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DEBORAH L. McHENRY, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

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DEBORAH L. McHENRY, CLERK  
SUPREME COURT OF APPEALS  
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Starcher, C. J., concurring:

I concur with the majority's decision, and write to emphasize a fundamental principle underlying the majority's opinion: a prosecutor has the utmost duty to be fair and just.

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). *See also* Standard 3-1.2(c), *American Bar Association Standards for Criminal Justice* (3d ed. 1993) ("The duty of the prosecutor is to seek justice, not merely to convict.") 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 518.

While the prosecutor operates within the adversary system, the role of a prosecutor is not limited to convicting the guilty. A prosecutor, acting on behalf of the people, must diligently guard the rights of the accused as well as to enforce the rights of the public. We need only look in the newspaper or turn on the television to see stories of courts in other countries -- like China -- "diligently" pursuing convictions on behalf of the "people," with no regard for the rights of the accused and no concept of fairness, justice, or due process of law.

A 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. *See West Virginia Constitution, Article IX, Section 1; W.Va. Code, 7-4-1 [1971]* (“It shall be the duty of the prosecuting attorney to attend to the criminal business of the State in the county in which he is elected and qualified . . .”). The prosecutor must seek impartial justice for the guilty as well as the innocent. And, in discharging his or her duties, a prosecutor deserves and receives a high degree of support from the circuit courts, and receives the respect of the citizens of the county.

Wearing the cloak of the office, a prosecutor can therefore usually exercise great influence upon jurors. Because of this, the conduct and language of the prosecutor in a trial in which the accused’s liberty is at stake should be forceful but fair, based upon the evidence, and not directed towards gaining a conviction through the aid of passion, prejudice or resentment. If the accused is guilty, he or she should be convicted only after a fair trial conducted according to the sound and well-established rules that are set in law.

I agree with my dissenting colleague that neither the prosecutor nor counsel for the accused should be unduly hampered or narrowed in addressing the jury. However, the prosecuting attorney is bound to rules of courtroom conduct the same as all other attorneys. The privilege of addressing the jury should never be taken as a license to state, or to comment upon, or to suggest that the jury draw an inference from, facts not in evidence, or for that matter to raise issues which a jury has no right to consider -- issues such as race,

religion, economic status, the accused's exercise of a constitutional right, or some other issue designed to encourage jurors to act with an improper motive.

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. However, even the most conscientious prosecutors may be tempted to sneak their thumb onto the scale of justice to make it more certain that the jury reaches a guilty verdict.

As this Court recently said in *State v. Stephens*, \_\_\_ W.Va. \_\_\_, \_\_\_ n. 5, \_\_\_ S.E.2d \_\_\_, \_\_\_ n. 5, Slip Op. at 17 n. 5 (No. 25893, December 3, 1999), there is neither merit, viability, nor integrity in the argument that prosecutorial misconduct (intentional or accidental) is more tolerable in cases where the evidence strongly tends to show that an accused is guilty, but less tolerable when the evidence is less compelling. A prosecutor must work with the evidence that is available, and evidence is often a product of circumstances and luck. In fact, when a prosecutor has an excess of evidence, our rules specifically prohibit the prosecutor from "piling it on." See *West Virginia Rules of Evidence* Rule 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed . . . by considerations of . . . needless presentation of cumulative evidence.").

Similarly, a prosecutor may not more permissibly "pile on" the rhetoric and appeals to passion, prejudice or resentment, in cases where the evidence tends to show more clearly that a defendant is guilty, but be more strictly sanctioned for doing so in a "close

case.” Any average person can comprehend that such a distinction between what is permissible in the trial of an accused is patently unfair, and contrary to constitutional equal protection guarantees.

The rule encompassed in the majority opinion is not an “arbitrary, complex and unfair prohibition[]” for prosecutors as my dissenting colleague suggests. It is quite simple: a prosecutor has a duty to be scrupulously fair and just. A duty to seek justice, not convictions. A duty not to comment on an accused’s exercise of fundamental constitutional rights, or appeal to the passions, prejudices and feelings of resentment held by the jury.

I therefore concur.