

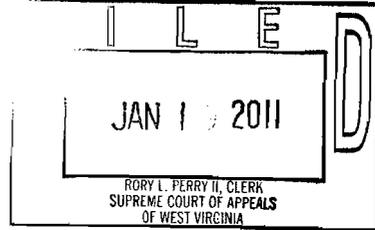
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Docket No. 35739**

**STATE OF WEST VIRGINIA**  
**Respondent,**

**Vs.**

**ANTHONY CHARLES JUNTILLA,**  
**Petitioner**



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**APPEAL FROM THE CIRCUIT COURT OF BERKELEY COUNTY**  
**HONORABLE DAVID H. SANDERS, JUDGE**  
**CASE NO. 08-F-35**

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**PETITIONER ANTHONY JUNTILLA'S BRIEF**

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## **ASSIGNMENTS OF ERROR**

1. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT A JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S CASE IN CHIEF AND AGAIN AT THE CLOSE OF ALL THE EVIDENCE
2. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED ENTRY OF PETITIONER'S STATEMENT GIVEN ON MARCH 13, 2008 TO BE ADMITTED INTO EVIDENCE
3. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED PETITIONER'S MOTION TO STRIKE PROSPECTIVE JUROR DAVID SMALLWOOD BECAUSE OF BIAS
4. THE PETITIONER'S SENTENCE TO LIFE WITHOUT A RECOMMENDATION OF MERCY SHOULD BE REMANDED BECAUSE IT WAS PLAIN ERROR FOR THE CIRCUIT COURT TO ALLOW THE JURY IN A UNITARY FIRST DEGREE MURDER PROCEEDING TO DECIDE THE ISSUE OF MERCY WITHOUT SETTING FORTH ANY APPROPRIATE STANDARDS

Assignment of error number 4 was not presented to the lower tribunal and Petitioner asserts plain error.

5. PETITIONER'S SENTENCE TO LIFE WITHOUT A RECOMMENDATION OF MERCY MUST BE HEARD BY THE SUPREME COURT OF APPEALS OF WEST VIRGINIA BECAUSE APPELLANT'S DUE PROCESS RIGHTS ARE BEING VIOLATED BECAUSE WEST VIRGINIA HAS NO MANDATORY REVIEW FOR LIFE SENTENCES WITHOUT RECOMMENDATION OF MERCY

Assignment of error number 5 was not presented to the lower tribunal and Petitioner asserts plain error. Further, Petitioner respectfully asserts this issue may be considered moot based on the procedures set forth in the Revised Rules of Appellate Procedure effective December 1, 2010 or the granting of Petitioner's previously filed petition for appeal

## STATEMENT OF THE CASE

This is a Petition for Appeal from an Agreed Re-Sentencing Order entered by the Circuit Court of Berkeley County on December 2, 2009, which denied Petitioner's Post-Trial Motions and Sentenced the Petitioner to the Penitentiary. (D.R. 519-523). Petitioner was indicted by a Berkeley County Grand Jury in the February 2008 Term for the following offenses: one (1) Count of Murder in the First Degree in violation of West Virginia Code § 61-2-1; one (1) Count of Felony Murder in the First Degree in violation of West Virginia Code § 61-8B-3; one (1) Count of Sexual Assault in the First Degree in violation of West Virginia Code § 61-8B-11; one (1) Count of Conspiracy to Commit Murder in violation of West Virginia Code § 61-10-31; and one (1) Count of Conspiracy to Commit Sexual Assault in violation of West Virginia Code § 61-10-3. (D.R. 36-38). At trial, the State elected to proceed under Count 1 of the Indictment and did pursue a conviction for Murder in the First Degree; as such, Count 2 of the Indictment, alleging Felony Murder in the First Degree was dismissed.

Petitioner was convicted in the Circuit Court of Berkeley County on one (1) Count of Murder in the First Degree; one (1) Count of Sexual Assault in the First Degree; and one (1) Count of Conspiracy to Commit Sexual Assault after a trial by jury on September 2, 2008 to September 4, 2008. (D.R. 519-523). The issues of guilt and mercy were not bifurcated at trial and Petitioner's previous counsel made no motion for the same. After finding the Petitioner guilty of the crime of Murder in the First Degree, the Jury did attach a recommendation of *no* mercy. (D.R. 519-523).

By agreement between the State and Petitioner's prior counsel, an Agreed Re-Sentencing Order was entered on December 2, 2009; the original Sentencing Hearing being held on October 27, 2008. (D.R. 519-523). At the October 27, 2008 Sentencing Hearing, Petitioner's Post-Trial Motions were denied and Petitioner was sentenced to life without the possibility of parole in the custody of the Commissioner of the Department of Corrections upon his conviction for Murder in the First Degree as charged in Count 1 of the Indictment; Petitioner was sentenced to an indeterminate sentence of 15 to 35 years in the custody of the Commissioner of the Department of Corrections upon his conviction of Sexual Assault in the First Degree as charged in Count 3 of the Indictment; Petitioner was sentenced to an indeterminate sentence of 1 to 5 years in the custody of the Commissioner of the Department of Corrections upon his conviction of conspiracy to Commit the Offense of Sexual Assault as charged in Count 5 of the Indictment. (D.R. 488-490, 519-523). All sentences were ordered to be served consecutively. (D.R. 488-490, 519-523).

It is from this Sentencing Order that the Petitioner now appeals. (D.R. 519-523). Petitioner did file a written notice of appeal after being appointed to represent said Petitioner. (D.R. 527-529). Petitioner was granted a sixty (60) day extension to file the instant appeal upon written motion. (D.R. 534).

Petitioner timely filed a Petition for Appeal and the same was granted by the Supreme Court of Appeals of West Virginia.

On December 16, 2010, clerk of the Supreme Court of Appeals of West Virginia did set a briefing schedule and did forward a copy of the entire designated record to the parties.

## **SUMMARY OF THE ARGUMENT**

The charges set forth in the Petitioner's indictment stem from an alleged murder that occurred in the early morning hours of May 27, 2007 at a residential townhouse located in Berkeley County, West Virginia. The facts surrounding this tragic death are undoubtedly grim. However, when reviewing the record in this case, it is clear that the State of West Virginia did not meet its burden of proof when convicting Petitioner Anthony Juntilla of any of the charges brought against him.

The facts the State relied upon to sustain a wrongful conviction of Petitioner are set forth as follows: On May 27, 2007, it was alleged that Fred Douty was driving a car and Anthony Juntilla was riding in the passenger seat when they first encountered victim Tina Starcher. After a brief discussion, Tina Starcher agreed to enter the vehicle and was driven by Fred Douty to a residence located at 86 Tecumseh Trail; said residence being a townhouse owned by Anthony Juntilla's father. While on the bottom floor of the townhouse, Fred Douty claimed that he and Anthony Juntilla sexually assaulted Tina Starcher and that Tina Starcher was knocked unconscious. After being knocked unconscious, it was alleged that Tina Starcher was carried to an upstairs bathtub where Anthony Juntilla committed murder by cutting and stabbing said victim. Fred Douty further claimed that he and Anthony Juntilla placed Tina Starcher's body in a plastic tub container and drove said body to a secluded area on Dam #4 road. After carrying the container to the side of the road, Fred Douty claims that Anthony Juntilla kicked Tina Starcher's body until she fell over a rock ledge.

Prior to trial, Fred Douty accepted a plea agreement to one (1) count of Felony Murder in the First Degree; said plea agreement assured Fred Douty to a sentence of life with the possibility for parole if he testified against Petitioner Anthony Juntilla.

It is uncontested that Fred Douty is a liar. Law enforcement witnesses admit that Fred Douty is a liar. The State admits that Fred Douty is a liar. *Fred Douty* admits he is a liar. The story that Fred Douty told at trial is gruesome, false, and solely created to assure that Fred Douty will see the parole board in his lifetime. Further, evidence elicited from other witnesses at trial confirmed that Petitioner Anthony Juntilla was convicted upon nothing more than a foundation of deceit.

At trial, the State primarily relied on Fred Douty's perjured testimony to convict Petitioner of the Counts contained in the Indictment. Fred Douty is a criminal who shows no remorse for the brutal crimes he has committed and did not hesitate in improperly placing blame for his actions on Petitioner Anthony Juntilla.

Petitioner now respectfully asserts that the State did not present sufficient evidence to sustain a conviction and that certain procedural errors occurred at trial that require reversal of said conviction. Further, Petitioner alleges that Circuit Court committed plain error when it failed to instruct the jury regarding the issue of mercy without setting forth any appropriate standards. Lastly, the Petitioner did previously assert that the Petitioner's appeal should be accepted because Petitioner was sentenced to life without the possibility for parole but now believes said issue may be considered moot based on the mandates of the Revised Rules of Appellate Procedure effective December 1, 2010 or the granting of Petitioner's previously filed petition for appeal.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

- I. Petitioner affirmatively states that the issues raised in assignments of error I-III of the instant petition are issues that have been authoritatively decided and oral argument is not necessary unless the Court determines that other issues raised upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 of the West Virginia Revised Rules of Appellate Procedure argument and disposition by memorandum decision.
- II. Petitioner affirmatively states that the issues raised in assignment of error IV of the instant petition are issues of public importance and that deal with the constitutionality of a statute and may be selected for oral argument pursuant to Rule 20 of the West Virginia Revised Rules of Appellate Procedure and memorandum decision.
- III. Petitioner affirmatively states that the issue raised in assignment of error V are most likely rendered moot and oral argument is not necessary on said issue.

## ARGUMENT

1. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO GRANT A JUDGMENT OF AQUITTAL AT THE CLOSE OF THE STATE'S CASE IN CHIEF AND AGAIN AT THE CONCLUSION OF ALL THE EVIDENCE

That State simply did not present credible evidence to meet its burden of proof in convicting Petitioner Anthony Juntilla on any of the crimes for which he is imprisoned. The Circuit Court wrongfully denied Petitioner's properly made Motions for Judgment of Acquittal after the close of the State's evidence and again at the conclusion of all evidence. The standard of review for ruling on sufficiency of the evidence arguments is set forth as follows:

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the Petitioner's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt."

Syl. Pt. 2. *State v. Edmond*, 702 W.Va. 408 (2010) (quoting Syl. Pt. 1. *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

A criminal Petitioner challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial in the light most favorable to the prosecution and must credit all inferences and reducibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighted, from which a jury could find guilty beyond a reasonable doubt.

Syl. Pt. 3. *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

In a criminal case, a verdict of guilty will not be set aside on the ground that it is contrary to the evidence, where the State's evidence is sufficient to convince impartial minds of guilt of the Petitioner beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilty on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.

Syl. Pt. 1 *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1979).

Petitioner recognizes the heavy burden associated with contesting sufficiency of evidence at trial, but Petitioner believes that his burden has been met. After presenting its case in chief, the State chose to proceed against Petitioner for the crime of Murder in the First Degree; as such, the State had to prove that Petitioner did "willfully, intentionally, deliberately, premeditatedly with malice and intent, kill Tina Marie Starcher." After choosing to proceed under a theory of Murder in the First Degree, the State was precluded from seeking to convict Petitioner under the less stringent evidentiary requirements for proving Felony Murder in the First Degree. At trial, the State provided no credible evidence to sustain a conviction on any of the charges brought against Petitioner Anthony Juntilla.

The State primarily relied on the testimony of Fred Douty to convict Petitioner Anthony Juntilla. As noted above, everyone in this case, including Fred Douty, recognizes that Fred Douty is a liar. In short, Fred Douty's testimony should not have been considered credible by the jury and should have resulted in the acquittal of Petitioner Anthony Juntilla for all of the charges lodged against Petitioner, including the Charge of Murder in the First Degree.

Prior to committing the murder, Fred Douty had a serious drug problem and supported himself by stealing items from the local mall. On direct examination by the State, the following exchange occurred:

Q. And did at the time you were living there did you have a drug problem?

A. Yes.

Q. How where you supporting yourself?

A. Stealing.

Q. And what kind of things would you steal?

A. DVDS and things from the mall.

Q. And you would convert those into cash?

A. Yes.

(Tr. 43-63, September 3, 2008).

By stealing, Fred Douty was able to support a drug habit that cost him \$29,200.00 a year. (Tr. 114-115, September 3, 2008). Further, Fred Douty's criminal history consists of various other crimes of violence and crimes of dishonesty. (Tr. 113, September 3, 2008).

At trial, Trooper Bowman, lead investigating officer in this case, readily testified that Fred Douty had told at least *forty-four (44) different lies* over the course of the investigation. (Tr. 57-58, September 3, 2008). In a thorough and persuasive manner, trial counsel did cross examine Trooper Bowman on a majority of inconsistencies that Fred Douty had given during the investigation. (Tr. 43-63, September 3, 2008).

At the start of the investigation, Trooper Bowman suspected that he was intentionally avoiding the police and was actually trying to evade arrest. (Tr. 25-26,

September 3, 2008). After finally being found by law enforcement, on June 18, 2007, Fred Douty gave a statement contains a great amount of falsehoods. At trial, Trooper Bowman confirmed all of the lies that Fred Douty told him during the June 18, 2007 interview. (Tr. 43-63, September 3, 2008). A sample of some of the forty-four (44) lies Fred Douty told to law enforcement officers during his June 18, 2007 interview is set forth as follows:

- a. Fred Douty initially tells the officers in response to their first inquiry that the interview is “a bunch of bullshit.” (Tr. 42, September 3, 2008).
- b. Fred Douty lied about where he was before the murder. (Tr. 42, September 3, 2008).
- c. Fred Douty lied about consuming and being in the presence of drugs. (Tr. 42-43, September 3, 2008).
- d. Fred Douty lied about where he traveled before the murder. (Tr. 43, September 3, 2008).
- e. Fred Douty lied about being in Anthony Juntilla’s vehicle when he was clearly driving said vehicle. (Tr. 43, September 3, 2008).
- f. Fred Douty lied about being in another persons’ vehicle when he was clearly driving Anthony Juntilla’s vehicle. (Tr. 43-44, September 3, 2008).
- g. Fred Douty lied about his trip to capitol heights prior to the murder. (Tr. 44, 48 September 3, 2008).
- h. Fred Douty lied about being in the presence of females before the murder. (Tr. 45, September 3, 2008).

- i. Fred Douty lied about having sex with anyone prior to the murder. (Tr. 46, September 3, 2008).
- j. Fred Douty lied by stating that Anthony Juntilla drove the car that night. (Tr. 48, September 3, 2008).
- k. Fred Douty lied about making stops while he was driving prior to other places prior to the murder. (Tr. 48, September 3, 2008).
- l. Fred Douty lied about who he purchased crack from prior to the murder. (Tr. 48-49, 52, September 3, 2008).
- m. Fred Douty lied about being dropped off on Tomahawk Road before the murder. (Tr. 51, September 3, 2008).
- n. Fred Douty lied about what clothes he was wearing before the murder. (Tr. 52, September 3, 2008).
- o. Fred Douty lied about the last time he was on Dam #4 road. (Tr. 54, September 3, 2008).
- p. Fred Douty lied about the identity of the girl who was picked up prior to the murder. (Tr. 54, September 3, 2008).
- q. Fred Douty lied about being picked up by his grandfather on the day after the murder. (Tr. 56, September 3, 2008).

Fred Douty freely admitted during his testimony that he lied to law enforcement when giving his June 18, 2007 statement. (Tr. 98, 116, September 3, 2008). As clearly evidenced by the testimony taken at trial and his own admissions, Fred Douty will lie about anything, whether it is relevant, self serving, or simply mundane facts having no bearing on his guilt or innocence. It was only after Fred Douty knew he was caught that

he changed his story during the June 18, 2007 interview and spoke to law enforcement officers about the murder. (Tr. 59, September 3, 2008). However, as clearly depicted, the story he told law enforcement about Petitioner Anthony Juntilla murdering Tina Starcher was nothing more than a self serving lie.

At trial, Fred Douty continued his dishonesty and two of his biggest lies were exposed. First, at trial, Fred Douty testified that, after Tina Starcher was knocked unconscious, Anthony Juntilla carried her up the stairs and that he did not help him do so. (Tr. 88-89, September 2, 2008). This was clearly a lie as Trooper Bowman testified that he had previously told law enforcement that he had helped Petitioner Anthony Juntilla carry Tina Starcher upstairs to the bathtub. (Tr. 146, September 4, 2008).

Second, at trial, Fred Douty also testified that he only had vaginal sex with Tina Starcher. (Tr. 118, September 2, 2008). This was also a lie as Trooper Bowman testified that he had previously told law enforcement that he had engaged in oral sex with the victim. (Tr. 147, September 4, 2008).

As noted during Petitioner's trial counsel during closing argument, Fred Douty showed no remorse for his actions during trial, prior to trial, or when he was committing murder. Fred Douty didn't decide to talk to law enforcement about the murder until several weeks after it occurred and never called 911 or independently alerted law enforcement. (Tr. 140, September 3, 2008). During cross examination of Fred Douty, the following exchange occurred which perfectly illustrates the callous nature of Fred Douty:

Q. So you had sex with her after she got punched in the face?

A. After he punched and had sex with her I took my turn, yes.

(Tr. 132, September 3, 2008).

Ultimately, Fred Douty told the biggest lie of all at trial when he told the jury that Anthony Juntilla slit the victim's throat and stabbed her to death. It is clear that Fred Douty's lies were promulgated for one reason: to assure that he got the benefit of a plea by testifying against Petitioner Anthony Juntilla.

Although Fred Douty's perjured testimony was primarily used to convict Petitioner Anthony Juntilla, witness Stephanie Brennan also gave perjured testimony in order to seek revenge against Anthony Juntilla. Stephanie Brennan did have a child with Petitioner Anthony Juntilla. (Tr. 213, September 2, 2008). Stephanie Brennan did have a serious crack cocaine problem and delivered said child while being addicted to crack cocaine. (Tr. 214, September 3, 2008). Child protective services initiated an abuse and neglect proceeding against Stephanie Brennan and Anthony Juntilla and did seek to terminate their parental rights to said child. (Tr. 214, September 3, 2008). Ultimately, Stephanie Brennan and Anthony Juntilla lost their parental rights during said abuse and neglect proceeding in the Circuit Court of Berkeley County, West Virginia.

At the time of the murder, Stephanie Brennan was in a 21 day inpatient drug rehabilitation program. (Tr. 214, September 3, 2008). Stephanie Brennan testified that, while in rehabilitation, Anthony Juntilla told her during a phone conversation that he had done something bad and told "her to think Hannibal Lecter." (Tr. 214, September 3, 2008). Stephanie Brennan then testified that after Anthony Juntilla had picked her up from rehabilitation he told her about how he beat Tina Starcher unconscious and carried her upstairs into a bathroom and stabbed her until she was dead. (Tr. 219-220, September 3, 2008).

However, Stephanie Brennan had a motive as to why she would create these lies in order to convict Petitioner Anthony Juntilla. Stephanie Brennan was extremely upset about losing her child in the abuse and neglect proceeding and blamed Petitioner Anthony Juntilla for the loss of their child because he would not conform to the requirements of the Circuit Court during the abuse and neglect proceeding. (Tr. 242, September 3, 2008). Suspiciously, Stephanie Brennan claims Petitioner Anthony Juntilla told her about the murder around June 4, 2007 or June 5, 2007, but she did not attempt to contact the police until close to two (2) weeks later. (Tr. 242, September 3, 2008).

Lastly, the medical evidence and scientific DNA evidence presented at trial was correctly termed by trial counsel as nothing more than “smoke and mirrors.” Dr. Kaplan, Stephen King, and Douglas Owsley, Ph. D. could not give an exact cause of death after performing medical exams on the body that was recovered. (Tr. 3-41, September 3, 2008). In fact, no medical evidence could be produced at trial which proved that victim Tina Starcher was ever cut or stabbed. (Tr. 41, September 4, 2008).

The DNA evidence presented in this case did not prove anything regarding the guilt or innocence of Petitioner Anthony Juntilla. The only DNA evidence that could be conclusively presented at trial was that Fred Douty’s seminal fluid was found on a couch in the basement of the home where the murder occurred. (Tr. 94, September 3, 2008). At most, the State presented scientific evidence that Anthony Juntilla could not be excluded as a contributor of DNA to the couch area where a sample was taken. (Tr. 94, September 3, 2008). Petitioner respectfully posits that said DNA evidence regarding Anthony Juntilla is conclusive of nothing as he *resided* in the basement where the couch

was exhumed and most likely his DNA had been on the couch for some time. (Tr. 247-248 September 2, 2008). No seminal fluid of Anthony Juntilla was found in or around anywhere Tina Starcher's body had been located. No DNA from Anthony Juntilla had been found on Tina Starcher's body. The only DNA evidence in this case linking Anthony Juntilla to the crime is the fact that he could not be excluded as a contributor of DNA to a portion of a couch that had been placed in an area of the home where he resided. Furthermore, evidence was presented at trial which proved that Anthony Juntilla had cut his leg very badly a couple of weeks before the murder and that he entered the basement area where the couch was located while bleeding "like a stuck pig." (Tr. 239-240, September 2, 2008). Lastly, the State's primary DNA expert was forced to admit that it was only a mere "possibility" that Petitioner Anthony Juntilla could not be excluded as contributor of DNA to the couch area in question and it was certainly was not a "probability" that he could not be excluded as a contributor. (Tr. 112, September 4, 2008).

It is clear, after reviewing the transcripts at issue, the State simply sought to put on a barrage of "experts" to convince that all of its irrelevant medical and scientific evidence created absolute proof that Petitioner committed a murder when all it actually proved was that Petitioner's DNA came in contact with a couch that was placed in an area where he resided on a full time basis.

Even when evaluating the fact and expert testimony presented at trial in the light most favorable to the State, it is clear that Petitioner's motions for judgment of acquittal should have been granted. Further, it is clear that the evidence presented at trial is insufficient to sustain a conviction against Petitioner Anthony Juntilla.

2. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED PETITIONER'S STATEMENT GIVEN ON MARCH 13, 2008 TO BE ADMITTED INTO EVIDENCE

The Circuit Court of Berkeley County committed reversible error when it allowed Petitioner's March 13, 2008 statement to be admitted into evidence. Prior to the pre-trial hearing in this matter, Petitioner's trial counsel filed a written motion to suppress said statement and the issue was argued at the June 2, 2008 pre-trial hearing. After having said motion denied, at trial, Petitioner's trial counsel diligently placed his continued objection to the admission of said evidence on the record. (Tr. 225, September 3, 2008).

At trial, Trooper Faircloth testified that he was responsible for collecting a DNA Sample from Petitioner Anthony Juntilla while Petitioner was incarcerated at the Potomac Highlands Regional Jail. (Tr. 223, September 3, 2008). While taking said DNA sample, Petitioner allegedly made conversation with Trooper Faircloth and stated that "he didn't know what was taking so long, they had a pretty solid case, that if he was in Virginia he would already have been to trial and sentenced by now." (Tr. 227, September 3, 2008). Trooper Faircloth testified that Petitioner was not given a Miranda warning before he allegedly gave said statements. (Tr. 227, September 3, 2008). Prior to trial and again at trial, Petitioner's trial counsel objected to the admission of said statements based on the fact that Petitioner was not given a Miranda warning.

On appeal, the standard for review for ruling on Petitioner's argument regarding suppression of said March 13, 2008 statement is an abuse discretion. The Supreme

Court of Appeals of West Virginia has stated the following regarding said standard of review:

The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.

Syl. Pt. 1, *State v. Morris*, \_\_\_ S.E.2d \_\_\_ (2010) (quoting Syl. Pt. 1, *State v. Nichols*, 208 W. Va. 432, 541 S.E.2d 310 (1999)).

Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.

*Miranda v. Arizona*, 384 U.S. 436, 444-5, 86 S.Ct. 1602, 1612 (1966).

The determination of whether a person was subjected to a custodial interrogation for purposes of *Miranda* requires a consideration of the totality of the circumstances. *Damron v. Haines*, 223 W. Va. 135, 672 S.E.2d 271 (2008). The factors to be considered by the trial court in making a determination of whether a custodial interrogation environment exists, while not all-inclusive, include: the location and length of questioning; the nature of the questioning as it relates to the suspected offense; the number of police officers present; the use or absence of force or physical restraint by the police officers the suspect's verbal and nonverbal responses to the police officers; and the length of time between the questioning and formal arrest. Syl. Pt. 2, *State v. Middleton*, 220 W. Va. 89, 640 S.E.2d 152 (2006). Said list of factors is not all inclusive, and other relevant factors used to determine whether a custodial interrogation occurred include the "nature of the interrogator, the nature and condition of the suspect,

the time and length of the questioning, the nature of the questioning-accusatory or investigatory, and the focus of the investigation at the time of questioning.” *Damron*, 223 W. Va. at 135, 672 S.E.2d at 277.798, 805. Further, the determination of whether a custodial interrogation occurred is “based upon whether a reasonable person in the suspect’s position would have considered his or her freedom of action curtailed to a degree associated with a formal arrest. Syl. Pt. 1, *State v. Middleton*, 220 W. Va. 89, 640 S.E.2d 152 (2006).

When evaluating the totality of the circumstances in this case, it is clear that a custodial interrogation occurred. At the time said statements were allegedly made, Trooper Faircloth was taking a DNA sample of Petitioner at a jail and Petitioner was obviously not free to leave. Further, Trooper Faircloth was taking said DNA sample pursuant to a Court Order and outside the presence of Petitioner’s attorney. Although there is a question as to whether an actual interrogation occurred no recorded evidence of the conversation exists. It is the position of Petitioner that an interrogation must have occurred for Petitioner to make said statements as statements of this nature would not occur in the normal course of a conversation.

Admission of said statements at trial was unduly prejudicial to Petitioner and the admittance of said statements constituted reversible error on the part of the Circuit Court of Berkeley County, West Virginia.

3. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED PETITIONER’S MOTION TO STRIKE PROSPECTIVE JUROR DAVID SMALLWOOD BECAUSE OF BIAS

The Circuit Court of Berkeley County committed reversible error when it denied trial counsel’s motion to strike potential juror David Smallwood for cause. When

assessing whether a trial court properly denied a motion to strike a prospective juror for cause, the standard of review and legal standard is as follows:

The challenging party bears the burden of persuading the trial court that the juror is partial and subject to being excused for caused [sic]. An appellate court only should interfere with a trial court's discretionary ruling on a juror's qualification to serve because of bias only when it is left with a clear and definite impression that a prospective juror would be unable faithfully and impartially to apply the law.

Syl. Pt. 1. *State v. Mills*, 219 W.Va. 28, 631 S.E.2d 586 (2005) quoting Syl. Pt. 6, *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996).

By looking at prospective juror David Smallwood's responses to voir dire questions, it is clear that said prospective juror holds a bias which should have disqualified him from the jury panel. During jury selection, trial counsel did make a motion to strike said prospective juror for cause based on the fact that said juror was predisposed to make a recommendation of a no mercy verdict. (Tr. 159-160, September 3, 2008).

Specifically, said Juror stated that it would be "unlikely that I would feel any mercy but I would have to, you know, I would have to hear the case through." (Tr. 158, September 3, 2008). Further, said potential juror is a strong proponent of the death penalty and believes West Virginia should adopt the death penalty as a sentence. Tr. 155, September 3, 2008).

By denying Petitioner's motion to strike said juror for cause, the Circuit Court of Berkeley County unduly prejudiced said Petitioner as he was forced to use one of his peremptory strikes to eliminate said prospective juror. The Circuit Court's failure to strike juror David Smallwood for cause is reversible error which requires Petitioner's convictions be reversed.

4. PETITIONER'S SENTENCE TO LIFE WITHOUT A RECOMMENDATION OF MERCY SHOULD BE REMANDED BECAUSE PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY ALLOWING THE JURY TO DECIDE THE ISSUE OF MERCY IN A UNITARY FIRST DEGREE MURDER TRIAL WITHOUT SETTING FORTH ANY APPROPRIATE STANDARDS

Petitioner's sentence to life without a recommendation of mercy should be remanded because Petitioner's due process rights were violated by allowing the jury in a unitary first degree murder proceeding to decide whether to recommend mercy for a life sentence without setting forth any appropriate standards to decide said issue.

During the trial, no objection was made to the jury instructions proposed or submitted, however, the giving of a jury instruction with no standards regarding the issue of mercy during a unitary first degree murder trial amounts to plain error. In order to trigger the application of the plain error doctrine "there must be (1) an err; (2) that is plain; (3) that affects the substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 1, *State v. Poore*, \_\_\_ S.E.2d \_\_\_ (2010) (quoting Syl. Pt. 8, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995)). When ruling upon a question of law or an interpretation of a statute, a *de novo* standard of review is applied. Syl. Pt. 1, *State v. Edmonds*, 702 S.E.2d 408 (2010).

The law regarding issues of mercy in first degree murder trials pursuant to West Virginia Code § 62-3-15 is as follows:

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.

West Virginia Code § 62-3-15

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. 1, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996).

If the jury renders a verdict convicting an Petitioner of first degree murder, and recommends mercy, the Petitioner is sentenced to life imprisonment, but is eligible for parole consideration in 15 years. If mercy is not recommended, the Petitioner is not eligible for parole.

*State v. Rygh*, 206 W. Va. 295, 524 S.E.2d 447 (1999) (*footnote 1*).

We do not believe that conceptually there is any separate or distinctive “Burden of Proof” or “burden of production” associated with the jury’s mercy/no-mercy determination in a bifurcated mercy phase of a murder trial, if the court in its discretion decides to bifurcate the proceeding. In making its overall verdict, in a unitary trial or a bifurcated trial, the jury looks at all of the evidence that the Petitioner and the prosecution have put-on and if the jury concludes that an offense punishable by life imprisonment as 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 an Petitioner 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

an Petitioner, in the absence of the Petitioner opening the door to permit narrowly focused impeachment or rebuttal evidence from the prosecution.

*State v. Rygh*, 206 W. Va. 295, 524 S.E.2d 447 (1999) (*footnote 1*).

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, 363 S.E.2d 504 (1987).

As noted above, after Petitioner was convicted of the crime of Murder in the First Degree, the jury recommended no mercy for said life sentence. The guilt/innocence phase of the trial was not bifurcated from the mercy phase of the proceeding.

At trial, the following instruction, which sets forth no standard for making a recommendation of mercy, was read to the jury:

If, however, you find the Defendant guilty of murder in the first degree, the Court must - - now we are on page 5 – must sentence him to confinement in the penitentiary for life and he shall not be eligible for parole unless you in your discretion further find and add to your verdict a recommendation for mercy. That recommendation of mercy would mean that the Defendant, Anthony C. Juntilla, could be eligible for parole consideration after having served a minimum of 15 years.

(Tr. 161-162, September 4, 2008).

No objection at trial to said jury instructions was necessary as the law at the time of said trial precluded instructions that would set forth a standard for determining whether a recommendation of mercy should attach to a conviction of Murder in the First Degree.

Petitioner's due process rights were violated by allowing the jury to decide the issue of whether the Petitioner should receive a life sentence with a recommendation of mercy without giving the jury any guidance on how to decide this issue. As noted

above, the jury is absolutely unfettered when making a decision as to whether to attach the recommendation of mercy to a life sentence and is not bound by no standards

Procedural issues regarding the mercy phase of a bifurcated first degree murder proceeding have recently been addressed by this Court in *State v. McLaughlin*, 226 W. Va. 229, 700 S.E.2d 289 (2010). In said opinion, the Supreme Court of Appeals of West Virginia ruled upon the following issues that had previously not been addressed regarding the mercy phase of a bifurcated first degree murder proceeding: the type of evidence admissible at the mercy phase of a bifurcated first degree murder proceeding; whether the State or defendant should proceed first during the mercy phase of a bifurcated first degree murder proceeding; which party has the burden of proof during the mercy phase of a bifurcated first degree murder proceeding; and whether the jury verdict must be unanimous in the mercy phase of a bifurcated first degree murder proceeding. Syl. Pts. 3-8, *State v. McLaughlin*, 226 W. Va. 229, 700 S.E.2d 289 (2010).

One of the arguments raised by the defendant in *McLaughlin*, was whether West Virginia Code § 62-13-15 was unconstitutional because it does not contain any standards to guide the jury's exercise of discretion when ruling upon the issue of mercy. Footnote 12, *State v. McLaughlin*, 226 W. Va. at \_\_\_, 700 S.E.2d at 293. This Honorable Court did decline to rule on said issue because the defendant never raised the issue before the trial court. *Id.* However, this Honorable Court did note that the issue regarding the imposition of standards to guide juries during the mercy phase of a first degree murder proceeding had previously been addressed in *State v Miller*, 178 W. Va. 618, 363 S.E.2d 504 (1987).

Petitioner respectfully contends that there are distinguishing factors in *Miller* from the instant proceeding and differing arguments which require that the relief requested by Petitioner be granted. In *Miller*, this Honorable Court determined that an instruction setting forth guidelines for the issue of mercy was improper, however, the Court did not rule on the constitutionality of this issue, but only found that the guidelines given in said case should not be given. Another distinguishing factor in the *Miller* decision from this proceeding is that the Appellant in said proceeding asserted the objection to the guidelines given in *Miller* because he found said guidelines to be confusing. Further, this Honorable Court in *Miller* cited the following case law from *State ex rel. Leach v. Hamilton*, 280 S.E.2d 62, 64 (1980):

The West Virginia first-degree murder statute leaves very little sentencing discretion to juries. A finding of guilt automatically results in a life sentence and a jury's only discretion is whether to grant parole eligibility by recommending mercy. The factors that a jury should consider in deciding whether to recommend mercy are not delineated, but these are for legislative determination.

*State v. Miller*, 178 W. Va. 618, 620-621, 363 S.E.2d 504, 506-507.

The *Miller* decision does not suggest that guidelines for determining whether to grant mercy in a first degree murder trial should never be given, in fact, the *Miller* decision suggests that said guidelines could be implemented if properly delineated. Unfortunately, the *Miller* decision has been the fallback argument whenever this issue has been raised. See *Billotti v. Dodrill*, 183 W. Va. 48, 394 S.E.2d 32 (1990). However, for the reasons set forth above and below, it is time for this line of jurisprudence to be reversed.

In West Virginia, a sentence of life without mercy is the harshest sentence that an individual can receive. Although this Honorable Court has specifically noted that the

body of case law and protections applied to first degree murder cases in jurisdictions which have the death penalty should not be applied to first degree murder cases in West Virginia, it is still relevant and necessary to compare a sentence of life without the possibility of parole to a sentence of death; as said sentence is in essence considered capital punishment in West Virginia. Footnote 1, *State v. Rygh*, 206 W. Va. 295, 524 S.E.2d 447 (1999).

The due process violation that the Petitioner in this case was subjected to is the same due process violation that all Petitioners in a first degree murder trial face. There are simply no guidelines for a jury to follow when determining whether to recommend that Petitioner's life sentence carry a recommendation of mercy.

Under current West Virginia Law, a jury can simply make a recommendation of life without mercy for any reason whatsoever whether theoretically constitutionally permissive or theoretically unconstitutionally permissive. For instance, a juror could make a determination to recommend a life sentence without the attachment of mercy simply because said juror was afraid of being scrutinized for their decision. A juror could recommend a sentence of life without mercy simply because he did not like the way the Petitioner looked. Without guidelines for the jury to follow when determining whether to recommend that a Petitioner be granted mercy in first degree murder prosecution, the jury is left to their own devices and the Petitioner is given little to no due process protections.

Although this Honorable Court recently made rulings regarding procedure in the mercy phase of bifurcated first degree murder proceedings, this Honorable Court did not opine as to procedures for the mercy phase in unitary first degree murder proceedings.

*See State v. McLaughlin*, 226 W. Va. 229, 700 S.E.2d 289 (2010). Further, although this Honorable Court did note that the constitutionality of West Virginia Code § 62-3-15 had been previously been addressed on several instances, this Honorable Court did not specifically issues of constitutionality regarding the imposition of standards during the mercy phase of a first degree mercy proceeding as it had not been raised through certified question to the trial court. *State v. McLaughlin*, 226 W. Va. at \_\_\_, 700 S.E.2d at 293.

Petitioner respectfully asserts that his right to due process was violated because West Virginia Code § 62-13-15 allows for juries to arbitrarily and capriciously decide the fate of a defendant's life. In death penalty cases, it has been long established that juries are not allowed to make said determination without standards. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972). Admittedly, in West Virginia the death penalty is not applicable; however, under the current state of the law, juries are allowed to impose the most strict penalty allowed, incarceration without parole, without any standards.

In this trial, the mercy phase was not bifurcated from the guilty phase. At the same time during trial, the jury was thoroughly and completely instructed in every other aspect of the case except the mercy phase of the proceeding. Without guidance, the jury in this proceeding was not instructed on one of the most important procedural aspects of the entire case, but was allowed to decide this issue without proper guidance.

It is for these reasons, that the Petitioner respectfully asks that the Supreme Court of Appeals of West Virginia establish a standard for juries to follow when making a

recommendation of mercy or no mercy in a unitary first degree murder trial and remand. Petitioner's case so said standard can be applied.

5. PETITIONER'S SENTENCE TO LIFE WITHOUT A RECOMMENDATION OF MERCY MUST BE HEARD BY THE SUPREME COURT OF APPEALS OF WEST VIRGINIA BECAUSE APPELLANT'S DUE PROCESS RIGHTS ARE BEING VIOLATED BECAUSE WEST VIRGINIA HAS NO MANDATORY REVIEW FOR LIFE SENTENCES WITHOUT RECOMMENDATION OF MERCY

Petitioner had previously sought through his initial petition to assert that his due process rights were being violated because West Virginia did not have mandatory appellate review for defendants sentenced to life without mercy. However, this previously asserted issue may be deemed moot based on the Revised Rules of Appellate Procedure or this Court's acceptance of the previously filed petition for appeal.

Prior to the December 1, 2010 Revised Rules of Appellate Procedure, the issue of mandatory appellate review of criminal convictions was as follows:

West Virginia does not grant a criminal Petitioner a first appeal of right, either statutorily or constitutionally. However, our discretionary procedure of either granting or denying a final full appellate review of a conviction does not violate a criminal Petitioner's guarantee of due process and equal protection of law.

Syl. Pt. 4. *Billotti v. Dodrill*, 183 W. Va. 48, 394 S.E.2d 32 (1990).

Under the old appellate procedure, West Virginia did not grant criminal Petitioners sentenced to life without the recommendation of mercy a first appeal of right either statutorily or constitutionally. However, Petitioner recognizes that the new Revised Rules of Appellate Procedure appear to be constructed to grant all criminal defendants,

including defendants sentenced to life without mercy, the opportunity for final, full appellate review.

As Revised Rules of Appellate Procedure have only been in effect since December 1, 2010 and this issue has not been previously addressed, Petitioner respectfully requests that this Honorable Court consider mandating that cases involving life without mercy sentences be given the most stringent appellate review under the new revised rules.

Lastly, if the Revised Rules of Appellate Procedure have not made the issues in this previously asserted assignment of error moot, Petitioner concedes that this issue is most likely rendered moot because of this Honorable Court's acceptance of the Petitioner's previously filed petition for appeal.

### **CONCLUSION AND RELIEF REQUESTED**

For the reasons set forth above, Petitioner respectfully requests that this Petition be granted; that the judgment of the Circuit Court of Berkeley County be reversed; that the Petitioner be granted a hearing or new trial in this matter; or that the case be remanded to conduct a new mercy phase of Petitioner's proceeding with the jury being instructed regarding proper standards for determining whether mercy should be granted.

Respectfully submitted,  
Anthony Juntilla,



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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**  
**Docket No. 35739**

**STATE OF WEST VIRGINIA**  
**Respondent,**

**Vs.**

**ANTHONY CHARLES JUNTILLA,**  
**Petitioner**

**CERTIFICATE OF SERVICE**

I, Christopher J. Prezioso, counsel for the Petitioner, do hereby certify that I have served a true and accurate copy of the foregoing Petitioner Anthony Juntilla's Brief upon the following person, by hand delivery, on this 18th day of January, 2011:

Christopher C. Quasebarth  
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