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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Maynard, Justice, dissenting:

The majority opinion in this case has absolutely no basis in law, reason, or common sense, and it unnecessarily reverses the sentence of life without mercy of an appellant who brutally beat, terrorized, tortured, raped, and strangled a 92-year-old woman.

The jurors below heard evidence that the appellant entered the little house in West Huntington where 92-year-old Mabel Hetzer had lived her entire life. They heard evidence that the appellant beat Ms. Hetzer. They heard evidence that the appellant raped Ms. Hetzer – both anally and vaginally. They heard evidence that the appellant broke Ms. Hetzer’s back. They heard evidence that the appellant forced Ms. Hetzer to drink rubbing alcohol. And they heard evidence that the appellant manually strangled Ms. Hetzer. The jurors heard evidence that, after two friends from Ms. Hetzer’s church became concerned when they could not reach her by telephone, Ms. Hetzer’s lifeless, bruised, violated, tortured, mangled, broken body was found lying in that little house where she had always lived. After hearing all of this evidence, the jurors found the appellant guilty of two counts of sexual assault in the second degree and murder in the first degree. Subsequently, at the bifurcated penalty phase of the trial, the same jurors who heard all of the evidence above decided, not surprisingly, to refuse mercy to the appellant.

The majority finds that the jury's decision to refuse mercy to the appellant was improperly influenced by the fact that the appellant was required to wear a jail uniform during the penalty phase of his trial. The majority bases its finding on the U.S. Supreme Court case of *Deck v. Missouri*, 544 U.S. 622 (2005), where that Court ruled that the Constitution forbids the appearance of the offender in shackles during the penalty phase unless the use of shackles is justified by an essential state interest. The majority concludes that there is no discernible difference in the prejudicial effect upon a jury of seeing a person in prison garb versus seeing that person in shackles. This conclusion is ridiculous.

The use of shackles informs the jury that an offender is so dangerous and prone to violence that he or she must be restrained in order to ensure the safety of everyone in the courtroom. Because the offender's danger to the community is a relevant factor in determining whether or not he or she should receive mercy, one can see how the use of shackles may adversely affect the jury's perception of an offender.

In contrast, the appellant's wearing of jail clothing communicated to the jurors the one thing that they already knew – the appellant is an incarcerated convict. The jurors already knew this because they convicted the appellant of two counts of sexual assault and one count of first degree murder. As a result, there is no possibility that the appellant's attire during the penalty phase of trial could have in any way adversely affected the jury's

perception of him. The fact is the jury's perception of the appellant had already been sufficiently adversely affected by the fact that he brutally beat, terrorized, tortured, raped, and strangled a 92-year-old woman. Thus, the appellant's clothing during the penalty phase was irrelevant to the jury's refusal to grant mercy. Doubtless, the appellant could have appeared in court wearing an Armani suit and Italian leather shoes and the jury's decision would have been the same.

In sum, the jurors below refused mercy to the appellant because he committed unspeakably evil acts and not because of what he wore during the penalty phase of his trial. Any claim to the contrary is wholly unsupportable.

Accordingly, even though I joined Chief Justice Davis's separate opinion, for the reasons set forth above, I also file this dissenting opinion.