

No. 32847 – *State of West Virginia ex rel. The West Virginia Department of Health and Human Resources v. The Honorable Fred Fox, Judge of the Circuit Court of Marion County; and Miranda M. and Charles M.*

**FILED**

**December 15, 2005**

Starcher, J., concurring:

released at 3:00 p.m.

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

I join this Court's majority opinion and write separately to note my strong agreement with the ruling of the distinguished circuit judge, the Honorable Fred Fox, whose ruling the DHHR challenged in the instant case.

To review the facts: this father was first convicted of manslaughter, based on highly-disputed circumstantial evidence – in a trial in which juror misconduct was so severe that Judge Fox found it necessary to set aside the verdict. That does not happen every day.

Shortly before the second trial, the prosecution offered to let the father enter a plea without admitting guilt and be sentenced to probation only. This also is a rare, rare event.

Facing staggering expert witness costs, and just coming out of a trial where the jury was clearly swayed by emotional issues, the father faced a terrible choice. Do I go to trial again, and risk prison and the near-certainty of losing my only living child? Or do I enter a plea, knowing that I will have a fighting chance to regain my family?

I admire this father's choice. Unlike my dissenting colleague, I think that this father's love for his living child was shown in his decision to take the *Alford* plea.

I know Judge Fox, and he is one of the most strict judges on child welfare and

criminal sentencing in this State. Judge Fox is also the most senior sitting judge in our State. It is simply wrong to suggest, as the dissent does, that Judge Fox would put an innocent child at risk.

Accordingly, I concur with the majority opinion.