him on the tape.

(App. at 628.) While police had Petitioner in custody, Petitioner was videotaped in a holding cell speaking with another prisoner, saying "I shot some girl last night." (App. at 595.)

On August 18, 2005, Petitioner was indicted for Murder of the First Degree. (App. at 9.) The State moved to bifurcate so that evidence relevant to sentencing could be provided during the mercy phase. (App. at 38.) The Trial Court granted bifurcation. (App. at 94.)

A jury trial was held from April 25, 2006 through April 28, 2006. (App. at 97.) There were several different juror issues that came to light during the course of trial. One (1) juror worked for an attorney who did the real estate title search for Petitioner's trial counsel when Petitioner's trial counsel refinanced his house. (App. at 559.) The juror felt the need to disclose the information, but affirmed that she did not personally know Petitioner's trial counsel and would not be affected or influenced in any way. (App. at 559-60.) Neither side objected to the juror remaining on the jury. *Id.*

Another juror informed the Trial Court that he had "ran around" and "hung around" with one (1) of the witnesses. (App. at 897-98.) The juror only knew the witness by the witness's nickname, so he did not know that it was the same person when the witnesses' names were disclosed at *voir dire*. *Id.* The juror claimed that just because he "hung around" the defense

witness did not mean that he would favor or disfavor the witness's evidence or side of the case. (App. at 898.) The State moved to disqualify the juror and Petitioner opposed any disqualification. *Id.* The Trial Court disqualified the juror. *Id.*

Another juror, during the trial and before deliberations, expressed the opinion that she did not "believe that it would be first degree murder." (App. at 941.) The Trial Court excused the juror. *Id.* Petitioner objected to the juror's disqualification. *Id.*

Another juror informed the Trial Court that she had an encounter at a Dairy Mart:

After I left here yesterday, I stopped at the Dairy (sic) 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 in 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 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 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.

(App. at 983.) The juror agreed that she could render a fair and impartial verdict and that the encounter would not affect her deliberations in any manner. *Id.* She stated that she had no bias against the defendant or in favor of the State because she did not know who it was and she knew it was not Petitioner who made the statement. (App. at 984.) The Trial Court made a finding that "[t]his 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." (App. at 985.) Petitioner objected and moved for a mistrial. *Id.* The Trial Court denied Petitioner's motion for a mistrial. (App. at 986.) The Trial Court instructed the jury not to discuss with the juror the reason that she had to speak to the Trial Court at the bench conference. (App. at 1035.)

In the charge to the jury during the guilty phase of the trial, the Trial Court instructed the jury that “[a]ny sympathy or dislike to convict on your part should not enter into your deliberation.” (App. at 87, 1004.) Petitioner was found guilty of Murder of the First Degree. (App. at 88, 1085.)

Prior to the mercy phase, Petitioner objected to any of the victim’s family or friends being able to testify during the mercy phase of the trial on the basis that it would be inadmissible sympathy evidence. (App. at 192-97, 1089.) The Trial Court ruled that the victim’s family, up to four (4) witnesses, may testify at the mercy phase pursuant to the statute that provides for victims to testify at the time of sentencing. (App. at 218.)

On April 28, 2006, the Trial Court held the mercy phase of the trial. (App. at 100.) The first witness was Regina Uvanni (hereinafter “Ms. Uvanni”), the victim’s stepmother. (App. at 1090-091.) Ms. Uvanni testified that the victim had two (2) brothers and two (2) sisters. (App. at 1091.) The victim’s death has affected them all, including the need for counseling, not sleeping in their own beds at night, and a drop in their grades at school. (App. at 1092.) She stated that “[t]here should be no mercy.” (App. at 1093.)

The second witness was Jessica Kanno (hereinafter “Ms. Kanno”), the victim’s best friend. (App. at 1094.) She testified that the victim wanted to get married and have children. (App. at 1095.)

The third witness was Robert Lee Peterson, Jr. (hereinafter “Mr. Peterson”), the victim’s father. (App. at 1095-096.) Mr. Peterson testified to “a hole in [his] heart” and told the jury “[n]o mercy” and that his daughter was “not coming back.” (App. at 1096.)

The fourth witness was Mary Ann Lavadiere (hereinafter “Ms. Lavadiere”), the victim’s mother. (App. at 1097.) Ms. Lavadiere testified that her daughter “wanted to become a

pediatrician or a child psychologist.” (App. at 1098.) She testified that the victim had “rode on the Rescue Squad” and “volunteered at the Humane Society.” *Id.* Ms. Lavadiere testified that she had not been able to work for the previous four (4) months at her job as a charge nurse in the Emergency Department and as a county coroner. (App. at 1097-098.) Ms. Lavadiere told the jury: “I beg you to show him no mercy.” (App. at 1098.)

Petitioner chose not to put on any witnesses at the mercy phase. (App. at 1099.)

The Trial Court gave the jury two (2) instructions during the mercy phase. (App. at 89-92, 1101-103.) The first instruction informed the jury that they could recommend mercy, which would result in parole eligibility after fifteen (15) years, or not recommend mercy. (App. at 89-90, 1101-102.) The second instruction informed the jury that the decision regarding mercy had to be unanimous. (App. at 91-2, 1102-103.) The jury recommended that Petitioner not receive mercy. (App. at 93, 1104-105.) The Trial Court sentenced Petitioner to “be confined in the West Virginia State Penitentiary for the remainder of his natural life.” (App. at 101.)

On June 26, 2006, at a Post-Trial Hearing, the Trial Court informed the parties that the bailiff had informed the Trial Court that the juror who informed the Trial Court of the Dairy Mart incident had told the bailiff when she reported it that “I’ve talked to the other members of the jury about this, and they said I should tell the Judge.” (App. at 1111.) This is the first time that it became evident that the juror had discussed the matter with other members of the jury, but had discussed it with them prior to informing the Trial Court about the matter. *Id.* Petitioner argued for a new trial. (App. at 1111-118.) The Trial Court denied Petitioner’s Motion for a New Trial. (App. at 1284-292.)

Petitioner filed a Petition for Appeal of the matter, arguing that, among other things, there should have been a mistrial based on the threat to the juror and that sympathy witnesses in the

mercy phase was improper. (App. at 1132-163.) This Court denied the Petition for Appeal. (App. at 1171-184.) Petitioner then filed a Petition for *Certiorari* to the United States Supreme Court. (App. at 1302.) The United States Supreme Court denied the Petition. *Id.*

On May 24, 2014, Petitioner filed a Petition for Writ of *Habeas Corpus*. (App. at 1187-1222.) The State filed a Response. (App. at 1225-227, 1271-278.) The Habeas Court denied the Writ of Habeas Corpus. (App. at 1294-1306.) This appeal followed.

## II.

### SUMMARY OF THE ARGUMENT

The Trial Court held Hearings with each juror that raised an issue. The juror who overheard a threat at Dairy Mart was found to be very sincere in her affirmation that she could be fair and impartial. There was no evidence that the statements were made by an interested party. There is no evidence that Petitioner was prejudiced or did not receive a fair trial, Petitioner merely wants the Court to assume prejudice, despite the actual inquiry performed by the Trial Court, which rebutted the existence of any prejudice. Additionally, an automatic disqualification rule would encourage juror intimidation. Moreover, evidence of Petitioner's guilt was overwhelming.

Pursuant to West Virginia Code § 61-11A-2, victim's family members have a right to testify prior to sentencing. There is no law in West Virginia that excludes testimony from the victim's family during a mercy phase of a trial.

This Court has held that Trial Courts are not to give standards to juries during the mercy phase of a trial. Moreover, Petitioner has not provided any standards that the Court should have given, but were denied.

### III.

#### STATEMENT REGARDING ORAL ARGUMENT AND DECISION

All the issues raised by Petitioner have been authoritatively decided. The facts and legal arguments are adequately presented in the briefs and the Appendix. The decisional process would not be aided by oral argument. This matter is appropriate for a Memorandum Decision.

### IV.

#### ARGUMENT

This Court has articulated a three-prong standard of review in *Habeas Corpus* actions:

In reviewing challenges to the findings and conclusions of the circuit court in a *habeas corpus* action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review.

Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 418, 633 S.E.2d 771, 772 (2006).

Pursuant to West Virginia Code § 53-4A-1(a), a person who has been convicted and incarcerated may file a Writ of *Habeas Corpus Ad Subjiciendum*. W. Va. Code § 53-4A-1(a) (1967). However, “[a] *habeas corpus* proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed.” Syl. Pt. 4, *State ex rel. McMannis v. Mohn*, 163 W. Va. 129, 130, 254 S.E.2d 805, 806 (1979).

In this case, Petitioner asserts two (2) errors: [1] error in not discharging the juror who was threatened at Dairy Mart and declaring a mistrial and [2] error in permitting sympathy witnesses at the mercy phase and for not providing standards for the jury to consider. Pet’r’s Br. at 1. This Court should reject Petitioner’s assignments of error and affirm the *Habeas* Court’s dismissal of Petitioner’s claims.

**A. This Court Should Reject Petitioner’s Claim That The Trial Court Erred In Not Dismissing The Threatened Juror And In Not Declaring A Mistrial.**

Petitioner’s claim that a mistrial should have been granted following the disclosure of a juror that she overheard a threat while at Dairy Mart should be rejected. This Court has held that issues regarding juror misconduct are within the discretion of the Trial Court:

“A motion for a new trial on the ground of the misconduct of a jury is addressed to the sound discretion of the court, which as a rule will not be disturbed on appeal where it appears that defendant was not injured by the misconduct or influence complained of. 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.”

Syl. Pt. 1, *State v. Sutphin*, 195 W. Va. 551, 553, 466 S.E.2d 402, 404 (1995) (quoting Syl. Pt. 7, *State v. Johnson*, 111 W. Va. 653, 164 S.E. 31 (1932)). This Court requires Trial Courts to hold a Hearing regarding allegations of juror tampering:

In any case where there are allegations of any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about a matter pending before the jury not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial with full knowledge of the parties; it is the duty of the trial judge upon learning of the alleged communication, contact, or tampering, to conduct a hearing as soon as is practicable, with all parties present; a record made in order to fully consider any evidence of influence or prejudice; and thereafter to make findings and conclusions as to whether such communication, contact, or tampering was prejudicial to the defendant to the extent that he has not received a fair trial.

Syl. Pt. 2, *Sutphin*, 195 W. Va. at 553-54, 466 S.E.2d at 404-05. This Court has also held that unless there is evidence that an interested party was the one inducing juror misconduct, the jury verdict will not be reversed:

In the absence of any evidence that an interested party induced juror misconduct, no jury verdict will be reversed on the ground of juror misconduct unless the defendant proves by clear and convincing evidence that the misconduct has prejudiced the defendant to the extent that the defendant has not received a fair trial.

Syl. Pt. 3, *Sutphin*, 195 W. Va. at 554, 466 S.E.2d at 405. “[C]ourts recognize 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.” *State ex rel. Trump v. Hott*, 187 W. Va. 749, 754, 421 S.E.2d 500, 505 (1992).

In this case, the juror came forward and advised the Trial Court of the incident at the Dairy Mart. (App. at 983.) The Trial Court held a Hearing at the bench with the juror to inquire of the matter and both parties were permitted to cross-examine the juror. *Id.* The juror was standing in line and heard a male voice utter two (2) phrases: [1] “[t]here’s one of those bitch jurors” and [2] “[i]f we take a few of those out, Scoot will go free.” *Id.* The juror did not see who made the comment and knew that it was not Petitioner who made the comment. (App. at 983-84.) The juror agreed that she could render a fair and impartial verdict and that the encounter would not affect her deliberations in any manner. (App. at 983.)

Clearly the Trial Court held the required Hearing to determine whether or not the juror was prejudiced by the occurrence. There was zero (0) evidence that the statements were made by an interested party. It was an unknown person who made the statement. (App. at 983.) In addition to the absence of any evidence that the statement was made by an interested party, there is no evidence that Petitioner was prejudiced or did not receive a fair trial. As such, the jury verdict should not be reversed. *See* Syl. Pts. 1 & 3, *Sutphin*, 195 W. Va. at 554, 466 S.E.2d at 405.

Petitioner argues that the statement created presumptive prejudice pursuant to *Remmer v. U.S.*, 347 U.S. 227, 229, 74 S. Ct. 450, 451 (1954). Pet’r’s Br. at 19-27. However, it is just as likely that such intimidation would have made the juror more likely to render a not guilty verdict out of fear. Nonetheless, the Trial Court, following a Hearing with the juror, where the juror

stated that she was not prejudiced by the occurrence, made an express finding that the juror “was very, very sincere when she said it would not affect her at all.” (App. at 985.) As such, there was no juror bias or prejudice demonstrated and any presumptive prejudice was rebutted. Absent juror bias or prejudice, there was no reason for the Trial Court to dismiss the juror or to declare a mistrial.

Petitioner argues that West Virginia Code § 61-5-7 makes it a crime for someone to harass, intimidate, or retaliate against a juror. Pet’r’s Br. at 17-8. The State would agree with Petitioner, but notes that there is nothing in West Virginia Code § 61-5-7 that provides for the dismissal of any such juror. *See* W. Va. Code § 61-5-7 (1959). The purpose of West Virginia Code § 61-5-7 is to discourage juror harassment and intimidation. *Id.* To require dismissal of a juror because some unknown person made a statement such as the one in this case would effectively nullify the purpose of West Virginia Code § 61-5-7 because the automatic dismissal of jurors would encourage harassment and intimidation of jurors. If all it takes is a statement from an unknown person at a public place to create automatic disqualification of the juror, then witness harassment will surely increase so that mistrials will occur in these types of cases. Both the Trial Court and *Habeas* Court reasoned that an automatic dismissal rule would affect the entire system:

[a]ny defendant could commission a friend or stanger 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 incapacity course of events.

(App. at 1304.)

It was not until two (2) months after trial that the Trial Court became aware that when the juror told the bailiff that she needed to tell the Trial Court about what occurred at the Dairy Mart, that she stated to the bailiff that “I’ve talked to the other members of the jury about this, and they said I should tell the Judge.” (App. at 1111.) As such, it was not until two (2) months post trial that the Trial Court became aware that the juror had actually mentioned the matter to other jurors prior to telling the Trial Court. *Id.* At that time, the Trial Court was not able to *voir dire* the jurors to determine what had been discussed. Moreover, there is absolutely no evidence that Petitioner was prejudiced. Petitioner wants this Court to assume that there was prejudice, despite the juror’s statements and the Trial Court’s express findings that there was no prejudice.

Petitioner cites to *Owen v. Duckworth*, 727 F.2d 643 (7th Cir. 1984) to support his claim. *Owen* is inapposite. Unlike in this case, where the juror may have mentioned the incident to other jurors before she told the Trial Court, in *Owen*, the juror ignored the instruction of the Trial Court to not tell other jurors about the incident. *Owen*, 727 F.2d at 644. In *Owen*, the juror deliberately disobeyed the judge’s instructions. *Id.* That is not the case here.

Petitioner cites to *U.S. v. Dutkel*, 192 F.3d 893 (9th Cir. 1999), to support his claim. *Dutkel* is inapposite. In *Dutkel*, the co-defendant bribed a juror and “secured himself a hung jury,” while “[t]he same jury convicted Dutkel.” *Dutkel*, 192 F.3d at 894. This case did not involve co-defendants, bribery, or a hung jury. Petitioner’s reliance upon *Dutkel* is misplaced.

Petitioner cites to other issues with jurors in the matter to support his claim that this juror should have been dismissed. Pet’r’s Br. at 26. There were three (3) other juror issues, with two (2) of the other jurors being dismissed. First, a juror who worked for the law firm that did the title search for Petitioner’s trial counsel’s home was not excused. (App. at 559-60.) The Trial Court held a Hearing where the juror affirmed that she did not personally know Petitioner’s trial

counsel and would not be affected or influenced in any way. (App. at 559-60.) The Trial Court did not see prejudice and therefore, kept the juror.

Second, a juror informed the Trial Court that he had “ran around” and “hung around” with one (1) of the witnesses. (App. at 897-98.) The juror did not come forward during *voir dire* because he only knew the witness by the witness’s nickname, which was not mentioned at *voir dire*. *Id.* While the juror claimed that just because he “hung around” the defense witness did not mean that he would favor or disfavor the witness’s evidence or side of the case, the Trial Court was concerned about prejudice because of the fact that they “ran around together” and disqualified the juror. (App. at 898.)

Third, prejudice was clearly demonstrated when another juror, during the trial and before deliberations, expressed the opinion that she did not “believe that it would be first degree murder.” (App. at 941.) The Trial Court disqualified the juror. *Id.*

It is clear from each of these instances that the Trial Court conducted a Hearing each time to question the juror and to determine whether or not there was actual prejudice or bias. Where the juror “ran around” with a defense witness and where a juror stated that she did not believe that it was first degree murder, the Trial Court properly dismissed the juror on a finding of prejudice. Where the juror merely worked for an attorney who did Petitioner’s trial counsel’s title work for his house and where the juror overheard statements at Dairy Mart, but was very sincere about being impartial, the Trial Court properly kept the jurors on a finding of no prejudice.

Petitioner did not contest that he fired the shot that killed Ms. Peterson. Rather, he merely put on evidence that he had been drinking and taking Xanax in an attempt to seek a diminished capacity to preclude a mental state of First Degree Murder. In other words, evidence

of Petitioner's guilt is overwhelming and as such, reversible error does not exist. *See State ex rel. Trump*, 187 W. Va. at 754, 421 S.E.2d at 505.

Therefore, because the Trial Court conducted hearings with the jurors for each of the juror issues that were raised; because the juror who overheard the threat was very sincere in claiming that she could be fair and impartial; because there is no evidence that an interested party made the statement; because a motion for a new trial is within the sound discretion of the Trial Court; because there is not clear and convincing evidence that Petitioner was prejudiced or that Petitioner did not receive a fair trial; because an automatic disqualification rule would serve to encourage juror intimidation; because the Trial Court was unaware of any discussion with the other jurors until two (2) months after trial; and because the evidence of Petitioner's guilt is overwhelming, this Court should affirm the *Habeas* Court's denial of Petitioner's *Habeas* claims.

**B. During The Mercy Phase, The Trial Court Was Correct In Allowing The Victim's Family To Testify And Properly Declined To Provide Standards To The Jury.**

Petitioner argues that the Trial Court erred in allowing the State to put on "sympathy" witnesses and for not providing the jury standards for the mercy phase. Petitioner is wrong on both issues.

**1. The Trial Court Properly Permitted The Victim's Family To Testify During The Mercy Phase.**

The Trial Court was required by statute to have the jury recommend mercy or recommend against mercy and was required to allow the victim's family to testify. Pursuant to West Virginia Code, following a guilty verdict in a first degree murder trial, the jury is required to make a recommendation either for or against mercy:

If a person indicted for murder be found by the jury guilty thereof, they shall in their verdict find whether he or she is guilty of murder of the first degree or second degree. If the person indicted for murder is found by the jury guilty thereof, and if the jury find in their verdict that he or she is guilty of murder of the

first degree, or if a person indicted for murder pleads guilty of murder of the first degree, he or she shall be punished by imprisonment in the penitentiary for life, and he or she, notwithstanding the provisions of article twelve, 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: Provided, however, That if the accused pleads guilty of murder of the first degree, the court may, in its discretion, provide that such person shall be eligible for parole in accordance with the provisions of said article twelve, and, if the court so provides, such person shall be eligible for parole in accordance with the provisions of said article twelve in the same manner and with like effect as if such person had been found guilty by the verdict of a jury and the jury had recommended mercy, except that, notwithstanding any provision of said article twelve or 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.

W. Va. Code § 62-3-15 (1994).

West Virginia Code also requires a Trial Court to admit testimony of a victim's family prior to sentencing:

(a) For the purposes of this section, "victim" means a person who is a victim of a felony, or, where a death occurs during the commission of a felony or a misdemeanor, the following persons shall be notified if known by the prosecutor: A member of the deceased victim's immediate family, the fiduciary of the deceased victim's estate or an adult household member residing with the victim.

(b) Prior to the imposition of sentence upon a defendant who has been found guilty of a felony, or of a misdemeanor if death occurs during the commission of a crime, or has pleaded guilty or *nolo contendere* to a felony, or to a misdemeanor if death occurs during the commission of a crime, the court shall permit the victim of the crime to appear before the court to make an oral statement for the record if the victim notifies the court of his or her desire to make such a statement after receiving notification provided in subsection (c) of this section. If the victim fails to notify the court, the failure is a waiver of the right to make an oral statement. In lieu of the appearance and oral statement, the victim may submit a written statement to the court or to the probation officer in charge of the case. The probation officer shall forthwith file the statement delivered to his or her office with the sentencing court and the statement must be made a part of the record at the sentencing hearing. The statement, whether oral or written, must relate solely to the facts of the case and the extent of injuries, financial losses and loss of earnings directly resulting from the crime for which the defendant is being sentenced.

(c) Within a reasonable time prior to the imposition of sentence upon the defendant, the prosecuting attorney or assistant prosecuting attorney in charge of the case shall make reasonable efforts, in writing, to advise the person who was the victim of the crime, the parent or guardian of a minor who was the victim of a crime, the fiduciary of the victim's estate if the victim is deceased and the immediate family members of the victim if the victim is deceased and if their whereabouts are known to the prosecutor or assistant prosecutor. The writing will provide the date, time and place of the original sentencing hearing and of the victim's right to submit a written or oral statement to the sentencing court.

(d) The oral or written statement given or submitted by a victim in accordance with the provisions of this section is in addition to and not in lieu of the victim impact statement required by the provisions of section three of this article.

W. Va. Code § 61-11A-2 (2012).

“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.” Syl. Pt. 2, *State v. McLaughlin*, 226 W. Va. 229, 230, 700 S.E.2d 289, 290 (2010) (quoting Syl. Pt. 4, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996)). Even if *McLaughlin* sets some limits on evidence adduced at the mercy phase, it does not prohibit the victim's family from testifying:

The 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. Admissible evidence necessarily encompasses evidence of the defendant's character, including evidence concerning the defendant's past, present and future, as well as evidence surrounding the nature of the crime committed by the defendant that warranted a jury finding the defendant guilty of first degree murder, so long as that evidence is found by the trial court to be relevant under Rule 401 of the West Virginia Rules of Evidence and not unduly prejudicial pursuant to Rule 403 of the West Virginia Rules of Evidence.

Syl. Pt. 7, *McLaughlin*, 226 W. Va. at 230, 700 S.E.2d at 290. Similarly, *State v. Rygh*, 206 W. Va. 295, 524 S.E.2d 447 (1999), suggests that there are some limits on evidence admitted during the mercy phase, but it does not prohibit the victim's family from testifying:

We observe that there is nothing in *LaRock* that creates, merely by bifurcating a murder trial, a qualitative change in or a substantive expansion of the scope or type of evidence that the prosecution may put on against a defendant—as compared to that evidence that would be admissible in a unitary trial. Stated another way, discretionary trial-management bifurcation does not itself alter or

expand the scope of admissible prosecutorial evidence to include evidence that has been historically inadmissible in murder cases in this State. (Because bifurcation is a matter of trial court discretion, such an expansion could raise, *inter alia*, equal protection and due process issues, if one defendant were tried in a bifurcated proceeding with relaxed evidentiary limitations—as opposed to another defendant, who is tried in a unitary proceeding.)

We recognize, of course, that the evidentiary opportunities that a defendant may have in a mercy phase, as a result of bifurcation, may in turn affect the evidentiary limitations of the prosecution in rebuttal or impeachment. However, the opportunity for prosecution rebuttal or impeachment in a bifurcated mercy phase is not authorization for the prosecution to use unfairly prejudicial, extraneous, remote, or inflammatory evidence—even in rebuttal or impeachment. *See* note 2 *infra*. We also observe 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.

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.

*Rygh*, 206 W. Va. at 297, 524 S.E.2d at 449.

This Court has held that in the punishment phase of a bifurcated trial that the Trial Court has wide discretion regarding the evidence to be admitted:

As a general matter, “[t]he rules of evidence, including Evid. R. 404(b) regarding ‘other acts,’ do not strictly apply at sentencing hearings.” *State v. Combs*, No. CA2000–03–047, 2005 WL 941133, at \*2 (Ohio Ct.App.2005). *See Patton v. State*, 25 S.W.3d 387, 392 (Tex.App.2000) (“It has been held that Rule 404(b) does not apply to the penalty or punishment phase of a bifurcated trial.”). Moreover, “[a] trial court has wide discretion in the sources and types of evidence

used in determining the kind and extent of punishment to be imposed. And a sentencing court is not restricted by the federal constitution to the information received in open court.” *Elswick v. Holland*, 623 F.Supp. 498, 504 (S.D.W.Va.1985) (citations omitted).

*State ex rel. Dunlap v. McBride*, 225 W. Va. 192, 202, 691 S.E.2d 183, 193 (2010).

In this case, the witnesses that were put on were not “sympathy” witnesses, but rather were members of the victim’s family who were entitled to speak pursuant to West Virginia Code § 61-11A-2. The Legislature provided for a right of victim’s family to speak prior to the pronouncement of a sentence. In cases where there is a mercy phase and the judge does not have the discretion regarding sentencing, the family must speak at the mercy phase. While the testimony of a victim’s family member may include some statements that could be considered sympathetic, the Trial Court’s exclusion of the victim’s family would have prohibited the victim’s family the right to speak in clear violation of West Virginia Code § 61-11A-2. As such, the Trial Court rightly permitted the family to testify.

While the Legislature did not specify that the victim’s family is given the right to speak at the mercy phase of a trial, the Legislature provides for the right prior to sentencing. W. Va. Code § 61-11A-2. Because the jury’s determination of mercy affects the sentence in the case, the right to speak at the mercy phase is necessary. Under Petitioner’s position, a victim’s family would be permitted to testify in all cases, except where the crime involved life without mercy. *See Pet’r’s Br.* at 27-37. It would be unconscionable to deny the victim’s family the right to testify in the most heinous of circumstances.

Petitioner chose not to put on witnesses during the mercy phase. That was Petitioner’s decision. Petitioner could have put on witnesses, such as his own mother, who could have testified to the good things in his past, if any, about how he grew up with a very rough life, and

who could have pled for mercy on his behalf. Such testimony would necessarily have had the potential to be sympathetic.

Petitioner's citations to *McLaughlin* and *Rygh* are misplaced as there is nothing in either case that prohibits a victim's family from testifying as provided by the Legislature in West Virginia Code § 61-11A-2. Likewise, Petitioner's reliance upon *State v. Wade*, 200 W. Va. 637, 490 S.E.2d 724 (1997), is misplaced. Pet'r's Br. at 27-37. In *Wade*, sympathy evidence came in during the guilty phase of the trial, not the mercy phase. *State v. Wade*, 200 W. Va. at 641, 490 S.E.2d at 728. While the Court, in *Wade*, found held that "[e]vidence that a homicide victim was survived by a spouse or children is generally considered inadmissible in a homicide prosecution where it is irrelevant to any issue in the case and is presented for the sole purpose of gaining sympathy from the jury," the Court also found that the sympathy evidence did not amount to prejudice. *Id.* Here, any testimony from the victim's family offered pursuant to West Virginia Code § 61-11A-2 was not offered during the guilty phase as in *Wade*, but rather, during the mercy phase and did not amount to prejudice.

Therefore, because West Virginia Code § 61-11A-2 provides a right to victim's family members to testify prior to sentencing and because there is no law in West Virginia excluding testimony from the victim's family during a mercy phase of a trial, this Court should affirm the *Habeas* Court's denial of Petitioner's *Habeas* claims.

**2. The Trial Court Was Correct In Not Providing Standards To The Jury During The Mercy Phase.**

The Trial Court acted properly when it did not outline the factors or provide standards for the jury to consider in determine whether to grant mercy. "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. 1, *State v. Miller*, 178 W. Va. 618, 619, 363 S.E.2d 504, 505 (1987).

Petitioner, without providing any proposed standards, argues that the Trial Court erred by not providing standards to the jury. Pet’r’s Br. at 27-37. Petitioner has no evidence that this jury denied mercy on the basis of Petitioner’s “race, religion, social position, wealth, class, sex, or sexual preference,” but merely presents a hypothetical scenario and argues that the jury could do so unless they are provided standards. *Id.* Petitioner cannot demonstrate any harm that he suffered because of the Trial Court’s compliance with *Miller*’s requirement that the jury not be given standards.

Petitioner’s citations to *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972) and *California v. Brown*, 479 U.S. 538, 107 S. Ct. 837 (1987) are inapposite because they deal with death penalty matters. This Court has expressly declined to analogize to death penalty matters:

We also observe 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.

*Rygh*, 206 W. Va. at 297, 524 S.E.2d at 449.

Petitioner’s argument that the Court’s change of mind on punitive damage cases is an example of the need for the Court to change direction regarding mercy standards is unpersuasive. Pet’r’s Br. at 35-7. There is a big difference between punitive damages and mercy phase instructions. Moreover, Petitioner has not even put forth a list of standards that he asserts the Trial Court should have given. Rather, Petitioner merely argues that the Trial Court should have given some standards. *See* Pet’r’s Br. at 27-37.

Therefore, because this Court has already held that Trial Courts are not to give standards to juries during the mercy phase and because Petitioner has not provided any standards that the Court should have given, but were denied, this Court should affirm the *Habeas* Court's denial of Petitioner's *Habeas* claims.

IV.

CONCLUSION

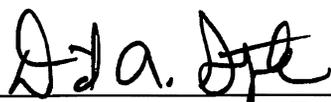
For the foregoing reasons and others apparent to this Court, this Court should affirm the *Habeas* Court's Order Denying Petitioner's Petition for *Habeas Corpus*.

Respectfully submitted,

DAVID BALLARD, WARDEN,  
MOUNT OLIVE CORRECTIONAL COMPLEX,  
*Respondent Below, Respondent,*

By Counsel,

PATRICK MORRISEY  
ATTORNEY GENERAL



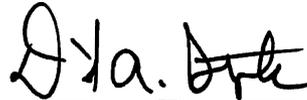
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DAVID A. STACKPOLE  
ASSISTANT ATTORNEY GENERAL  
812 Quarrier Street, 6th Floor  
Charleston, West Virginia 25301  
Telephone: (304) 558-5830  
State Bar No. 11082  
Email: David.A.Stackpole@wvago.gov  
*Counsel for Respondent*

**CERTIFICATE OF SERVICE**

I, David A. Stackpole, Assistant Attorney General and counsel for Respondent, do hereby verify that I have served a true copy of *RESPONDENT'S BRIEF* upon counsel for Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 8th day of June, 2015, addressed as follows:

Lonnie C. Simmons, Esquire  
DiTrapano, Barrett, DiPiero, McGinley & Simmons, PLLC  
P.O. Box 1631  
Charleston, WV 25326



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DAVID A. STACKPOLE  
ASSISTANT ATTORNEY GENERAL  
812 Quarrier Street, 6th Floor  
Charleston, West Virginia 25301  
Telephone: (304) 558-5830  
State Bar No. 11082  
Email: David.A.Stackpole@wvago.gov  
*Counsel for Respondent*