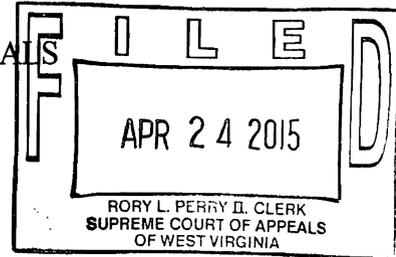


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 15-0028



DAYTON SCOTT LISTER,

Petitioner Below, Petitioner,

v.

DAVID BALLARD, Warden of the
Mt. Olive Correctional Complex,

Respondent Below, Respondent.

Appeal from the Circuit Court of Marion County, West Virginia

PETITIONER'S APPEAL BRIEF

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1. A juror on the night preceding the final day of trial was shopping and heard an unknown person in the store say, “There’s one of those bitch jurors.” The person then made a death threat against her by saying, “If we take a few of those out, Scoot [Petitioner’s nickname] will go free.”

2. As a result of this death threat, this juror was the victim of a crime, in violation of W.Va.Code §61-5-7(b)(2) and -7(c)(2); and

3. Despite the crime committed against this juror relating to her duties serving on the jury that convicted Petitioner, the trial court refused to strike her from the jury?

B. Whether the trial court erred in concluding Petitioner’s incarceration was not illegal and in violation of his constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article III, Sections 1, 5, 10, and 14 of the West Virginia Constitution, where:

1. In the mercy phase of the trial, the trial court permitted the State to present sympathy witnesses in direct contravention of *State v. Wade*, 200 W.Va. 637, 490 S.E.2d 724 (1997), *State v. Rygh*, 524 S.E.2d 447 (W.Va. 1999), and Rules 401 and 403 of the West Virginia Rules of Evidence for the sole purpose of illiciting an emotional response from the jury to provoke sympathy toward the victim and indignation toward Petitioner; and

2. The trial court failed to provide any standards for the jury to consider in determining whether or not to recommend life with or without the possibility of parole?

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I. ASSIGNMENTS OF ERROR

A.

Whether the trial court erred in concluding Petitioner's constitutional right to a fair and impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and Article III, Sections 10 and 14 of the West Virginia Constitution was not violated where:

1. A juror on the night preceding the final day of trial was shopping and heard an unknown person in the store say, "There's one of those bitch jurors." The person then made a death threat against her by saying, "If we take a few of those out, Scoot [Petitioner's nickname] will go free."

2. As a result of this death threat, this juror was the victim of a crime, in violation of W.Va.Code §61-5-7(b)(2) and -7(c)(2); and

3. Despite the crime committed against this juror relating to her duties serving on the jury that convicted Petitioner, the trial court refused to strike her from the jury?

B.

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1. In the mercy phase of the trial, the trial court permitted the State to present sympathy witnesses in direct contravention of *State v. Wade*, 200 W.Va. 637, 490 S.E.2d 724 (1997), *State v. Rygh*, 524 S.E.2d 447 (W.Va. 1999), and Rules 401 and 403 of the West Virginia Rules of Evidence for the sole purpose of illiciting an emotional response from the jury to provoke sympathy toward the victim and indignation toward Petitioner; and

2. The trial court failed to provide any standards for the jury to consider in determining whether or not to recommend life with or without the possibility of parole?

II. STATEMENT OF THE CASE

A.

Procedural history

On August 10, 2005, two people who had never met each other before became involved in a horrible tragedy in Fairmont, West Virginia. Krystal Peterson, who was eighteen years old, had plans to attend Fairmont State in the Fall. Petitioner, who was twenty-two years old, was living at home with his parents only a few blocks away from where this tragedy occurred. All it took was one random shot from a .22 gauge shotgun for Ms. Peterson to be killed and for Petitioner to be convicted of first degree murder without a recommendation of mercy, resulting in a life without the possibility of parole sentence.

The Honorable Judge Fred L. Fox presided over the underlying criminal case. On August 24, 2006, a jury in the Circuit Court of Marion County, West Virginia, convicted Petitioner of first degree murder, without a recommendation of mercy. (JA at 88).¹ On January 31, 2007, Petitioner appealed this conviction to this Court, which refused the appeal in an order entered June 5, 2007. (JA at 1171). Petitioner then filed a petition for a writ of certiorari to the United States Supreme Court, which refused the petition on October 29, 2007.

On May 20, 2014, Petitioner filed his **PETITION FOR WRIT OF HABEAS CORPUS** in the Circuit Court of Marion County, West Virginia. (JA at 1187). After holding a hearing to permit counsel to argue the legal issues briefed, the Honorable Judge Michael J. Aloï issued **FINAL OPINION AND ORDER DENYING RELIEF AND DISMISSING PETITION** on December 23, 2014, denying all habeas corpus relief. (JA at 1293). This appeal is being filed in response to this final order.

¹Citations to the record in the **JOINT APPENDIX** will be noted as “(JA at ____).”

B.

Petitioner's consumption of alcohol and Xanax

On August 10, 2005, Petitioner was twenty-two years old, Krystal Peterson was eighteen years old, and until the early morning hours on this date, neither of these individuals had ever met or had any type of connection or relationship with each other. During the evening of August 9, and into the early morning hours of August 10, 2005, a group of relatives, friends, and acquaintances were visiting with each other at an apartment complex in Fairmont, located a few blocks from Petitioner's residence. Through the testimony of various friends, acquaintances, and people who had observed him that evening, Petitioner presented evidence regarding his alcohol and Xanax consumption in the hours prior to the shooting resulting in the death of Ms. Peterson. (JA at 845-49; 865-66; 876; 879; 883-85; 888-90).

Two of the witnesses to the shooting, Lauren Ludovici and John Goode, gave statements and testified at trial that Petitioner appeared to be drunk. Specifically, Ms. Ludovici stated Petitioner did appear to be drunk because he was swaying and belligerent. (JA at 834). Mr. Goode testified Petitioner was acting up and down and Mr. Goode thought Petitioner was drunk. (JA at 787). Brandon Mitchell stated during the first incident between Petitioner and the group at this apartment complex, Mr. Goode actually stated to Petitioner he must have been drinking. (JA at 728). In his statement, Officer William Matthew Pigott noted when the group first asked Petitioner to leave, they said, "You're drunk. Just get back in your car and leave." (JA at 452).

Petitioner also presented expert witness testimony from John Damm, who diagnosed Petitioner as being alcohol dependent, polysubstance abuse, sedative ancillary dependent, and on Axis II, Anti-Social Personality Disorder. (JA at 907). Dr. Ryan Finkenbine, who is a psychiatrist and who teaches at West Virginia University, expressed his opinion, to a reasonable degree of

medical certainty, that Petitioner had alcohol dependence, alcohol intoxication, alprazolam dependence and intoxication, cocaine abuse, and opioid abuse. Dr. Finkenbine also stated, to a reasonable degree of medical certainty, “the nature of his mental state was to the extent that his capacity to form a specific element of crime was diminished. I did not have an opinion whether that element was formed or not.” “In this case because the Indictment was for murder, the four (4) areas that have some cognitive or emotional content to them which psychiatrists or psychologists might comment were those involving premeditation, deliberateness, willfulness, and maliciousness.” (JA at 919).

C.

The tragic random shooting of Krystal Peterson

Lauren Ludovicki testified she and Ms. Peterson were good friends. (JA at 819). At some time in the evening of August 9, 2005, Ms. Ludovicki was outside smoking when a Ford Taurus drove by with two people yelling racial epithets. (JA at 820-21). Ms. Ludovicki went inside and asked if anyone else had heard the yelling. (JA at 821). Soon thereafter, this group of friends went outside and listened to music in her car. (JA at 822). Ms. Peterson arrived once they were outside. (JA at 823). When Ms. Peterson arrived, she went with Mr. Lowery and they switched pants because she wanted to wear his baggy jeans. (JA at 725). The same maroon Ford Taurus Ms. Ludovicki previously had seen returned, Petitioner got out of his car, and said he was looking for a chick named September. (JA at 727). Mr. Mitchell testified, “When he had got out it, it was, like, does September live here? That’s when Semaj and them was coming from around the building and he was, like, she doesn’t live here no more. And he was, like, what, you want to fuckin’ fight? And that’s when I hopped out of the car, so he seen two (2) of us.” He said everything’s cool, Mr. Goode

said you've been drinking, and Petitioner went back to his car and popped the trunk. (JA at 728). When the trunk was opened, the light activated and Mr. Goode saw Petitioner pull out a gun, but at first Mr. Goode thought it was a bat. Mr. Goode ran up the stairs as Petitioner approached him with the gun. (JA at 774).

Petitioner then tried to point the gun at Mr. Mitchell and yelled at him, but Mr. Mitchell blocked the gun with his arm. (JA at 729). Petitioner then left without any further incident. Mr. Mitchell did notice a tattoo on the guy's arm when he knocked away the gun, but did not see exactly what the design was. Ms. Ludovicki saw Petitioner hit Mr. Mitchell's arm. (JA at 826). Ms. Ludovici fell down and Petitioner told her to get the hell out of there. She got into her car with the keys in her hand and Petitioner returned to his car. Mr. Lowery and Ms. Peterson asked her what happened and Ms. Ludovici told Ms. Peterson to get in the car because they were going to leave and she told them Mr. Mitchell had been struck with a gun. (JA at 827). Ms. Peterson told Ms. Ludovici she was too upset to drive, so they got into Ms. Peterson's car. Ms. Peterson worked at All About Sports with someone named September, so she called her job to get September's number, but they would not give it to her. (JA at 828). They drove around the block, but returned to check on Mr. Mitchell.

Mr. Lowery is the person who called the police after Petitioner first dropped by the house. The police arrived quickly and everyone present spoke with the officer. While the officer was there, he got another call and had to leave. (JA at 731). While they were all outside after the police had left, they heard a truck come down the street with a loud revving sound and the driver aimed a gun out of the passenger side window. Mr. Mitchell could see in the truck and saw the driver lift the gun up. Mr. Mitchell and the others took off running into the apartment complex and then Mr. Mitchell

heard one shot. Mr. Mitchell recognized the driver of the truck as being the same as the driver of the Taurus. (JA at 733).

As Ms. Ludovici and the others ran into the apartment complex, she heard one gunshot and then blood, parts of a skull, and brain hit her hand. (JA at 776-77, 830). She looked out and saw Petitioner looking and then driving away. (JA at 831). Mr. Lowery could see the shotgun in Petitioner's hands when he arrived back at the scene, after the police had left, only this time Petitioner was driving a truck. (JA at 805). Mr. Lowery believed the shotgun was pointed at him in the doorway. Mr. Lowery claims as he was running, he noticed others already in the house and Ms. Peterson was beside him. When the shot was fired, Ms. Peterson hit the ground and Mr. Lowery froze in the doorway. (JA at 806). He saw Petitioner holding the shotgun up to his shoulder and aiming it at him. (JA at 809). Ashlea Bush, who lived across this apartment complex, testified the shooting occurred around 1:30 a.m. (JA at 396). After hearing the shot, she ran over to the window, opened the blinds, and saw a red pickup truck pull out very fast and travel down the street. (JA at 397-98).

The police returned soon after the shot. (JA at 734). Ms. Ludovici, Mr. Mitchell, Mr. Goode, and Mr. Lowery were able to identify Petitioner in the courtroom as the person involved in the initial incident at this apartment complex as well as the shooting. (JA at 737, 782, 809, 831). Fairmont Officer William Matthew Pigott testified about 1:21 a.m., he was called out to investigate a male subject brandishing a weapon at an apartment complex and further was informed the suspect hit one of the complainants in the face with the shotgun before fleeing the scene. (JA at 441). When Officer Pigott arrived, he spoke with three black males and two white females. They told the office a male had arrived in a maroon Ford Taurus, exited the car, approached the group, asking for Stephanie. (JA at 442).

After being at this scene for about two minutes, Officer Pigott received a call regarding a shooting at 611 Oliver Avenue. Officer Pigott determined there was no medical attention needed, so he responded to this shooting call. (JA at 443). The calls for these two events were made about the same time. His plan was first to go to Locust Avenue to make sure medical attention not needed, and then proceed to Oliver Avenue. (JA at 444). The shooting at the Oliver Avenue residence occurred inside the house using a nine millimeter handgun. The identity of that shooter was Travis Catsonis. *Id.* While they were looking for Mr. Catsonis, they heard a gunshot coming from the general direction of Locust Avenue. Once in his car, the report was made there had been a shooting at 903 Locust. Officer Pigott was the first officer at the scene. (JA at 445).

When he arrived, he could see the female lying in the doorway and he determined she was deceased. (JA at 446). During his testimony, Officer Pigott narrated a video of the crime scene. (JA at 447). Officer Pigott noticed the Dodge pickup driven by Petitioner went by the house twice. A deputy made a traffic stop of the truck. (JA at 448). Some of the witnesses described tattoos on the arm of the male who had been to the apartment complex and Officer Pigott knew from prior experience that Petitioner had similar tattoos on his arm. (JA at 450).

Fairmont Officer David McGlone acted as backup to Officer Pigott and accompanied him to the apartment complex as well as to the shooting at Oliver Avenue. (JA at 459). Later during the day of this shooting, Officer McGlone went to Petitioner's address on Upland Drive and gave him a ride to the police station for questioning. (JA at 461). During this ride, Officer McGlone testified Petitioner did not appear to be intoxicated. (JA at 463). When he picked up Petitioner, it was about six and one half hours after the shooting. (JA at 466).

Rebecca Hayhurst, the Marion County Medical Examiner, arrived at the apartment complex after receiving a call around 1:34 a.m. advising her of a shooting. (JA at 381). When she arrived at the scene, she observed a female body lying on her stomach beside some stairs, half in the stairway and half out. There was blood and brain splatter and bone fragments throughout the entire stairwell and entryway. Ms. Hayhurst also observed a very massive wound to the back of Ms. Peterson's head. (JA at 383).

Dr. Zia Sabet is a Deputy Chief Medical Examiner for the State and she performed the autopsy on Ms. Peterson. (JA at 374). The fatal entrance wound was in the back of Ms. Peterson's head near the midline area. (JA at 375). No alcohol or drugs were detected in Ms. Peterson's blood, urine or other bodily fluids. (JA at 478). Fairmont Detective Douglas Edward Yost conducted a search of Petitioner's red Ford Taurus and found a single .22 caliber rifle in the trunk. Detective Yost did not find any beer bottles or drugs. (JA at 492-93).

Fairmont Police Chief Stephen G. Cain put together a photo line-up including Mr. Catsonis, who was the shooter at the Oliver Avenue address, and showed it to the Locust Avenue witnesses, but they did not identify Mr. Catsonis as the shooter. (JA at 516-17). When he later learned Petitioner had been stopped and another officer knew Petitioner had a tattoo, he prepared another photo line-up including a photo of Petitioner. The Locust Avenue witnesses identified Petitioner as the shooter and eliminated Mr. Catsonis. (JA at 517-18).

Marion County Deputy Kevin Alkire was involved in looking for a red Dodge Ram pickup truck that morning, based upon a "be on the lookout" issued, when he saw a red Dodge Ram pickup slowing traveling down Lowell Street and turning on to Locust. At the time he stopped this truck, Deputy Alkire had understood the shooter already had been arrested. (JA at 531). Petitioner was the driver of the truck he stopped. (JA at 532). Petitioner stated, "What's wrong? What did I do?"

Petitioner was wearing a blue t-shirt, blue jeans, open toed sandals, and a camouflage patterned ball cap. (JA at 534-35). Deputy Alkire asked Petitioner to get out of the truck, performed a horizontal gaze nystagmus test, and did not notice Petitioner slurring his words. (JA at 535). Deputy Alkire could smell alcohol on Petitioner's breath and Petitioner acknowledged he had been drinking earlier in the evening. Other than that, Deputy Alkire did not notice any other action by Petitioner exhibiting he was under the influence. (JA at 536). Petitioner passed the horizontal gaze test and then Deputy Alkire let him go. (JA at 537-38). This stop occurred at 2:31 a.m. (JA at 539). Deputy Alkire did not have Petitioner perform any other field sobriety tests and did not offer a PBT. (JA at 541). Petitioner told Deputy Alkire he had been arrested for a DUI about a month earlier. (JA at 542).

Marion County Deputy Jason Beardon assisted Deputy Alkire in the stop of Petitioner's truck. (JA at 546). Deputy Beardon searched the truck for weapons, but did not see any. (JA at 547). He did find shotgun shells and different handgun shells. (JA at 548). Marion County Deputy Lieutenant Rich Danley also was involved in the stop of Petitioner's truck. (JA at 551). He observed Deputy Alkire interviewing Petitioner and particularly was interested in seeing if Petitioner appeared to be intoxicated. (JA at 551). He did not observe any evidence of intoxication. (JA at 552).

Richie Workman, an inmate in the North Central Regional Jail on various charges, including forgery, uttering, petit larceny, and entering without breaking, testified after being sentenced to two one to ten concurrent sentences. Mr. Workman claimed he was testifying because he wants justice done for the girl and he was not offered any deals by the prosecutor or police. (JA at 562). Mr. Workman was in the same section of the jail with Petitioner and they had conversations. (JA at 563). Petitioner said it was getting to him and he asked whether he should see a psychiatrist to get

medications. Mr. Workman told him if you do, they will know you committed the crime. Petitioner also said he did not like interracial dating and he said that girl was with a black guy at the time, that he had been making racial remarks, and he said he went and got a shotgun and came back and that is when he shot her. (JA at 564).

Fairmont Detective John Bennington was involved in the questioning of Petitioner, which occurred at 8:34 a.m., on August 10, 2005. At the time he was questioned, Petitioner was not under arrest. Detective Bennington also testified Petitioner did not appear to be intoxicated at that time. (JA at 580-81). During his testimony, a video was played for the jury showing Petitioner in a room with Mr. Catsonis and other inmates. According to the transcript, Petitioner asks whether the girl was white or black, says he has never shot anyone before, and tells another inmate I shot some girl in the head last night. (JA at 595).

Koren K. Powers, who is employed by the West Virginia State Police Laboratory in the trace evidence section testified gunshot residue was detected on Petitioner's left hand and the passenger side, lower door panel sample. (JA at 605, 608). Philip Ken Cochran, a firearm and tool mark examiner for the West Virginia State Police Forensic Laboratory, testified he was able to determine the one shotgun was not the one used, but as to the other shotgun, he did not have enough marks to say one way or the other. (JA at 614-15).

Fairmont Detective Sergeant Kelly Moran testified from the search of the red pickup truck, the police recovered one fired twelve gauge shell casing and three unfired shells. (JA at 619). This was the shell used to compare with shells fired from the two shotguns recovered from Petitioner's house. (JA at 619). Once Mr. Catsonis was eliminated as the Locust Street shooter, three out of four witnesses identified Petitioner as the shooter from the photo lineup. (JA at 621).

Detective Moran was one of the officers who went to Petitioner's house to pick him up. Petitioner appeared to be asleep on his bed when they knocked on his bedroom door. (JA at 622). During the interview at the police station, Petitioner stated he had been at the Impulse Bar at 7 or 8 p.m. He claimed he had one beer there, stayed twenty minutes, and went home. Petitioner said he had been driving the Taurus that night and had not been anywhere else. Petitioner later said he had a beer and one mixed drink at the bar. Earlier in the day, around noon, Petitioner stated he had fired a .22, a 20 gauge, a 16 gauge, and a 12 gauge. (JA at 626-27). This shooting occurred at the Poor Farm. Sonja Carr and her thirteen year old son Preston Swann was with him.

Petitioner also said he shot from inside the truck with a 22 gauge. At that time, he consented to a gunshot residue test. Petitioner stated he had taken a shower since shooting at the Poor Farm and he had changed clothes. When Petitioner was told three witnesses had identified him as stopping by Locust and Lowell and asking about a girl named September, and Petitioner stated he had stopped there and when he was told September was not there, he went home. Petitioner described September as the most beautiful girl in the world. Petitioner denied getting out of the car and denied getting into an argument. Petitioner said he did leave his home around 2:00 a.m., to go to Rachel Smith's house. It was during this trip when he was stopped by the police. (JA at 627). Rachel lives across from the First Exchange Bank and at that time he was driving his truck. When he was told the same three witnesses had identified Petitioner as the shooter, Petitioner did not respond and shook his head. "I told him that we were not getting anywhere with this and at this time he was going to be placed under arrest for murder. He stated, she died? I stated, yes, she did. Lister then stated, I shot her, but it was an accident. I'll tell you the whole story. At that point in time, I asked him to put it on tape and he did not allow me to put him on the tape. That was the end of the interview. (JA at

628). Detective Moran did not obtain a signed statement from Petitioner and did not record the interview by audio or video. (JA at 630).

After the jury returned its verdict of first degree murder, the parties then went into the mercy phase of this case. During the mercy portion of the trial, over the Petitioner's objections, the State presented testimony from Regina Uvanni, Ms. Peterson's stepmother, Jessica Kanno, Ms. Peterson's best friend, Robert Lee Peterson, Jr., Ms. Peterson's father, and Mary Ann Lavadiere, Ms. Peterson's mother. (JA at 1090, 1094-95, 1097). Petitioner did not testify nor did he provide any testimony from any witnesses during the mercy phase of the trial. The jury deliberated and returned a no recommendation of mercy sentence.

D.

Multiple issues regarding juror disqualification

Throughout the trial of this case, several issues regarding the potential disqualification of jurors were raised. The first issue involved juror no. 8, who was a secretary for Reeder and Shuman and she thought that law firm represented Mr. Zimarowski, Petitioner's trial counsel. Mr. Zimarowski said he is not a client, but a social friend of some lawyers there. The trial court reserved the right for the State to explore that issue at a later time. (JA at 429-30). Later in the trial, a record was made of this juror employed by Robert Schuman, who had performed legal work for Mr. Zimarowski when his house was refinanced. (JA at 559). The State had no objection to this juror remaining on the panel. (JA at 560).

Second, there was a discussion about juror no. 2, who said he ran around with David Michael "Bumper" Sheranko, who was one of Petitioner's witnesses. (JA at 897). Although this juror said he was not real close to Mr. Sheranko and would not let that impact his deliberations, the State moved to excuse and the trial court granted, over Petitioner's objection. (JA at 898).

Third, while the State was still presenting its evidence, the bailiff presented the trial court with a note stating Ms. Tennant, juror no. 6, had stated there was no way the State would get a first degree murder conviction from her. The other jurors told her the Court had said jurors were not to discuss the case until trial had ended. (JA at 940). When questioned, Ms. Tennant said, “We’ve all expressed opinions.” She did acknowledge saying she did not believe it would be first degree murder. The trial court excused this juror, over Petitioner’s objection. (JA at 941). The trial court did not conduct any additional hearing to explore whether or not, as alleged by this juror, other members of the jury already had expressed opinions regarding the merits of this case. Once this juror was stricken by the trial court, there were no more alternate jurors left.

Fourth, juror Shannon Larry brought to the attention of the trial court the day before, she stopped at a Dairy Mart while her son remained in the car. While standing in line, she heard someone behind her say, “There’s one of those bitch jurors.” The person was a male and she did not turn around to look at him. As she paid for her items, she heard him say, “If we take a few of those out, Scoot will go free.” Petitioner’s nickname was Scooter. (JA at 409). She was afraid for her son, did not acknowledge what she had heard, and went to her car. When asked if she could render a fair and impartial verdict, she said, “Oh, absolutely.” (JA at 983). The trial court preserved Petitioner’s objection for refusing to excuse this juror and then to declare a mistrial. (JA at 984).

The following excerpt summarizes the arguments made by Petitioner’s trial counsel and the trial court’s response:

MR. ZIMAROWSKI: Your Honor, just so the record is clear, we would again move for a mistrial on the basis of manifest necessity. Second, this Court has dismissed two (2) jurors. The first juror that the Court dismissed was an individual who made similar representations that he could sit fairly and impartially when he recognized of the defense witnesses. At that point, this Court—

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

MR. ZIMAROWSKI: But he also stated unequivocally that he could sit fairly and impartially and decide this case, and the Court dismissed that juror. The second juror apparently made a comment in the jury room questioning—expressing agreement with another defense witness who was a psychologist or psychiatrist who testified and the Court dismissed that juror.

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

MR. ZIMAROWSKI: She expressed agreement with the—

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

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

THE COURT: Okay. That's denied. (JA at 985-86).

During the post-trial hearing on Petitioner's motion for a new trial, counsel and the trial court had a discussion in chambers. When the parties returned, the trial court explained:

Okay. The record reflect that I have discussed this matter with counsel in chambers and we—counsel and myself discussed it with the bailiff and with regard to the juror on the last day of trial that reported having heard a threat in a Go Mart or Dairy Mart, the issue was whether or not she told the other members of the jury. She—when she reported it to the bailiff, she said, "I've talked to the other members of the jury about this, and they said I should tell the Judge." So she did in fact discuss it with other members of the jury. (JA at 1110-11).

Thus, from the record, the disclosure that this juror had told other jurors about the death threat made against her was not known to anyone on the record until **after** Petitioner was convicted.

Consequently, the trial court did not make any record on what the other jurors had heard and, to the extent any of them learned of this threat, what impact the threat may have had on them.

III. SUMMARY OF ARGUMENT

Intimidating, harassing, or threatening a juror for carrying out the juror's official duties in a case is a serious criminal offense and such outside jury tampering jeopardizes a criminal defendant's constitutional right to a fair and impartial jury.

The Sixth Amendment guarantees criminal defendants the right to a fair trial by a panel of impartial, indifferent jurors. In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is deemed presumptively prejudicial.

In many cases, courts have held where a juror has been threatened or harassed outside of the courtroom, the juror who received the threat or harassment is disqualified from continuing as a juror in the case. Where a juror has been subjected to extraneous influences to which no juror should be subjected, it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made.

The trial court in the underlying criminal case committed clear error, resulting in the violation of Petitioner's constitutional right to a fair and impartial jury, when this challenged juror was permitted to remain on the jury.

Evidence that a homicide victim was survived by a spouse or children is generally considered inadmissible in a homicide prosecution where it is irrelevant to any issue in the case and is presented for the sole purpose of gaining sympathy from the jury.

While this Court has recognized in a mercy proceeding, the type of evidence that may be admissible is broader, nevertheless, mercy proceedings still are subject to existing case law and the West Virginia Rules of Evidence.

The combination of permitting the jury to consider inadmissible evidence in the mercy proceeding and failing to provide the jury with any standards on what factors can be considered in deciding whether or not to grant mercy resulted in a violation of Petitioner's constitutional rights.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the Rules of Appellate Procedure, Petitioner respectfully requests oral argument under Rule 19 or 20 because this appeal represents the main opportunity available to Petitioner to challenge his conviction, which resulted in a life without the possibility of parole sentence.

V. ARGUMENT

A.

The trial court erred in failing to conclude Petitioner's constitutional right to a fair and impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and Article III, Sections 10 and 14 of the West Virginia Constitution was violated when a juror on the night preceding the final day of trial was shopping and heard a direct threat made against her by some unknown person in the store regarding her involvement as a juror in Petitioner's trial and the trial court in the underlying criminal case refused to strike her from the jury

In the order denying all habeas corpus relief, the trial court found the ruling in the criminal case permitting the juror, who had overheard a threat directed at her regarding this trial, to remain on the jury, had been fully and fairly litigated, and was not clearly wrong. (JA at 1301-03).²

²The trial court also generally agreed with the comments expressed in the underlying trial that a "deleterious precedent" might be established if a threat against a juror by a person outside the

Intimidating, harassing, or threatening a juror for carrying out the juror's official duties in a case is a serious criminal offense and such outside jury tampering jeopardizes a criminal defendant's constitutional right to a fair and impartial jury. Under W.Va.Code §61-5-7(b)(2):

(b) It is unlawful for a person to use intimidation, physical force, harassment or a fraudulent legal process or official proceeding, or to threaten or attempt to do so, with the intent to:

* * *

(2) Impede or obstruct a juror or witness from performing his or her official duties in an official proceeding.

Under W.Va.Code §61-5-7(c)(2):

(c) *Retaliation.* - It is unlawful for a person to cause injury or loss to person or property, or to threaten or attempt to do so, with the intent to:

* * *

(2) Retaliate against a juror or witness for performing his or her official duties in an official proceeding.

courtroom could result in the disruption of a criminal trial. (JA at 1303-04). This suggestion ignores the well established constitutional right to a fair and impartial jury, where such contacts outside the courtroom have indeed resulted in convictions being set aside and further ignores what really occurred in this case. There was no evidence that Petitioner or his family had any involvement in encouraging or causing the stranger in the store to threaten this juror. By not disqualifying this juror, the stranger involved in threatening this juror has gotten away with a crime and there have not been any consequences. If these judges assume that the friends and family of a criminal defendant may be willing to threaten a juror in an effort to disrupt a criminal trial, why not assume the State or the law enforcement officers involved similarly may be willing to have a stranger intimidate a juror in an effort to turn the juror against the accused. Thus, the real danger with the precedent established by this case is the illegal harassment and intimidation of jurors may be encouraged rather than discouraged where the trial court chooses not to take any action.

Any person found guilty of harassing, intimidating, or retaliating against a juror for performing his or her official duties in an official proceeding can be convicted of a misdemeanor and “shall be confined in jail for not more than one year or fined not more than one thousand dollars, or both.” Such person also can be subject to civil liability, civil sanctions, and attorneys fees.

As noted above, near the end of Petitioner’s trial, a violation of this criminal statute was brought to the attention of the trial court when a juror reported the night before, while shopping at a Dairy Mart, she heard someone behind her say, “There’s one of those bitch jurors.” The person then made a death threat against her by saying, “If we take a few of those out, Scoot will go free.” Petitioner’s nickname was Scooter. (JA at 409). Thus, this juror was reporting to the trial court a violation of W.Va.Code §61-5-7. After the verdict was returned, it was learned for the first time that this juror had told the other jurors about this incident.

Threatening the life of a juror, as a result of that juror carrying out her official duties in a trial, is a very serious offense and strikes at the heart of the jury process. Despite the seriousness of this charge, the trial court refused to disqualify this threatened juror. By the time the crime against this juror was reported, the trial court already had excused the two alternative jurors, meaning the disqualification of this juror would have required a mistrial. Although it was determined on the record that this juror had mentioned the threat to other jurors, which normally would trigger the need for a hearing to question the other jurors about what impact that information had on them, the record is clear this fact was not determined until after Petitioner was convicted.

The Sixth Amendment guarantees criminal defendants the right to a fair trial by a panel of impartial, indifferent jurors. *Irvin v. Dowd*, 366 U.S. 717, 722, 6 L.Ed.2d 751, ___, 81 S.Ct. 1639, 1642 (1961); see *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554, 78 L.Ed. 2d

663, ___, 104 S.Ct. 845, 849 (1984)("[o]ne touchstone of a fair trial is an impartial trier of fact - a jury capable and willing to decide the case solely on the evidence before it") (internal quotation marks and citation omitted); *Patton v. Yount*, 467 U.S. 1025, 1037 n. 12, 81 L.Ed.2d 847, ___ n. 12, 104 S.Ct. 2885, 2891 n. 12 (1984) ("a juror is impartial only if he can lay aside his opinion and render a verdict based on the evidence presented in court"). "The bias...of even a single juror would violate [defendant's] right to a fair trial. *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir.), *cert. denied*, 525 U.S. 1033 (1998).

To protect a defendant's right to be tried "by a panel of impartial, 'indifferent' jurors[.]" *Morgan v. Illinois*, 504 U.S. 719, 727, 119 L.Ed.2d 492, ___, 112 S.Ct. 2222, 2228 (1992), the United States Supreme Court, more than a century ago, overturned a murder conviction on Sixth Amendment grounds in part because a bailiff told a jury during deliberations that "[t]his is the third fellow [the defendant] has killed." *Mattox v. United States*, 146 U.S. 140, 142, 36 L.Ed. 917, ___, 13 S.Ct. 50, 51 (1892) (internal quotation marks omitted). The *Mattox* Court held that "[p]rivate communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Id.* at 150, 119 L.Ed.2d at ___, 13 S.Ct. at 53.

The United States Supreme Court reaffirmed this principle in *Remmer v. United States* (*Remmer I*), 347 U.S. 227, 98 L.Ed. 654, 74 S.Ct. 450 (1954), stating that "[i]n a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, **deemed presumptively prejudicial**[" (Emphasis added). 347 U.S. at 229, 98 L.Ed. at ___, 74 S.Ct. at 451; *see also United States v.*

Dutkel, 192 F.3d 893, 894 (9th Cir. 1999) (jury tampering cases are treated "very differently from other cases of jury misconduct. Once tampering is established, [the court] presume[s] prejudice and put[s] a heavy burden on the government to rebut the presumption."). While the "presumption is not conclusive, . . . the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Remmer I*, 347 U.S. at 229, 98 L.Ed. at ___, 74 S.Ct. at 451; *accord Caliendo v. Warden*, 365 F.3d 691, 696 (9th Cir.), *cert. denied*, 543 U.S. 927 (2004) ("Any unauthorized communication between a juror and a witness or interested party is presumptively prejudicial, but the government may overcome the presumption by making a strong contrary showing."). "[E]ven indirect coercive contacts that could affect the peace of mind of the jurors give rise to the *Remmer* presumption." *Dutkel*, 192 F.3d at 897.

However, "due process does not require a new trial every time a juror has been placed in a potentially compromising situation." *Smith v. Phillips*, 455 U.S. 209, 217, 71 L.Ed.2d 78, ___, 102 S.Ct. 940, 945 (1982). "[The Supreme] Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Id.* at 215, 102 S.Ct. at 945; *see also United States v. Angulo*, 4 F.3d 843, 847 (9th Cir. 1993) ("[T]he remedy for allegations of jury bias is a *hearing*, in which the trial court determines the circumstances of what transpired, the impact on the jurors, and whether or not it was prejudicial.") (italics in original). In conducting the requisite hearing, the trial court must examine whether the tampering "interfered with the jury's deliberations by distracting one or more of the jurors[.]" *Dutkel*, 192 F.3d at 897. In determining whether the tampering raised a risk of influencing the deliberations, the trial court should examine such factors as whether the "unauthorized communication . . .

concerned the case[,] . . . the length and nature of the contact, the identity and role at trial of the parties involved, evidence of actual impact on the juror, and the possibility of eliminating prejudice through a limiting instruction." *Caliendo*, 365 F.3d at 697-98.

In this case, the trial court correctly held what sometimes is referred to as a *Remmer* hearing. This Court has decided a couple of cases where some improper contact was made either by a juror or to a juror. In *State v. Sutphin*, 195 W.Va. 551, 466 S.E.2d 402 (1995), during the trial, one juror, who knew one of the witnesses, visited with that witness in his home after the witness had testified. This contact between a witness and a juror was raised as an issue on appeal. In Syllabus Point 2 of *State v. Sutphin*, 195 W.Va. 551, 466 S.E.2d 402 (1995), this Court outlined the procedure a trial court must follow where there is evidence of outside harassment, communications, or tampering with a juror during a trial:

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

Under these facts, where the juror had acted on his own accord, this Court did not find any error with the improper contact between this juror and a witness.

In *State v. Daniel*, 182 W.Va. 643, 391 S.E.2d 90 (1990), a witness for the defendant, after testifying in the trial, called one of the jurors and intimated she would be willing to provide a

favorable deal to the juror's son for a used car and further asked the juror to do her best to help the defendant. A few weeks after the defendant was convicted, this juror disclosed to the trial court the conversation she had with this witness. This juror had never told anyone on the jury about this conversation until after the verdict had been returned. In concluding no mistrial should be granted under these facts, this Court noted this juror had not told any of the other jurors about this discussion prior to the verdict being returned and counsel for this defendant did not request a formal hearing on this issue. Thus, this Court held this defendant was unable to prove he suffered any prejudice as a result of this improper communication with this juror.

Clearly, the facts in *Sutphin* and *Daniel* are distinguishable from the facts in the present case, where a death threat had been made against a juror. Petitioner respectfully submits the trial court in this case denied him his constitutional right to a fair and impartial jury by refusing to disqualify this juror, who received the death threat.³

³Furthermore, earlier in the case, the trial court failed to conduct a full inquiry into the allegations made by Ms. Tennant, juror number 6, who was excused because she had expressed an opinion about the case before all of the evidence had been admitted. When questioned, Ms. Tennant explained several other jurors also had expressed opinions about the case, but the trial court did not hold a hearing to explore this issue with the other jurors.

Similarly, as noted, although it was not discovered that juror Larry had told the other jurors about the incident in the store until after Petitioner was convicted, Petitioner respectfully submits under Syllabus Point 2 of *Sutphin* and *Remmer*, a hearing should have been held to develop a record on this issue. The trial court disagreed and held, under *State ex rel. Trump v. Hott*, 187 W.Va. 749, 421 S.E.2d 500 (1992), where the evidence of guilt is overwhelming, extraneous information provided to the jury may not be sufficient to set aside a conviction. (JA at 1330). Although it is not disputed that Petitioner fired the fatal shot, the jury still had to decide which degree of homicide Petitioner committed and once the jury convicted Petitioner of first degree murder, the jury then had to decide whether or not to grant mercy. Furthermore, the trial court held the decision to leave juror Larry on the jury and not to explore whether her comments to the other jurors constituted error was not clearly wrong. *Id.*

In many of these *Remmer* cases, the juror who received the threat or harassment is found by the trial court to be disqualified from continuing as a juror in the case. *See, e.g., United States v. Anguilo*, 897 F.2d 1169 (1st Cir. 1990)(One juror, who was told by his girlfriend his life may be endangered by serving on this jury, and another juror, who received an offer of a bribe through an intermediary if the juror voted not guilty, were excused by the trial court); *Johnson v. Small*, 2009 WL 5218422 (C.D. Cal. 2009)(An alternate juror, who had been threatened by an person outside of the trial, was excused as well as a couple of other jurors who were told by the alternate juror about this threat); *United States v. Duktel*, 192 F.3d 893 (9th Cir. 1999)(Habeas relief granted where defendant, who was convicted in a joint trial with a co-defendant, who was not convicted because the jury could not reach a verdict, learned, after his conviction, that co-defendant had bribed a juror to hang the jury with respect to the co-defendant); *Acosta v. Evans*, 2008 U.S. Dist. LEXIS 124505 (C.D. Cal. 2008)(Juror who received an anonymous call asking her to vote not guilty was excused); *State v. Kurtz*, 1996 WL 429012 (Ohio Ct. Ap. 1996)(Juror threatened by an unknown person outside of the courtroom excused); *Owen v. Duckworth*, 727 F.2d 643 (7th Cir. 1984)(Habeas relief granted where a juror had received a threatening telephone call and this juror told other members of the jury about this threat, contrary to instruction of the trial court); *see also Krause v. Rhodes*, 570 F.2d 563 (6th Cir. 1978)(In civil rights litigation arising from the Kent State massacre, defense verdict reversed and remanded for a new trial where a juror was threatened three times and actually assaulted during the trial by someone).

In *United States v. Cheek*, 94 F.3d 136 (4th Cir. 1996), Garvey Cheek and James Rhodes were co-defendants tried in a joint trial. During the trial, a person posing as a courthouse official went to a juror's apartment, explained the juror was needed for some proceeding at the courthouse, was

driven first to a police station and then to a bail bondsman's office, where he saw Mr. Rhodes. Upon seeing Mr. Rhodes and realizing he was not there for any court-related purpose, this juror left the office and walked home about four or five miles. Some time after the trial, co-defendant Cheek learned of this incident and sought habeas corpus relief as a result of this improper out of court contact with one of the jurors. Cheek did not know Mr. Rhodes had engaged in this action and initially, the Government's position was if this allegation were true, Mr. Cheek was entitled to a new trial. The District Court, after considering the record presented, which included the testimony from this juror, denied relief claiming no communication was made directly regarding the trial, thus not triggering the presumption of prejudice.

On appeal, the Fourth Circuit held the district court had construed the *Remmer* decision too narrowly and proceeded to analyze the United States Supreme Court's decision in *Remmer v. United States*, 350 U.S. 377, 379, 100 L.Ed. 435, ___, 76 S.Ct. 425, 426-27, 100 L.Ed. 435 (1956) (*Remmer II*), which is the appeal that occurred after the remand to the district court based upon the initial *Remmer* decision:

The district court's record on remand, reviewed in *Remmer v. United States*, 350 U.S. 377, 379, 76 S.Ct. 425, 426-27, 100 L.Ed. 435 (1956) (*Remmer II*), disclosed that after the trial started a man suggested that the juror could make some easy money if he would make a deal with the defendant, Remmer. The juror reported this approach to the district court, which directed the FBI to investigate. After the trial, the juror stated that there was some question that he had been approached and that he had been under terrific pressure. Ultimately the district court held that the incident was harmless and had no effect on the juror's judgment, integrity, or state of mind. The district court found the juror to be a "forthright and honest man." *Remmer II*, 350 U.S. at 379, 76 S.Ct. at 426.

The Supreme Court reversed and granted Remmer a new trial. It said in part:

We think this evidence, covering the total picture, reveals such a state of facts that neither [the juror] nor anyone else could say that he was not affected in his freedom of action as a juror. From [the juror's] testimony it is quite evident that he was a disturbed and troubled man from the date of the [extrajudicial] contact until after the trial.... **He had been subjected to extraneous influences to which no juror should be subjected, for it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made.**

Remmer II, 350 U.S. at 381-82, 100 L.Ed. 435, ___, 76 S.Ct. at 427-28. (Emphasis added).

See also Barnes v. Joyner, 751 F.3d 229 (4th Cir. 2014)(Habeas corpus relief granted to a defendant convicted in state court where a juror had consulted with a minister during the trial regarding the death penalty, the trial court had failed to permit a hearing to be held to make a record on this issue, and the presumption of prejudice, therefore, was not overcome).

Using the *Remmer II* analysis, the fact that the district court had found this juror had rendered a verdict based upon the evidence presented was not enough to overcome the presumption of prejudice. Consequently, the Fourth Circuit reversed Mr. Cheek's conviction and remanded the case to the district court for a new trial.

Clearly, trial judges have a lot of discretion in making decisions regarding whether or not a juror is disqualified. When a challenge is made regarding the possible disqualification of a juror, the trial judge is able to view the juror's demeanor and decide whether or not the juror should remain on the case. While trial judges have discretion in this area, the *Remmer* line of cases makes it clear where a juror has been subjected to intimidation or harassment outside the courtroom as a result of that juror serving in a particular case, the State has to overcome the presumption of prejudice.

In this case, it is helpful to review how two challenged jurors were handled by the trial court. First, when Juror Banks came forward and said he knew Michael “Bumper” Sheranko, one of Petitioner’s witnesses, the following colloquy took place:

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

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

JUROR BANKS: No. (JA at 898).

Based upon this short discussion, the trial court excused this juror for cause.

Second, Juror Larry, who was the victim of a criminal intimidation and harassment, as a result of her service as a juror in Petitioner’s case, engaged in the following colloquy with the trial court:

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

JUROR LARRY: Oh, absolutely.

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

JUROR LARRY: No. No, not at all. (JA at 983).

Based upon this response, where once again the challenged juror stated she could decide the case fairly, instead of excusing this juror for cause, as the trial court did with Juror Banks, the trial court instead permitted this juror, who had been criminally harassed and intimidated because she was serving on Petitioner’s jury, to remain on the case.

While these types of judgment calls are difficult and for the most part, appellate courts will defer to the trial court’s discretion, in these circumstances, where the juror was threatened based

upon her service on Petitioner's jury and Petitioner was faced with losing his liberty for the remainder of his life, the trial court clearly was wrong in refusing to excuse Juror Larry because the State failed to refute the presumption of prejudice arising from this out of court contact with a stranger. As the United States Supreme Court held in *Remmer II*, "[The juror] had been subjected to extraneous influences to which no juror should be subjected, for it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made. *Remmer II*, 350 U.S. at 382, 76 S.Ct. at 428.

B.

The trial court erred in failing to conclude Petitioner's incarceration is illegal and in violation of his constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article III, Sections 1, 5, 10, and 14 of the West Virginia Constitution, because the trial court permitted the State to present sympathy witnesses in direct contravention of *State v. Wade*, 200 W.Va. 637, 490 S.E.2d 724 (1997), *State v. Rygh*, 524 S.E.2d 447 (W.Va. 1999), and Rules 401 and 403 of the West Virginia Rules of Evidence for the sole purpose to illicit an emotional response from the jury to provoke sympathy toward the victim and indignation toward Petitioner and because the trial court provided no standards for the jury to consider in determining whether or not to recommend life with or without the possibility of parole

Over Petitioner's objection, the trial court bifurcated the trial between the guilt and mercy phases. In the mercy phase, the State presented relatives or friends of Ms. Peterson, who did not have any facts relevant to the crime or to Petitioner, but rather who presented very sympathetic testimony regarding the personal losses they had suffered as a result of this tragic death.

In this habeas corpus action, the trial court concluded it was not clearly wrong to permit the State to present this sympathy evidence in the mercy phase of the case, suggesting the Rules of

Evidence and this Court's well established case law regarding what evidence may be admissible do not apply the same in a mercy proceeding as they would in the guilt phase or in any unitary trial. (JA at 1330-31). Furthermore, the trial court found the lack of instructions, lack of standards, and lack of review of the mercy decision by the jury to be consistent with existing law. *Id.*

In footnote 1 of *State v. Rygh*, 206 W.Va. 295, 524 S.E.2d 447 (1999), this Court made the following comments regarding the procedures to be followed in the mercy phase of a first degree murder trial:

We observe that there is nothing in *LaRock* that creates, merely by bifurcating a murder trial, **a qualitative change in or a substantive expansion of the scope or type of evidence that the prosecution may put on against a defendant—as compared to that evidence that would be admissible in a unitary trial. Stated another way, discretionary trial-management bifurcation does not itself alter or expand the scope of admissible prosecutorial evidence to include evidence that has been historically inadmissible in murder cases in this State.** (Because bifurcation is a matter of trial court discretion, such an expansion could raise, *inter alia*, equal protection and due process issues, if one defendant were tried in a bifurcated proceeding with relaxed evidentiary limitations—as opposed to another defendant, who is tried in a unitary proceeding.)

We recognize, of course, that the evidentiary opportunities that a defendant may have in a mercy phase, as a result of bifurcation, may in turn affect the evidentiary limitations of the prosecution in rebuttal or impeachment. **However, the opportunity for prosecution rebuttal or impeachment in a bifurcated mercy phase is not authorization for the prosecution to use unfairly prejudicial, extraneous, remote, or inflammatory evidence—even in rebuttal or impeachment.** *See* note 2 *infra*. We also observe that the availability of discretionary trial-management bifurcation in a West Virginia murder case does not mean that the body of case law that has developed in capital punishment jurisdictions around death-penalty/sentencing-phase proceedings is now applicable to the trial of West Virginia murder cases.

We do not believe that conceptually there is any separate or distinctive “burden of proof” or “burden of production” associated with the jury's mercy/no-mercy determination in a bifurcated mercy phase of a murder trial, if the court in its discretion decides to bifurcate the proceeding. In making its overall verdict, in a unitary trial or a bifurcated trial, the jury looks at all of the evidence that the defendant and the prosecution have put on—and if the jury concludes that an offense punishable by life imprisonment was committed, then the jury determines the mercy/no-mercy portion of its verdict, again based on all of the evidence presented to them at the time of their determination. We would anticipate that a defendant would ordinarily proceed first in any bifurcated mercy phase. We emphasize that the possibility of bifurcation of a mercy phase is not an open door to the expansion of the ambit of evidence that the prosecution may put on against a defendant, in the absence of the defendant opening that door to permit narrowly focused impeachment or rebuttal evidence from the prosecution. (Emphasis added).

In this case, the State presented sympathy witnesses in the mercy phase, whose testimony would have been inadmissible in a unitary trial. In Syllabus Point 10 of *State v. Wade*, 200 W.Va. 637, 490 S.E.2d 724 (1997), this Court reiterated this often stated rule:

“Evidence that a homicide victim was survived by a spouse or children is generally considered inadmissible in a homicide prosecution where it is irrelevant to any issue in the case and is presented for the sole purpose of gaining sympathy from the jury.” Syllabus point 5, in part, *State v. Wheeler*, 187 W.Va. 379, 419 S.E.2d 447 (1992).”

In Syllabus Point 7 of *State v. McLaughlin*, 226 W.Va. 229, 700 S.E.2d 289 (2010), in which this Court addressed a number of procedural questions relating to bifurcated proceedings in first degree murder cases, the Court emphasized the rules of evidence necessarily are broader in terms of evidence relating to the defendant’s character, but did not open the door for witnesses who exclusively provided testimony on the issue of sympathy:

The type of evidence that is admissible in the mercy phase of a bifurcated first degree murder proceeding is much broader than the

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

Allowing the jury to consider this inadmissible evidence was very prejudicial to Petitioner and a violation of his constitutional rights. The prejudice suffered by Petitioner was even worse because the jury was not provided any standards to consider in deciding whether or not to recommend mercy.

In Syllabus Point 1 of *State ex rel. Leach v. Hamilton*, ___ W.Va. ___, 280 S.E.2d 62 (1980), this Court held that "Life imprisonment without possibility of parole is not cruel and unusual punishment for first-degree murder. U.S.Const. amends. XIV and VIII; W.Va.Const. art. III, § 5." In *Leach*, this Court further made the point that a person convicted of first degree murder automatically is sentenced to life without parole, unless the jury, in its discretion, decides to recommend mercy.

One of the inherent constitutional deficiencies with this lack of guidelines is that the jury may make the decision to recommend or deny mercy for unconstitutional reasons. Suppose a jury decided not to recommend mercy because they did not like the defendant's race, religion, social position, wealth, class, sex, or sexual preference. Suppose this information came to light in the form of a juror's affidavit the day after the verdict was returned.

Generally speaking, courts are not permitted to impeach a jury's verdict "based on matters that occur during the jury's deliberative process which matters relate to the manner or means the jury

uses to arrive at its verdict." Syllabus Point 1, *State v. Scotchel*, 168 W.Va. 545, 285 S.E.2d 384 (1981). Thus, under present West Virginia law, not only would that jury's decision not to recommend mercy due to the defendant's race, religion, social position, wealth, class, sex, or sexual preference not be impermissible under the law, but would not be subject to review by either the trial court or this Court.

To date, this Court has approved of the procedure whereby the jury is given unbridled discretion in determining the mercy issue. Ironically, the only decision addressing the issue of providing such guidelines to the jury resulted in a reversal. In *State v. Miller*, 178 W.Va. 618, 363 S.E.2d 504 (1987), the defendant appealed a first degree murder conviction on the ground that the trial court erred in giving an instruction provided by the State which listed various factors for the jury to consider in deciding whether or not to recommend mercy. This instruction was based upon a provision of the Model Penal Code, which listed mitigating factors to be considered in death penalty cases.

In reversing the conviction, this Court held in Syllabus Point 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.

Thus, the only case reported in West Virginia where guidelines were given to the jury to consider in evaluating the mercy issue resulted in a reversal of the conviction. As a result, the only "guideline" given to the jury in most first degree murder or kidnaping cases is by the prosecutor in his or her final closing argument, where the jury is asked to "Give the defendant the same mercy he gave his victim." In many cases, other than the instruction explaining the parole implications of a mercy recommendation, this argument by the prosecutor is the only other mention of mercy in a trial.

In developing a constitutional challenge to this lack of guidelines, it is first necessary to understand this Court's reasons for approving the present procedure with respect to the mercy issue. In *Miller*, 178 W.Va. at ___, 363 S.E.2d at 506-07, the Court emphasized the jury's limited role on this sentencing issue:

We pointed out the jury's limited role in a murder case in *State ex rel. Leach v. Hamilton*, ___ W.Va. at ___, 280 S.E.2d at 64:

“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.”

Thus, the Court, at least at the time *Miller* was decided, continued to believe that if any guidelines are developed for the jury to consider in recommending mercy, it is the obligation of the Legislature, rather than the courts, to develop these guidelines.

Although *Miller* found it to be reversible error for a trial court to adopt the particular instruction given to the jury in that case, the Court did not have before it the issue of whether the lack of guidelines violated the defendant's constitutional rights. In footnote 7 of *Miller*, the Court noted that the defendant had not raised a constitutional issue with respect to this lack of guidelines. Due to the fact that it was the State, rather than the defendant, which offered the guidelines instruction, it is not surprising that the constitutional issue was not raised.

In *Billotti v. Dodrill*, 183 W.Va. 48, 394 S.E.2d 32 (1990), the Court not only approved West Virginia's procedure of discretionary appellate review, even where a life with no mercy sentence is imposed, but also challenged the lack of guidelines on the mercy issue. Specifically, the defendant

argued that the lack of guidelines in W.Va.Code, 62-3-15, violated his due process and equal protection rights. In rejecting this argument, the Court relied upon *Leach* and *Miller*, without extensively analyzing the issue.

Mr. Billotti raised these same issues in his federal habeas corpus proceeding. The Fourth Circuit addressed this particular issue in *Billotti v. Legursky*, 975 F.2d 113 (1992), *cert. denied*, 507 U.S. 987 (1993). Mr. Billotti analogized his case to the jurisprudence developed in death penalty cases, where the United States Supreme Court has mandated that the jury be instructed on what mitigating factors to consider in determining whether to grant life or impose the death penalty.

On the surface, the analogy to death penalty jurisprudence would seem to be persuasive. In *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the United States Supreme Court addressed the question of whether or not the imposition of the death penalty constituted cruel and unusual punishment. This *per curiam* opinion, which consists of five separate concurring opinions and four separate dissenting opinions, was the basis for invalidating many of the death penalty statutes on the books at that time. West Virginia had abolished its death penalty in 1965. W.Va.Code §61-11-2.

After recognizing generally that the imposition of the death penalty had been found not to constitute cruel and unusual punishment, Justice Douglas noted, however, that the procedure leading to the jury deciding to impose the death penalty may violate that clause:

It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.

* * *

Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual" punishments. 408 U.S. at 241, 256-57, 92 S.Ct. at 2727, 2735, 33 L.Ed.2d at ____.

Since the *Furman* decision, the United States Supreme Court has issued a number of decisions approving or disapproving of various jury instructions given in death penalty cases. Some of the general legal principles developed in these cases were summarized in *California v. Brown*, 479 U.S. 538, 541, 107 S.Ct. 837, 839, 93 L.Ed.2d 934, ____ (1987):

First, sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses. The Constitution instead requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972). Second, even though the sentencer's discretion must be restricted, the capital defendant generally must be allowed to introduce any relevant mitigating evidence regarding his "character or record and any of the circumstances of the offense." *Eddings, supra*, at 110, quoting *Lockett, supra*, at 604. Consideration of such evidence is a "constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina, supra*, at 304 (opinion of Stewart, POWELL, and STEVENS, JJ.).

Despite these arguments, Mr. Billotti was unable to persuade the Fourth Circuit that the present mercy recommendation procedure is unconstitutional. In rejecting his arguments, the Fourth Circuit first noted that "Whether the jury exercises its judgment in a discretionary fashion or under guidance from the court seems to us more a question of West Virginia law than one of federal due process." 975 F.2d at 116. The Fourth Circuit further observed, "There is a long tradition of discretionary sentencing practice in this country....Any modification of this practice has generally come through the legislative process, as happened at the federal level with the Sentencing Reform

Act of 1984 and the subsequent promulgation of more uniform sentencing guidelines." 975 F.2d at 116. Thus, the Fourth Circuit repeated the position of the West Virginia Supreme Court that this particular issue should be left to the Legislature.

As to the comparison with the death penalty jurisprudence, the Fourth Circuit held:

Nor do we think it avails petitioner that the Supreme Court has required instructions limiting jury discretion in capital cases. *See, e.g., Maynard v. Cartwright*, 486 U.S. 356, 100 L. Ed. 2d 372, 108 S. Ct. 1853 (1988). The Supreme Court has made it plain that the principle of those cases does not extend beyond the decision to impose capital punishment....To extend the many refinements of capital sentencing practice to noncapital cases would severely complicate the administration of criminal justice in state courts, and we decline to do so. 975 F.2d at 117.

Finally, the Fourth Circuit reasoned that it did not make sense to restrict a jury to the consideration of particular factors in determining whether or not to grant mercy because the very lack of guidelines may render the process even more lenient:

If the Constitution permits the jury wide discretion to be lenient in a capital case, it can hardly be read to prohibit a grant of discretionary mercy in this non-capital sentencing proceeding. The Court has required that the category of mitigating factors and evidence in a capital sentencing proceeding remain open-ended. *Walton v. Arizona*, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S.Ct. 3047 (1990). So too West Virginia may permissibly decide that "mercy" is one of those words that speaks in the end for itself, and that definition may ultimately limit the generosity with which mercy is granted. 975 F.2d at 118.

Thus, the Fourth Circuit suggests that the lack of any rigid guidelines may allow a jury to be more generous in granting mercy to a defendant.

For years, defense lawyers in civil cases included in their answers the assertion that the awarding of punitive damages was unconstitutional for a wide variety of reasons. For years, these arguments were ignored by the courts and juries were free, generally, to award punitive damages

without any extensive guidance from the trial court. Today, in every case involving punitive damages, the trial court is required to present extensive instructions to the jury on what can be considered in awarding punitive damages and the trial court is required to go through an extensive analysis of any punitive damages award before the matter may be appealed. All of these punitive damages instructions and guidelines were developed by the courts, without any involvement by the Legislature.

In Syllabus Point 2 of *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), the Court held:

"Under our system for an award and review of punitive damages awards, there must be: (1) a reasonable constraint on jury discretion; (2) a meaningful and adequate review by the trial court using well-established principles; and (3) a meaningful and adequate appellate review, which may occur when an application is made for an appeal."

See also TXO Production Corp. v. Alliance Resources Corp., 187 W.Va. 457, 419 S.E.2d 870 (1992).

These three elements were based upon the United States Supreme Court's analysis of the Fourteenth Amendment in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). Thus, when it comes to punishing defendants in civil cases through the award of punitive damages, the United States Supreme Court held that certain procedures must be in place to ensure that the due process rights of the civil defendant are protected.

In comparison, a jury in a case where a life with no mercy sentence is available, has no reasonable constraints on the jury's discretion, there is no meaningful and adequate review by the trial court based upon well established principles, and there is no meaningful and adequate appellate

review. Logically, if the mere fact that a civil defendant is entitled to constraints on jury discretion, trial court review, and appellate review of any punitive damages awarded, surely the imposition of the most severe sentence under West Virginia law, where a criminal defendant's liberty may be impacted until he dies, must also be subjected to the same due process concerns. To permit the harshest sentence available to be imposed without any reasonable constraints on the jury and without any review by the trial court or appellate court is a system "pregnant with discrimination" and fundamentally a violation of due process. *Cf. Furman v. Georgia*, 408 U.S. 238, 256-57, 92 S.Ct. 2726, 2735, 33 L.Ed.2d 346 (1972).

Petitioner respectfully submits the combination of the trial court's decision to permit the State to present inadmissible testimony in the mercy phase of the trial with the lack of standards provided to the jury to determine whether or not to grant mercy violated Petitioner's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article III, Sections 1, 5, 10, and 14 of the West Virginia Constitution. Thus, the trial court erred in denying habeas corpus relief on this issue.

VI. CONCLUSION

For the foregoing reasons, Petitioner Dayton Scott Lister respectfully moves this Court to schedule this case for oral argument, to set aside Petitioner’s conviction on one count of first degree murder, and to remand this case to the Circuit Court of Marion County for a new trial. Furthermore, Petitioner seeks such other relief as the Court deems appropriate.

DAYTON SCOTT LISTER, Petitioner Below,
Petitioner,

--By Counsel--


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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 15-0028

DAYTON SCOTT LISTER,

Petitioner Below, Petitioner,

v.

DAVID BALLARD, Warden of the
Mt. Olive Correctional Complex,

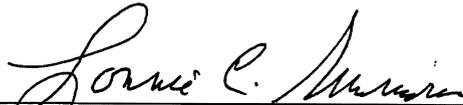
Respondent Below, Respondent.

Appeal from the Circuit Court of Marion County, West Virginia

CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, do hereby certify a copy of the foregoing **PETITIONER'S APPEAL BRIEF** and the **JOINT APPENDIX** was hand-delivered to counsel of record on the 24th day of April, 2015, to the following:

David A. Stackpole
Assistant Attorney General
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