

Starcher, Justice, concurring:

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July 2, 2002

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED

July 3, 2002

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

I concur with the majority opinion and write separately to point out that this defendant was absolutely and constitutionally entitled to *one fair jury trial* on the charges against him. Because there was a defective record (through no fault of the defendant), no one can say whether the defendant got a fair jury trial. Therefore, we remand the case for a new jury trial.

This simple syllogism is neither “ludicrous” nor lacking in “common sense,” as claimed by the dissent.

If the view of the dissent prevailed, then the constitutional rights of a defendant who asserted error in a magistrate court jury trial would be at the mercy of a tape recorder.

Taking what seems to me to be clearly a constitutionally superior approach, the majority opinion creates a situation where a defendant’s right to one fair jury trial cannot be overridden by mechanical failure.

Accordingly, I concur.