

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

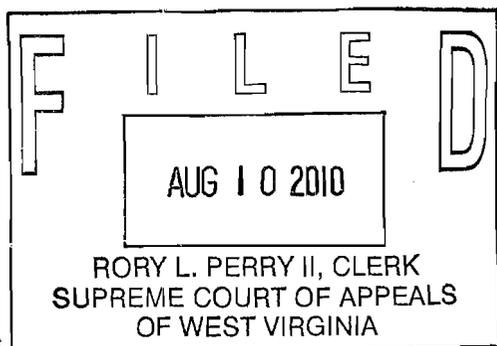
STATE OF WEST VIRGINIA,

v.

**Supreme Court No. 35501
Circuit Court No. 07-F-15-B
Raleigh**

**RODNEY JASON BERRY,
Appellant.**

APPELLANT'S REPLY BRIEF



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Introduction

Counsel disputes a considerable portion of the facts presented by the State. Counsel will *not*, however, go through the State's statement of facts issue by issue to refute what has been represented to this Court. Counsel will address a few of the more glaring misrepresentations and attempts by the State to twist the facts to fit within its theory in each individual discussion of law. However, an easy way to summarily dispose of the State's statement of facts is to point out that while Appellant Counsel's brief addressed legal rulings and issues that were problematic within Mr. Berry's trial, the State focused not on addressing the legal issues but on the facts of the case. Facts that admittedly are very tragic, a point Appellate Counsel has conceded from the beginning. However, the facts of the crime itself *are not the focal point of this appeal*. The significant issues in this appeal are the legal arguments and rulings that were made which, *are not subject to a harmless error analysis*, and are rulings that effectively denied Mr. Berry of his constitutional right to a fair trial. To quote Justice Felix Franfurter, the prosecutor "wields the most terrible instruments of government." *Martin v. Merola, 532 F.2d 191, 196(2d Cir. 1976)(Lumbard, J. concurring)*. Mr. Berry's case provides a perfect example of what happens when that "instrument" is abused.

Reply Argument

- I. **The State *incorrectly* argues that the previous marriage of 12 years and recent divorce between the trial judge and the prosecutor *did not* create an unacceptable appearance of impropriety which denied the Appellant his *fundamental constitutional right to an impartial tribunal*. (State's Brief 11-16)**

Constitutional rights are not "mere technicalities" that can be "unknowingly waived" by the person they are intended to protect as the State suggests in its brief. The State frivolously

claims that Mr. Berry waived his right to an impartial tribunal based on a *silent record*.¹ *State's Brief 13-15* The State cannot point to anything within the record of Mr. Berry's trial to support its assertion that the defense [Mr. Berry] was "fully informed of the prior relationship between the trial judge and the prosecutor" as is required. *State's brief at 14*² The State is fully aware that a defendant's constitutional rights, especially one as significant as the right to an impartial tribunal, *cannot* be deemed to have been waived based on the face of a silent record.

There must be a knowing and voluntary relinquishment of that right on the record, by the defendant [Mr. Berry], to satisfy the minimum requirements of due process. This reinforces both the importance and the need for the announcement requirement found in Canon 3E(1) to protect the integrity of the judiciary in the eyes of the public.³ The announcement requirement would have still applied to the case at bar even if as the State asserted this issue was "settled," a point counsel vigorously disputes; because the Canon requires announcement even in situations where the judge does not believe that recusal is necessary.

Justice Frankfurter explained that "[t]he administration of justice by an impartial judiciary⁴ has been basic to our conception of freedom since Magna Carta⁵." *Bridges v. Cal.*, 314 U.S. 252, 282 (1941) (*Frankfurter, J., dissenting*) Two widely recognized ethicists here in the

¹ The assignment of error regarding the denial of the right to an impartial tribunal was not undertaken lightly by Counsel. However, Counsel was under an ethical obligation to raise this argument. *Freedman & Smith, Understanding Lawyers' Ethics, The Impartial Tribunal (4th ED 2010)*, refer to the need to make a motion to recuse as "a professional obligation." *App. A at 30-31* Counsel is obligated to represent her client *zealously* within the bounds of the law. And that is what Counsel has done in this case. Counsel is also obligated as an officer of the court to raise issues that have the potential to tarnish this profession, as this is a self-governing profession. That includes addressing arguments that are unpopular.

² While their marriage may have been common knowledge within the legal community that does not mean it was known within the community. Additionally, the Judge and Ms. Keller did not have the same last name. While that is not unusual in today's time; it is still something unusual in small communities here in this State. Therefore, this fact makes it even less likely that the public would be aware of this relationship.

³ The announcement requirement is in place to ensure the public's confidence in the judiciary. See Canon 3E(1)

⁴ Justice Scalia defined impartiality as "*the lack of bias for or against either party to the proceeding.*" *White* 536 U.S. at 775. (*emphasis added*)

⁵ Originally issued in 1215 and passed into law in 1225.

United States and abroad begin their chapter on the issue of *The Impartial Tribunal* by stating that:

[a]n impartial judge is an essential component of an adversary system, providing a necessary counterpoise to partisan advocates. We may tolerate judges who lack wisdom or good judgment, but if a trial judge is not impartial, there is a 'structural defect' in the trial, and reversal is required without consideration of the harmless error doctrine. Indeed because the right to an impartial tribunal is essential to fundamental fairness, it is one of those 'extraordinary' rights that cannot be waived.

*Freedman & Smith, Understanding Lawyers' Ethics, The Impartial Tribunal (4th ed. 2010)*⁶

The State made a frivolous argument when it asserted that the United States Supreme Court's decision in *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991), does not legally support appellant's structural error claim. The State called the Court's discussion of structural error within the case mere "dicta." This frivolous assertion is easily discredited by looking directly to the source-- The Supreme Court of the United States. The Court most recently addressed the issue of "structural error" in May of this year in *United States v. Marcus*. It quoted *Fulminante* as *the authority* regarding "structural error." The Court has actually cited *Fulminante* five times when addressing "structural error."⁷ Additionally, the fourth circuit has also cited *Fulminante* five times when addressing issues involving "structural error."⁸

The State also incorrectly asserts that the appellant's "structural error" argument does not warrant appellate review because the Appellant failed to raise this issue at trial. *State's Brief at 14* This argument is also without merit. As was noted by Freedman and Smith: "... because the

⁶ This edition is yet to be published but is due out in September or October of this year. The Authors have graciously provided counsel with this material. Counsel has included the entire Chapter in Appendix A of this brief. United States Supreme Court cases include: *U.S. v. Marcus*, 130 S.Ct. 2159, 176 L.Ed.2d 1012(2010); *Puckett v. U.S.*, 129 S.Ct. 1423, 173 L.Ed2d 266 (2009); *Tyler v. Cain*, 533 U.S. 656; 121 S.Ct. 2478, 150 L.Ed2d 632 (2001); *Johnson v. U.S.*, 520 U.S. 461, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997); *U.S. v. Gaudin*, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444, (1995)

⁸ Fourth Circuit cases include: *U.S. v. Bradley*, 455 F.3d 453, 2006 U.S. App. LEXIS 18586, (2006 4th Circuit); *U.S. v. McKoy*, 129 Fed. Appx. 815, 2005 U.S. App. LEXIS 7517, (2005 4th Circuit); *Sherman v. Smith*, 89 F.3d 1134, 1996 U.S. App. LEXIS 17502, (1996 4th Circuit); *Adams v. Aiken*, 41 F.3d 175, 1994 U.S. App. LEXIS 33686, (1994 4th Circuit ; *U.S. V. Blevins*, 960 F.2d 1252, 1992 U.S. App. LEXIS 5734, (1992 4th Circuit)

right to an impartial tribunal is essential to fundamental fairness, it is one of those ‘extraordinary’ rights that *cannot* be waived.”⁹ This Court addressed the issue of the waiver of a fundamental constitutional right in *State v. Dozier*, 163 W.Va. 192, 196, 255 S.E.2d 552,555(1979)

In *Dozier*, an incorrect jury instruction that unconstitutionally shifted the burden of proof to the defendant was submitted by defense counsel. The defendant was convicted and on appeal raised the incorrect instruction as a basis for relief. The State acknowledged that the instruction did in fact shift the burden, but argued that because it was submitted by defense counsel it constituted invited error, and therefore was not subject to review. This Court rejected the State’s argument stating:

[w]e are of the opinion that it would be a *travesty of justice* to hold the accused invited error and thus effectively waived a fundamental constitutional right. It is extremely unlikely that the defendant had any knowledge that the constitutionally erroneous instruction was being offered on her behalf. It is even more unlikely that she made a knowing and intelligent waiver of her constitutional rights, *and we shall not presume that she did in the face of a silent record.*”

Id. at 197, 555 (*emphasis added*). See also *Johnson v. Zerbst*, 304 U.S. 458, 58S.Ct. 1019(1938)

Moreover, the obligation to recognize these disqualifying factors and recuse is placed on the *Judge*. It is *not* the Appellant's obligation as the State incorrectly asserted. *State's Brief at 12, 14* In *Liljeberg*, Justice Rehnquist recognized “that the statute [§455]¹⁰ was intended to avoid the appearance of impropriety, that it replaced the subjective standard with an objective

⁹ The State's assumption that trial counsel failed to make the necessary motion to recuse because: “...it only demonstrates that counsel had no concerns about the judge's impartiality,” is simply wrong. A more likely possibility, a suggestion that is supported by numerous experts is that of fear of angering the judge which is especially true of lawyers who appear before the judge on a regular basis. Richard Flamm, considered the nation's premier expert on judicial recusal, explains that lawyers who use professional care and raise appropriate motions for recusal should not have to fear chastisement or fear penalties for raising these tough *but* necessary motions. *Richard Flamm, Judicial Disqualification: Recusal and Disqualification of Judges; Conflicts of Interest and Law Firm Disqualification §1.10.2 (Banks & Jordan Publ. 2003)*

¹⁰ §455, is the Federal judicial disqualification statute. Most states, including W.Va., have adopted this statute in the form of Judicial Cannons

one and that it *eliminated the duty to sit.*” Rehnquist explained “*the obligation to identify the existence of those grounds [which require recusal are placed] upon the judge himself, rather than requiring recusal only in response to a party affidavit.*” 486 U.S. 847, 108 S. Ct. 2194(1988) (*emphasis added*)¹¹ The Court in *Liljeberg*, also addressed an issue that is present in the current situation and one this Court will have to address: “in determining whether a judgment should be vacated for a violation of §455(a), *it is appropriate to consider the risk of injustice to the parties in the particular case, the risk the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process. We must keep in mind that 'to perform its high function in the best way 'justice must satisfy the appearance of justice'”* at 864, 2205 (*citations omitted*) (*emphasis added*)

The shift to the judge of the obligation to recognize grounds for recusal and act without *any action* on the parties was reiterated six years later by Justice Scalia writing for the majority in *Liteky v. U.S.*, 510 U.S. 540: “§455 ‘placed the obligation to identify the existence of those grounds upon the judge himself, rather than requiring recusal only in response to a party affidavit.’” A version of § 455 has been adopted by most States in the form of Judicial Cannons. This requirement is found within West Virginia Judicial Cannon 3E(1) which states: “[a] judge *shall* disqualify himself in a proceeding in which his impartiality “might” reasonably be questioned.” *Appellant’s brief at 19*

This Court discussed the requirements and practical impact of the application of Cannon 3(E)(1) in *State ex rel. Brown v. Dietrick*, 191 W.Va. 169, 174 n. 9, 444 S.E.2d 47, 52 n. 9 (1994) (*citations omitted*), stating that the objective standard will require recusal even in instances where the judge is capable of being impartial. The importance of the judiciary’s reputation for

¹¹ See *Freedman & Smith App. A at 31* They state that [a]n objective standard, and the elimination of the duty to sit, make it less likely that a judge will be able to successfully avoid recusal when it is warranted.

This Court discussed the requirements and practical impact of the application of Canon 3(E)(1) in *State ex rel. Brown v. Dietrick*, 191 W.Va. 169, 174 n. 9, 444 S.E.2d 47, 52 n. 9 (1994) (citations omitted), stating that the objective standard will require recusal even in instances where the judge is capable of being impartial. The importance of the judiciary's reputation for impartiality was demonstrated by the United States Supreme Court in 1955, when it reversed a case even though there was no allegation of bias. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150 89 S.Ct. 337(1955), the Supreme Court unanimously agreed that a judge "not only must be unbiased but also must avoid even the appearance of bias." In this case there was no assertion of bias; however, the Court still reversed the case claiming that the undisclosed business relationship "might create an impression of possible bias." *Id* at 149 See also *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 459 S.E. 2d 374, 385 (1995) (To be clear, avoiding the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself.)

While the State correctly quoted Justice Cleckley in *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 459 S.E.2d 374 (1995) asserting that the standard announced by the United States Supreme Court described the standard for recusal as whether a reasonable and objective person knowing all of the facts *would* harbor doubts concerning the judge's impartiality. *Id*. This is a common but, *incorrect* statement of the standard announced by the Supreme Court in *Liljeberg*. The common mistake: "is a tendency for some judges and commentators-and particularly for advocates opposing disqualification---to slip away from the statutory language, turning "might into "could" or "would." *The differences are important*. The word "might" is used to express "tentative possibility;" "could" is used to discuss "possibility;" while "would" connotes what "will" happen or is "going to" happen. Accordingly, the word

“would” requires significantly more than tentative possibility of doubt regarding a judge’s impartiality, and the use of the word “would” therefore produces a subtle but substantial change in the meaning of the statute.” *Freedman & Smith App. A at 26-27*

The correct standard the Supreme Court announced and, the one still in force today is described as “‘catchall’ recusal provision, covering both ‘interest or relationship’ and ‘bias or prejudice’ grounds, but requiring them *all* to be evaluated on an *objective* basis, so that what matters is not the reality of bias or prejudice but its appearance. Quite simply and quite universally, recusal was required whenever ‘impartiality *might* reasonably be questioned.’” *Liteky v. United States, 510 U.S. 540, 548, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994)* The judge’s actual “‘state of mind’, purity of heart, incorruptibility or lack of partiality is not the issue” “If there is an appearance of impartiality, *that ends the matter*, regardless of the judge’s own belief of actual bias, and *disqualification is required to restore due process.*” *Sharisse O’Carroll, Partiality, Public Comment, Incivility and Disqualification: Protecting Due Process in the Wake of a Changing Judiciary, 76 Okla. B.J. at 2822-23* “[D]enial of impropriety by the judge whose impartiality might reasonably be questioned, is not sufficient to remove the question under *Liljeberg.*” *Freedman and Smith App. A at 27-28*

The State relied on the “duty to sit” as an additional justification for the Judge’s continued participation in criminal cases. That reliance is misplaced. *State’s brief at 15* “While a judge may have a duty to sit in cases where he or she is not disqualified, there is an equally strong duty not to sit in cases where he or she is disqualified.” *Jeffrey M. Shaman et al., Judicial Conduct and Ethics §4.02 at 109 (3d ed. 2000)* Considerable discussion has resulted regarding what is the proper guide when judging these issues from the “reasonable and objective observer knowing all the relevant facts *might* question the judge’s impartiality.” When a situation

presents a close call; the default position is to opt for recusal. There are at least four circuits that have held recusal is required when a close situation is presented.¹² Leslie Abramson cautions that: “the general [catch-all] standard should not be overlooked.” *Abramson, Legal Ethics Conference: “Judging Judges’ Ethics,” 32 Hofstra L. Rev. 1181,1185 (2004)* *Freedman & Smith* assert that if reasonable people may disagree about the judge’s impartiality then the only logical conclusion one can arrive at is that “a reasonable person *might* question the judge’s impartiality, and recusal is required.”¹³

If you apply this standard to the case at bar, Appellate counsel cited both a civil statute from California that listed former spouse as a disqualifying factor and, what is *most compelling, a complete change in local rules implemented by the Supreme Court of Indiana to deal with the exact situation that is presented by Ms. Keller and the Judge*. The Indiana Supreme Court stated the amendment of the rules, which involved the creation of a special panel of judges, was necessary due to the large amount of recusals that would be required upon the filing of an appearance by the former spouse of the regular judge of the lower court.

Therefore, counsel presented two separate examples of official state conduct taken to address the exact situation before this Court. Additionally, if *Freedman & Smith’s* logic is applied to Appellant’s trial, reasonable people [state officials in California and Indiana] thought the exact situation created the appearance of impropriety and, took significant measures to correct it. The only conclusion possible in Mr. Berry’s case is—that the appearance of

¹² *Nichols v. Alley*, 71 F.3d at 352. *Accord In re Boston’s Children First*, 244 F.3d 164, 167 (1st Cir. 2001); *Republic of Panama v. Am. Tobacco Co.*, 217 F.3d 343, 346 (5th Cir. 2000); *United States v. Dandy*, 998 F.2d 1344, 1349 (6th Cir. 1993); *U.S. v. Torkington*, 874 F.2d 1441(11th Cir 1989).

¹³ A good example of a recent high profile case in which a recusal motion was filed that offended the sitting judge and prompted public attacks of the lawyers involved is the Casey Anthony murder trial in Florida. There has been considerable coverage of the harsh words the judge in that case has made to the media regarding their motion to recuse him. Counsel’s motion was prompted when they found that the judge was communicating with a blogger regarding the case. The Judge recused himself, but was clearly angered by the Attorney’s filing.

impropriety existed due to the marriage and recent divorce of Ms. Keller and the Judge. Based on that appearance alone, Mr. Berry was denied his constitutional right to an impartial tribunal--- a right that cannot be waived upon a silent record. Therefore the only remedy is for this Court to reverse Mr. Berry's convictions and order a new trial.¹⁴

As appellate counsel also demonstrated in Appellant's brief, recusal has been ruled as necessary in situations with far less connections than that of a former spouse of twelve years by this Court¹⁵ and numerous Court's around the nation. Counsel also detailed numerous West Virginia Judicial Commission Opinions that were issued with significant requirements to be followed; again in situations that addressed far more removed relationships. Justice Scalia's statement in his Memorandum Opinion in *Cheney*, 541 U.S. At 917, decisive in the case at bar. In his memorandum, Scalia "expressly acknowledged that when a friend¹⁶ is a party to a lawsuit, and therefore has a stake in the outcome, then "assuredly" "friendship is basis for recusal."

Freedman & Smith App. A at 78-79

This exact issue of a friendship between the judge and the prosecutor was addressed in *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985) In *Murphy*, the Court stated that the

¹⁴ A high profile recusal that is a perfect example of how a recusal motion can and should be addressed was the recent removal of the Judge in the Ohio serial killer case by the Ohio Supreme Court, on April 23, 2010. After removing the Judge due to emails regarding the case that were sent from her personal email account regarding details of the case, the Court found it necessary to remove the Judge even though her daughter admitted to being the author of the emails. The Court justified this decision by stating that the postings regarding the case impeded the judge's ability to resolve legal issues in the case that would appear to be objective and fair. While there is no evidence of the Judge's actual bias "disqualification is appropriate where the public's confidence in the integrity of the judicial system is at stake." The Supreme Court made this ruling despite the fact that the Judge in the case responded to the lawyer's motion asserting that she held no bias regarding the case and asserted that she had never had any improper discussions regarding the case.

[Http://cnn.cite.printthis.clickability.com/pi/cpt?action=cpt&title=Judge+removed+from+O](http://cnn.cite.printthis.clickability.com/pi/cpt?action=cpt&title=Judge+removed+from+O) counsel visited this site on August 7, 2010

¹⁵ *Rissler v. The Jefferson City Bd. Of Zoning Appeals*, 693 S.E.2d 321(2010)

¹⁶ Clearly, a former spouse of 12 years in a situation that was self-described as amicable can be characterized to be at least the equivalent of a friend when dealing with the issue of recusal. It is well known that a marriage establishes one of the closest relationships recognized. Married couples are thought of and treated as one in society. The level of intimacy that is shared in a marriage clearly sets it apart from any other relationship. "The decision to marry is a fundamental right" *Turner v. Safley*, 482 U.S. 78, 95(1987)

social relationship that existed between the prosecutor and the judge implied extensive personal contact between the judge and the prosecutor and created the possibility that the judge would accept and rely on the prosecutor's representations to a greater degree. *Id. at 1538* The Court also stated:

The U.S. Attorney lays his own prestige, and that of his office, on the line in a special way when he elects to try a case himself. By acting as trial counsel he indicates the importance of the case and of a conviction, along with his belief in the strength of the Government's case. It is a particular blow for the U.S. Attorney personally to try a highly visible case such as this and lose. A judge could be concerned about handing his friend a galling defeat on the eve of a joint vacation. A defendant especially might perceive partiality on learning of such close ties between prosecutor and judge.

Id. See also Appellant's Brief 15-17

Finally, Counsel also pointed out that as the elected prosecutor, Ms. Keller's reputation and livelihood was dependent on her performance in these high profile cases and this was an issue the Judge would be cognizant of himself due to his position. *Appellant's Brief at 15-16*¹⁷

The State asserts this issue is "settled." *State's brief at 13-14* Counsel disagrees. First and foremost, issues involving fundamental constitutional rights must be resolved on a case by case basis. Counsel does agree that this same issue was addressed in an unrelated case; however, the decision made in that case was based on an untimely filed, two page motion that did not address the issue in any respect other than to cite the judicial canons and the administrative orders that were involved. The motion did not contain any citations to case law, any suggestion of the appropriate standard the motion should be reviewed under, or any mention that the right asserted within that motion concerned a fundamental constitutional right; in other words, the motion was generic. That motion pales in comparison to the full briefing of this issue that has

¹⁷ Although the Court in *Murphy* ultimately upheld the defendant's conviction, Mr. Berry's case can be distinguished in two major ways. The Court hung its hat on the fact that defense counsel was also a close friend to the Judge and had also vacationed with him and the prosecutor at the same time. The court also pointed out that Murphy, the defendant himself was aware of the longstanding relationship among the judge, prosecutor, and his counsel. *Murphy*, 768 F.2d at 1540

occurred here. There was no argument before this Court nor was a signed opinion rendered, in the unrelated case. There was an order signed which refused the relief requested based on the advocacy and facts involved *in that particular case*.¹⁸

Judicial recusals and the rules and regulations governing them are a matter of deep concern for entire judicial system of the United States. The need for the states to heed Justice Kennedy's advice to "adopt recusal standards more rigorous than due process requires" and to effectively use the ones that are in place is more imminent and necessary now than when he suggested it in 2002. *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) (concurring)¹⁹

Recently, the case of Charles Hood was in the media. His case presented a very similar set of facts regarding the Judge and the prosecutor.²⁰ In Mr. Hood's case, both the prosecutor and judge were married, but they had carried on an affair for approximately twenty years. The affair ended right before Mr. Hood's trial began. Ultimately, Mr. Hood was tried, convicted and sentenced to death. Years after his sentence, Mr. Hood filed a habeas and asserted the affair as

¹⁸ Furthermore, the State's reliance on the six page letter that the Judge authored, to send to this Court in response to the recusal motion in this unrelated case, is misplaced. All of the issues that the judge addressed and his personal representation that there is no longer a disqualifying relationship between himself and Ms. Keller is not the appropriate standard by which this issue is to be judged. The appropriate question is whether the 12 year marriage along with the very recent divorce creates a situation that "might" cause a reasonable observer to question the Judge's impartiality. Additionally, with all due respect to the Judge, a reasonable observer "might" easily take his letter and the lengths he went to in order to dispel any impropriety as an indication that the Judge was aware that the situation was questionable.

¹⁹ A point he reiterated once again while writing the majority opinion in *Caperton v. A. T. Massey Coal Co.* 129 S.Ct. 2252 (2009)

²⁰ A main distinction between Mr. Berry's and Mr. Hood's case is that the relationship between the Judge and the Prosecutor in Berry involved a marriage. An institution that is held out as the "sanctity of marriage," an institution that brings out such strong feelings that the definition of what constitutes a "marriage" has been argued all the way up to the United States Supreme Court. This issue was just this week addressed by the California court system in the case commonly known as "proposition 8." Counsel would reiterate a point that was made in Appellant's brief: to act as though all of the reasons that necessitated the need for an administrative order prohibiting the Judge from handling criminal cases, while the two were married simply vanished upon the entry of the final divorce order, *is an act of willful denial*. The other distinction is that Mr. Hood was sentenced to death, which is the ultimate punishment; However, Mr. Berry was sentenced to two life-without-the-possibly of parole. This is W.Va.'s *ultimate punishment*. A punishment the United States Supreme Court recently recognized as the "second most severe penalty" in *Graham*

grounds for a new trial. He claimed the illicit affair denied him the right to an impartial tribunal. The appeals court granted him a new sentencing hearing on other grounds, but failed to address the recusal issue. His counsel appealed the denial of an impartial tribunal to the United States Supreme Court. The Court did not accept Mr. Hood's case, but no assumption can be made as to why the case was not accepted.²¹ Counsel would note the Supreme Court received lots of criticism for what journalists described as "dodging" a crucial legal issue.

Numerous experts and professionals within the State of Texas joined in Mr. Hood's case requesting that the United States Supreme Court hear the case. There was a group of former prosecutors and judges that filed a brief, even the attorney general of the State wrote a letter on behalf of Mr. Hood to the appellate court urging them to address the relationship. Additionally, the 30 top ethicists here in the United States filed a brief on Hood's behalf, and the former Governor of Texas²² and William Sessions also joined urging the Supreme Court to reverse Mr. Hood's conviction asserting that to protect the integrity of the judicial system his conviction had to be reversed based on the denial of the right to an impartial tribunal.

This is an issue of the utmost importance that must be addressed. Mr. Berry's case presents this Court with the opportunity to bring our State into the forefront of recusal law, an area that has recently been the source of considerable criticism of the Judicial System here in the United States.²³ This Court has recognized that integrity and survival of the judicial system is dependent on the public's belief that justice is carried out in a manner that guarantees *each and every party* enjoys, the right which has been referred to by many as the cornerstone or foundation

²¹ All of the mentioned briefs filed on behalf of Mr. Hood can be found on the United States Supreme Court's web site. <http://www.supremecourt.gov/>

²² An admitted supporter of the death penalty as 19 executions occurred during his tenure as governor.

²³ See the recent actions of the Michigan Supreme Court addressing recusal. MCR 2.003 (2010)

of the judicial system-- *the right to a trial before an impartial tribunal.* ²⁴ *Tennant v. Marion Health Care Foundation, Inc.*, 459 S.E. 2d 374, 385 (1995) That goal is not being met in the situation presented here when Judge Burnside and Ms. Keller served as judge and prosecutor. This is speaking not only as a member of the “public” but also as an individual defendant, that was adjudicated in our State, Mr. Henry William Johnson stated the following regarding his decision to enter a Kennedy Plea before Judge Burnside, in his federal lawsuit claiming that he was unlawfully seized and extradited: “My decision was based on the conflict of interest— Kristen Keller being Judge Burnside’s former wife—and my reservations that I would not have received a fair trial; and also entering into a Kennedy plea.” *West Virginia Record, Prisoner names McGraw in extradition-related suit, Kelly Holleran, October 9, 2008.*

II. The State incorrectly represented to this Court that trial counsel was given opportunity after opportunity to bifurcate at trial. The State also failed to address Counsel’s claim that Appellant was improperly denied the right to present mitigation evidence during his unitary murder trial, based on the State’s outrageous argument that such evidence was not pertinent in a murder trial. (State’s brief 16-21)

There is no better way to refute the State’s argument than to repeat the *final* arguments that occurred on this subject, at the beginning of Mr. Berry’s case-in-chief , before any evidence was presented on his behalf:

Prosecutor: The prosecutor made a motion in limine to prevent “inadmissible evidence from being suggested to the jury by any means....immaturity is not a pertinent character trait. His social history, his psychological history, the relationship between him and Martha Mills going beyond one month before the killing, which was the time frame settled upon, and any general character remarks, such at that he was such a good boy or these kind of things, those are not pertinent character

²⁴ The Best Defense: Why Elected Courts Should Lead The Recusal Reform, Deborah Goldberg, James Samples and David E. Pozen Washburn Law Journal Vol. 46 at 522

traits in a murder trial and the Defendant, again, had chose to withdraw their bifurcation motion.” *Tr. 1347-48*

* * *

Counsel: “...the issue of mercy is of such importance that the law allows its bifurcation as separate argument, I mean the fact that it is allowable altogether means that mercy is a very, very important issue in a murder case where the Defendant may be subject to life without ever having a chance at parole. It’s a key issue. Its as key as the guilt issue. ...when the Court has ruled that we can’t separate after a motion on it, then it’s still an issue in the case and we should be able to put evidence of that issue in front of...the jury.” *Tr. 1349*

* * *

Court: earlier rulings stand and the issues---“evidence of the Defendant’s psychological status or history, and I think that might include sub-issues of the level of his social and emotional maturity, the evidence of his degree of development of his ability to interact socially and the evidence of the –the long term- evidence of the nature of the relationship all has been excluded by the court previously and it remains excluded.” *Tr. 1354*

The State represented to this court: **“The defense could have pursued the pre-trial motion for bifurcation, but instead withdrew it and declined repeated pre-trial invitations by the trial court to renew it.”** *State’s Brief at 21* Actually, the following arguments occurred time and time again:²⁵

Counsel argued that the evidence that they were trying to present “goes to the issue of mercy that the jury has to consider in this case...” *Tr. 327* The court held that bifurcation could have solved the problem. *Tr. 328* In response to the court’s comment, counsel argued that the jury would be making a mercy decision at the same time that they are deciding guilt. *Tr. 329* The State also argued that this evidence was not relevant to guilt. Counsel further argued if the only basis for exclusion is to relevance to guilt...if that is the only basis...we are also trying the issue of mercy and that makes it relevant. *Tr. 333* Ultimately, the court ruled that the evidence would not come in. *Tr. 334*

Again the issue was revisited:

Counsel renewed their motion for bifurcation. They argued that the State would not be prejudiced. Counsel further argued that “ the Court is very much limiting the admissibility of the elements we feel are very important for the jury to be able to

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determine mercy and holding as to evidence that is relevant to his guilt. *That would mean that we are being closed down altogether on issues that would be very, very important to mercy.*" *Tr. 874* (emphasis added) Counsel argued that the pretrial motion for bifurcation placed the State on notice and that the State had not presented anything that would hinder them from proceeding in a bifurcated trial. *Id.* The prosecutor objected claiming that defense counsel had made a tactical decision to withdraw the motion and they were essentially stuck with that decision. The Court refused the motion to bifurcate. *Tr. 890*

As Counsel was able to demonstrate, from the quoted testimony, not only did counsel renew their motion for bifurcation, they also relentlessly argued that even if the trial was not bifurcated that they were entitled to present evidence that was relevant to the issue of mercy.²⁶ These arguments were unsuccessful. Nowhere within the State's discussion of this assignment of error was there any attempt to refute or distinguish this Court's precedent cited by Appellate counsel in support of Mr. Berry's right to address the issue of mitigation before the jury. Mr. Berry is entitled to a new trial due to the State's outrageous arguments and the trial court's incorrect rulings, which denied him his constitutional right to put evidence of mitigation before the jury during a unitary trial.²⁷

²⁶ The discussion of the right to present evidence of mitigation in a unitary trial is an issue that is noticeably missing from the State's brief. The State failed to address any of the authority found within Counsel's argument regarding this issue because there is no way to justify the arguments she made on this issue.

²⁷ Counsel must address the State's discussion of the jury's deliberation time. First, Counsel will note that all of counsel's cites are directly from the official court record which reflects:

at 3:31 p.m. to begin deliberations. *Tr. 1830* At 3:40 p.m. jurors requested a break to call their families to tell them they were going to be late and to take a smoke break. That break lasted until 5:08 p.m. *Tr. 1834* Almost immediately after the break ended, the Court was notified the jury had arrived at a verdict. The record reflects the jurors were brought back into the court room to announce their verdict at 5:10 p.m. *Id.*

Court-reporters routinely document when a trial recesses and resumes. It is part of their job. In an attempt to refute counsel's accurate reporting of the amount of time the *official trial court-record documents was spent on deliberation* in Mr. Berry's case, the Prosecutor quotes *Defense Counsel's belief* as to how long deliberations took during a *post-trial hearing*. Trial Counsel's representation of time was correct as to the *total amount of time that elapsed* from the conclusion of closing arguments until that jury arrived at a verdict. The official court record reflects the jury initially retired to the jury room at 3:31 p.m. Then at 5:08 jurors alerted the Court that it had reached a verdict. (The 1 ½ hour represented by Defense Counsel.) Appellate counsel stands by the *official record kept by the court reporter* which reflects a total of eleven minutes of deliberation time occurred from 3:31 p.m. until 5:08 p.m., on a Friday before a long holiday weekend, which resulted in Mr. Berry's two convictions of first degree murder without a recommendation of mercy as to either count. *See State's Brief 10 See Appellant's brief 4*

Finally, within this section of its brief, the State curiously argues that counsel misrepresented the Court's 60 day time frame, quoting *a statement by the trial court that appeared in Appellant's brief*. However, what the State fails to inform this Court is not only did it try to enforce the 60 day time-frame initially set by the Court, it further argued that because the State chose to limit its questioning during its case-in-chief to 30 days prior that the defense should also be limited to discussing only 30 days prior to the crime. A point that she renewed during her motion-in-limine made at the beginning of the Defendant's case-in-chief.²⁸ "..., the relationship between him and Martha Mills going beyond one month before the killing, which was the time frame settled upon,..." *Tr. 1347-48 See also Appellant's reply brief 25*

III. The State failed to address the argument that Mr. Berry's convictions must be reversed because the State failed to produce sufficient evidence at trial to support the alternative theory of murder-by-lying-in-wait. An offense the jury was instructed on over trial counsel's objections. (State's brief 21-26)

The State incorrectly addresses Counsel's argument regarding this assignment of error. Counsel is not suggesting that the error is due to the indictment on alternative theories of first degree murder, as the State incorrectly asserts. Counsel argued that because the jury was instructed on a theory of murder that the State failed to produce sufficient evidence of at trial to support a conviction, Mr. Berry's convictions must be reversed. The United States Supreme Court has noted that when a jury returns a general verdict of guilty but was instructed on alternative theories of guilt, that verdict *must be reversed* if one of the alternative theories was legally invalid. *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064 (1957); *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532 (1931)

²⁸ The State's motion-in-limine is quoted in-full on page 13 of this brief.

The State contends that this argument was not asserted as error in the appellant's brief. Each of trial counsels numerous motions to dismiss the charges of murder by lying in wait due to insufficient evidence, all of which are detailed in Appellant's brief, were denied by the trial court. *Appellant's brief 32* Further, counsel requested that the verdict form require the jury to elect on which theory it convicted. *State's brief 13* This request was also denied. Counsel again tried to get the Judge to poll the jury, in the event that they returned a verdict of guilty of first degree murder as to what manner it convicted on, but the Judge denied this motion too. *Id.* Therefore, trial counsel preserved this issue at every stage possible. The trial court was given opportunity after opportunity to address this issue by way of counsels motions to dismiss due to lack of evidence, counsels motion to require the verdict form to have an election of what theory the conviction was for, and finally by way of counsel's motion to poll the jury as to what manner they convicted on in the event that the verdict was for first degree murder. Therefore, because we do not know what theory of murder the jurors convicted on and, because jurors were instructed on a theory of murder that the State failed to meet their burden of proof on, Mr. Berry's convictions must be reversed.

IV. The State incorrectly asserts that the trial court did not abuse its discretion when it allowed the State to present an unbelievable and overwhelming amount of photos, both from the crime scene and the medical examiners office, that were not necessary to prove any fact in dispute or to refute any argument made by the defense. The State also incredibly denies that the photos were cumulative, gruesome, and unnecessary. (*State's brief 26-32*)

There is no way to defend the excessive use of photos that occurred in Mr. Berry's case.²⁹ That is why there is very little discussion of case law in the State's response to this assignment of error. In fact, the State used this section of its brief as an opportunity to inflame this Court, just

²⁹ This Court must keep in mind that at the request of the prosecution these photos were presented to the jury on a 10X10 screen.

as it did the jurors at trial, by recounting over and over the wounds Mr. Worthington and Ms. Mills suffered, and a significant amount of testimony that occurred regarding the photos. There are several misrepresentations within this section regarding the photos. Counsel will only address the most egregious ones.

The State suggests that the photos of Mr. Worthington, in the ambulance, did not contain the fatal entry and exit wounds to his head. This is not true. Several of the photos of Mr. Worthington showed the wound to his forehead. Additionally, several of the photos of Mr. Worthington in the ambulance depicted the same wounds, just at various angles. Therefore, one of the pictures would have sufficed, if it was determined to be more probative than prejudicial. Additionally, the photos from the M.E. which pictured the same wounds would have been far less inflammatory than those of Mr. Worthington in the ambulance. If this Court views the photos of Mr. Worthington in the ambulance it will be apparent what the prosecutors intention was in using them---to inflame the jurors.

The State also attempts to argue that the photos showing the wounds to Mr. Worthington were necessary to corroborate Ms. Canady's testimony that Mr. Berry went around the truck, opened the door and continued firing. Once again, this is not true. Mr. Berry admitted in his statement to police that he fired rounds at Mr. Worthington after he opened the truck door; jurors heard this statement and Mr. Berry also testified to this same point before the jury. The prosecutor addressed this on cross examination too.

The State also attempts to suggest that it exercised discretion by not using the photos which pictured the fatal injury to Ms. Mill's face. This is a disingenuous argument made by the State. The picture of Ms. Mill's face from the M.E., in its cleaned condition, shows one small

circle beside her nose. This photo is by far less inflammatory than the numerous photos of her sheet covered body with a trail of blood running from it that the State did introduce.

The final point that counsel will address regarding the photos is the State's argument that the crime scene photos that showed Ms. Mills' sheet-covered body was necessary to corroborate Ms. Canady's testimony that Mr. Berry had to step over the body to flee. It is impossible for these photos to demonstrate this point. One of the State's investigating officers verified during his testimony that both Ms. Mills's body and the shell casings pictured in these photos were moved by residents at the scene prior to any crime scene photos being taken. *Tr. 935-36, 942* Therefore, the numerous pictures of Ms. Mills sheet covered body that were introduced did not demonstrate where she fell. This Court should also note, the State used a *completely different justification* for the use of the photos picturing Ms. Mills sheet covered body at trial. At trial, the prosecutor argued that a photo showing a bullet casing beside Ms. Mills' sheet-covered body was crucial evidence³⁰ despite the fact that the officer who took the photos had just testified both the body and the casings had been moved before the pictures were taken. *Tr. 935-36, 942*

Justice Cleckley stated with great clarity in *Derr* that the change in the method of evaluating photos was not a signal to prosecutors and courts that there is a " 'lesser' admissibility standard" In fact, Justice Cleckley stated:

...factors such as whether the photograph was black and white, whether there was blood and gore, or whether there was a mangled and distorted face or body are still to be considered under Rule 403. When gruesome photographs are offered with only slight probative value and because of their prejudicial nature are likely to arouse passion and anger, they should be excluded by the trial judge. ***Otherwise, on appeal, this Court will not hesitate to reverse.*** (emphasis added).

The State failed to heed this warning in Mr. Berry's case. The State's action in this case demonstrates a severe abuse of prosecutorial discretion. As Counsel asserted in Appellant's

³⁰ *Tr. 939*

brief, the sheer number of photos alone is enough to require reversal. *Appellant's Brief at 37*

The probative value of these photos was clearly outweighed by the prejudicial effect. The prosecutor used these photos in Mr. Berry's case to inflame the jurors and tip the scale in her favor. Because there is no way to assert that this abuse *did not* impact the jurors' decision as to *mercy*, this error cannot be said to be *harmless*. Again, Counsel could not envision a more appropriate set of facts for this Court to use in order to demonstrate its willingness to reverse based on the misuse of minimally relevant and highly prejudicial photos.

V. The State's denial of any misconduct calls into question this Prosecutor's understanding of the ethical obligations that are associated with holding a quasi-judicial position. The incidents of Prosecutorial Misconduct that are asserted in Appellant's brief are fully supported by the record in Mr. Berry's case. (State's Brief 32-35)

The Prosecutor holds a very powerful position. To Quote Justice Starcher the "prosecuting attorney is not just an officer of the court, like every attorney, but is also a high public officer charged with representing the people of the State. *State v. Swafford, 206 W. Va. 390,397, 524 S.E.2d 906,914 (1999) (Starcher, J concurring)* In *State v. Boyd*, this court held that the prosecutor holds a duty to set a tone of fairness and impartiality during trial. This Court emphasized the fact the prosecutor's duty to approach a case with fairness can be "elevated when the offense charged is of a serious or revolting nature, as it is recognized that a jury in this type of case may be more easily inflamed against the defendant by the very nature of the crime charged." *Syl. Pt.3 and 4, in-part, State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977).*

This Court importantly stated: "even if the evidence against the appellant were characterizable as overwhelming, we cannot see merit, viability, or integrity in an analysis that would in effect more readily tolerate prosecutorial misconduct in those cases where the evidence

tends to show more clearly that a defendant is guilty—but would be less tolerant of prosecutorial misconduct in the trial of a defendant against whom the evidence happens to be less compelling. Such a distinction would tend to encourage prosecutorial “piling on” in precisely those cases where a defendant has the most need of scrupulous adherence to the rules. Such a distinction might arguably have the defect of being contrary to the guarantee of equal protection of the law.” *State v. Stephens*, 206 W.Va. 420,427, 525 S.E2d 301, 308 (1999) The prosecutor demonstrated her unwillingness to exercise this level of discretion when she stated: “[a] gunman can reduce the number of photographs introduced by the prosecution at trial by shooting each victim only once or twice, instead of making Berry's admitted choice to fire 'thirteen or fourteen rounds' into his human 'targets.’” *State's brief at 28* Additionally, in an attempt to refute counsel's assertion of misconduct based on the failure to exercise any level of discretion when selecting the photos that were “necessary” at trial the prosecutor deflected the blame and pinned responsibility on the trial court while at the same time questioning Counsel's understanding of basic trial procedure: “Appellant's Brief [sic Counsel] forgets that it is the trial court judge---not the prosecutor ---who determines which exhibits will be admitted into evidence.”³¹ *State's brief at 32-33*

The State once again makes an insulting argument in its brief that Mr. Berry was not under arrest at his home. The prosecutor defends the combined decision, of herself an experienced prosecutor, and the lead officer, an 18 year veteran of the police force, that even after the scene was processed there was still not enough evidence to arrest Mr. Berry. This argument was stretched to the extreme when the prosecutor allowed two officers to testify that

³¹ The State correctly stated that not all improper trial court rulings constitute an appearance of impropriety. However, not all trials conducted involve former spouses performing the roles of judge and prosecutor. This statement by that State feeds back into counsel’s initial argument of the right to an impartial tribunal. The fact that all of these photos were admitted over trial counsels repeated objections, specifically the two sets of Mr. Worthington’s wounds that were exactly the same other than one showed the clean version and the other showed his body as the M.E. received it, demonstrates an abuse of discretion that “might” cause a reasonable observer to question the Judge’s impartiality.

they would have had no choice but to let Mr. Berry walk out of the police station if he had decided to that night before he gave his statement. *Appellant's Brief at 7-9, 38-39 State's brief at 3-5*

Every citizen must be able to trust their criminal justice system. The public must be assured that the guilty will be punished and that the innocent will be exonerated. But when there is a reasonable question of guilt or innocence, the public should be assured that both sides will get a fair shot to prove their case. *State v. Swafford, 206 W. Va. 390,397, 524 S.E.2d 906,914 (1999) (Starcher, J. concurring)* The actions of a prosecutor should be guided by two considerations. First, "a prosecutor's duty is to obtain justice and not simply to convict[.]" *Nicholas v. Sammons, 178 W.Va. 631,632, 363 S.E.2d 516, 518 (1987)* Second, it is a prosecutor's duty to maintain "public confidence in the criminal justice system . . . by assuring that it operates in a fair and impartial manner." *Nicholas v. Sammons, 178 W.Va. at 631, 363 S.E.2d at 51*

Counsel would also point out that the State failed to address Counsel's argument within Appellant's first assignment of error which alleged that the State had just as much of a duty as the trial judge to either seek the Judge's recusal or assign the case to another prosecutor. The failure to abide by the ethical obligations of its quasi-judicial role, as a prosecutor, and either move to recuse the Judge due to their prior marriage or to assign a different prosecutor to the case amounted to misconduct. Counsel asserts the prosecutor did not address these authorities because there is no way to without admitting fault. *Appellant's Brief at 22*

This prosecutor is known to push the envelope and in many instances steps well over the line. This prosecutor has been reversed for prosecutorial misconduct on several occasions, as the errors were deemed by this Court to have infected the fairness of the trials in question.

Additionally, this Court has ruled that this prosecutor committed misconduct in other trials, however in those trials it was deemed that the misconduct was “harmless” Since 1992, this Court has addressed issues of prosecutorial misconduct alleged against this prosecutor. This Court explained in *State v. Wheeler*, 187 W.Va. 379,389, 419 S.E2d 447, 457(1992), “that counsel must keep within the evidence, not make statements calculated to inflame, prejudice or mislead the jury, nor permit or encourage witnesses to make remarks which would have a tendency to inflame, prejudice or mislead the jury....[W]e do not believe that the fact that Mrs. Fluharty, the victim’s spouse, was permitted to testify constitutes adequate grounds for reversal. *However, we strongly caution the prosecution against the future use of this type of potentially incendiary testimony. In a closer case, the mere use of such testimony could possibly justify reversal. (emphasis added)* In *State v. Leadingham*, 190 W.Va. 482, 492, 438 S.E.2d 825, 835 (1993), the Court admonished this prosecutor for misconduct in closing argument. it cautioned the prosecutor on remand of the case for a new trial that “*a prosecuting attorney is in a quasi-judicial role and ‘is required to avoid the role of partisan, eager to convict,’ and must ‘set a tone of fairness and impartiality[.]’*” *Id.* at 492, 438 S.E.2d at 836 (*emphasis added*) In *State v. Wyatt*, 198 W.Va. 530, 482 S.E.2d 147 (1996), this Court found the same prosecutor’s questioning of the defendant regarding her past participation in satanic rituals to be plain error in violation of Rules 401 and 403 of the West Virginia Rules of Evidence, specifically holding that “*the only purpose for this evidence was to prejudice the jury and that it may well have had that effect. We condemn its introduction and find that it constituted plain error, there being no showing of relevance or probative weight.*” *Id.* at 544, 482 S.E.2d at 161 (*emphasis added*).

Again in the first trial of *State v. Marvin Mills*, 211 W.Va. 532, 566 S.E.2d 891 (2002), this Court found the same prosecutor’s questioning of a detective regarding the defendant’s

failure at pretrial court proceedings to express remorse or sorrow over killing the victim, and her closing argument indicating that the defendant did not express remorse and ask for forgiveness, constituted improper evidence and comment on the defendant's failure to testify and was prejudicial error. Finally, during the second trial of Mr. Mills this Court found that the prosecutor's remarks equating life without mercy to mercy were *clearly erroneous* but ultimately held the remarks did not constitute clear prejudice or manifest injustice. 219 W.Va. 28 (2005)

In 2009, this Court heard another first degree murder case tried by this prosecutor. In an attempt to explain away the fact that she bolstered other state witnesses credibility by asking the investigating officer if in his opinion they were being truthful, the prosecutor *verbally represented* to this court that the attempt to bolster credibility was the product of an "inadvertent mistake." This Court did not accept the prosecutor's explanation and in fact ruled the issue complained of was caused by "calculated" behavior on behalf of the prosecutor and reversed the conviction. *State v. Martin*, 224 W. Va. 577, 687 S.E.2d 360(2009) This Court did not specifically label the behavior as "prosecutorial misconduct" but, it is clearly a reasonable interpretation of the discussion regarding that issue in this Court's written opinion. *Id.*

As demonstrated from the cases cited above, Mr. Berry's case represents a continued disregard by this prosecutor of the duty to seek justice not convictions. This prosecutor received the first warning from this Court 17 years ago, regarding this type of behavior. It is apparent the prosecutor has yet to heed to warnings that have consistently been issued by this Court. As her record demonstrates, this prosecutor regularly disregards the ethical obligations that are part of the powerful position of a prosecutor and in the process denies defendants their *constitutional right to a fair trial*.³² Rights that are vitally important especially when, as in Mr. Berry's case,

³² This is a concern on many levels but, a consequence of this continued behavior that is easily overlooked is the large expense to W.Va. taxpayers that this continued defiance creates.

the defendant is facing this State's ultimate punishment---life-in-prison without the possibility of parole.

Counsel will close with a final quote from Justice Starcher: “[i]t is quite simple: a prosecutor has a duty to be scrupulously fair and just. A duty to seek justice, not convictions. ...[and a duty not to] appeal to the passions, prejudices and feelings of resentment held by the jury. *State v. Swafford*, 206 W. Va. 390,398-99, 524 S.E.2d 906,914-15 (1999) (Starcher, J concurring)

The prosecutor in this case violated *all* of these duties during Mr. Berry's trial. The state trampled on Mr. Berry's constitutional rights *in the pursuit of a conviction* and in the process called into question the reputation of the justice system in our State. Counsel urges this Court to hold this prosecutor accountable for this unethical and improper behavior by reversing Mr. Berry's convictions due to prosecutorial misconduct. *Any time we deny any citizen the full exercise of his constitutional rights, we are weakening our own claim to them”---Dwight D. Eisenhower*

Relief Requested

Mr. Berry respectfully requests that this Honorable Court reverse his case and remand it back to the Circuit Court of Raleigh County for a new trial.

Respectfully Submitted,

Rodney Jason Berry

By Counsel,



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CERTIFICATE OF SERVICE

I, Crystal L. Walden, hereby certify that on the 10th day of August, 2010, I mailed a copy of the foregoing *Appellant's Reply Brief* to Kristen Keller, Prosecuting Attorney for Raleigh County, 112 N. Heber Street, Beckley, West Virginia 25801.



Crystal L. Walden
Deputy Public Defender

EXHIBITS

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