IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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STATE OF WEST VIRGINIA,

Plaintiff below, Respondent,

v.

Supreme Court No.: 23-86
Case No. 22-F-130
Circuit Court of Kanawha County

GAVIN BLAINE SMITH,

Defendant below, Petitioner.

PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

In Petitioner's first degree murder trial, sentencing was not a jury question because children under eighteen automatically receive mercy. His defense did not contest identity, but asked jurors to find a less culpable mental state.

Did the circuit court err by instructing jurors that if they voted for the most serious degree of homicide, it would sentence Petitioner to parole eligibility after fifteen years?

STATEMENT OF THE CASE

At no point in Gavin's trial did anyone contest that, as a youth, he killed his stepfather, mother, and two younger brothers.[1] The only issue was the *why*. The State theorized that Petitioner premeditated and killed with malice so he could be with his girlfriend, who, via video chat, egged him on during the act.[2] Defense counsel argued that Petitioner's stepfather abused him, and that Petitioner's fear and isolation only intensified during the pandemic.[3] Quarantine robbed Petitioner of any refuge and trapped him with his abuser until, finally, he snapped.[4]

Petitioner now appeals because the State had an unfair advantage persuading jurors to find a more culpable mental state. Even though sentencing was not a jury issue,[5] the court instructed on the statutory punishment.[6] It told jurors that if they voted to convict Petitioner of four first degree murders, the court would sentence him to fifteen years to life.[7]

It is much easier to condemn a young person if you know their fate will soon rest with the parole board.[8] Because sentencing should have played no part in the jury's deliberations, Petitioner asks the Court to reverse for a new trial.

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[1] A.R. 278.
[2] A.R. 273–78; A.R. 393.
[3] A.R. 278–92.
[4] *Id.*; *see also* Syl. Pt. 4, *State v. Harden*, 223 W. Va. 796, 679 S.E.2d 628 (2009).
[5] *See* W. Va. Code § 61-11-23.
[6] A.R. 677–79.
[7] *Id.*
[8] *See State v. Parks*, 161 W. Va. 511, 516, 243 S.E.2d 848, 852 (1978).

A. Petitioner repeatedly fled his abusive household but CPS failed to intervene.

On September 6, 2020, Petitioner's parents reported him as missing.[9] The responding officer found the situation odd.[10] His parents knew Petitioner was likely at his grandfather's home that Sunday afternoon, yet they considered him a runaway.[11] The parents had reported him as running away under similar circumstances many times before.[12] And so, when the officer found him at his grandfather's home—just six miles away—he asked the sixteen-year-old about his home life.[13]

Petitioner told the officer he wanted to stay with his grandfather.[14] He wanted to go to school, but his parents would not allow him to return to in-person classes.[15] Instead they made him responsible for his two-year-old brother's daily care.[16] Petitioner also told the officer that his parents restricted food access to him and his siblings by padlocking cabinets, doors, and the refrigerator/freezer.[17]

Based upon his interview of Petitioner and his grandfather, the officer advised they could file a domestic violence petition.[18] If they filed one, Petitioner may be able to stay with his grandfather instead of returning home.[19] But that would be up to them. The officer would not determine that on their behalf.[20]

The officer returned Petitioner to his parents, then referred the matter to CPS.[21] The record does not show whether CPS investigated or offered the family services.[22] Six months later, Petitioner shot his parents and two brothers.[23]

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[9] A.R. 578–79.
[10] A.R. 581–82.
[11] A.R. 580.
[12] A.R. 581.
[13] A.R. 582.
[14] A.R. 587.
[15] A.R. 582.
[16] *Id.*
[17] *Id.*
[18] A.R. 587.
[19] *Id*.
[20] *Id*.
[21] A.R. 580; A.R. 582.
[22] *See* A.R. 586.
[23] A.R. 278.

B. Petitioner's now ex-girlfriend encouraged him to kill his family, then pled guilty to accessory after the fact to avoid trial for quadruple murder.

The State called numerous witnesses establishing the uncontested issue of identity.[24] As to Petitioner's mental culpability, the State's main fact witness was Petitioner's former girlfriend and codefendant.[25] She testified that she and Petitioner met in high school and began dating.[26] Soon after, the COVID lockdown ended in-person classes and social distancing separated them.[27]

Even after lockdown conditions relaxed, neither family approved of the relationship and disallowed the two from seeing or communicating with one another.[28] However, they maintained contact by sneaking phones and other devices behind their parents' backs.[29]

One topic the witness and Petitioner discussed was his difficulties at home.[30] The ex-girlfriend knew Petitioner had tried running away many times.[31] Petitioner was angry he could not get away and ideated about killing his family.[32] Petitioner and his ex-girlfriend believed they could then be together.[33] She did not recall whether she tried to contact CPS,[34] but she encouraged Petitioner to contact an online counselor: an adult he could "talk to about what's going on at home."[35]

When that did not work, she encouraged Petitioner to kill his family. On December 9, 2020, the couple were video chatting.[36] Petitioner showed her a gun and knife and said he wanted to kill his parents.[37] She encouraged him to do it: "hurry up and do it."[38] The

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[24] *See* A.R. 195–96.
[25] A.R. 367–68.
[26] A.R. 369–70.
[27] A.R. 370–71; A.R. 407–08.
[28] A.R. 372–75; A.R. 377.
[29] A.R. 375–76; A.R. 382–83; A.R. 408–11.
[30] A.R. 418; *see also* A.R. 415.
[31] A.R. 381.
[32] A.R. 382.
[33] *Id*.
[34] A.R. 420.
[35] A.R. 419.
[36] A.R. 383.
[37] A.R. 384.
[38] A.R. 393.

screen went black for a few moments, then Petitioner returned to say it was over.[39] He biked to his girlfriend's home where he stayed until his arrest.[40]

The defense crossed-examined the ex-girlfriend with the deal she received for cooperating.[41] The State originally charged her on four counts of first degree murder for encouraging Petitioner.[42] In exchange for her cooperation, the State allowed her to plead to accessory after the fact.[43] For encouraging Petitioner's ideation in the months leading up to the killing and goading him as he carried out the act, she received a ten year sentence.[44] She became parole eligible in June of 2023 with a projected release date in 2025.[45]

To highlight the bargain's value, the defense asked what she understood the possible sentence would be if she proceeded to trial on the murder charges.[46] She answered imprecisely,[47] and the State objected that jurors may believe a guilty verdict would result in a life without mercy sentence.[48] The defense agreed to an instruction to explain the witnesses' testimony.[49] The court told jurors that "with regards to first degree murder with regards to juveniles, juveniles are not subject to being in prison for the rest of their life, they are actually eligible for parole after 15 years."[50]

The defense then asked, "[d]id you have an understanding through counsel, that the murder charge carried a life sentence … possibility of parole after 15 years?"[51] The ex-girlfriend said yes.[52]

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[39] A.R. 385–86.
[40] A.R. 390–91; A.R. 395.
[41] *E.g.* A.R. 397–00.
[42] A.R. 399.
[43] A.R. 397; A.R. 403.
[44] A.R. 398.
[45] *Id.*; See DCR Database, https://apps.wv.gov/ois/offendersearch/doc/, (search Offender ID (OID) Number "3671373," complete website validation entries, click "Search").
[46] A.R. 405.
[47] *Id.*; A.R. 425.
[48] A.R. 426.
[49] A.R. 427.
[50] *Id.*
[51] *Id.*
[52] A.R. 427–28.

C. Over objection, the court instructed jurors on the statutory penalty if they convicted Petitioner of first degree murder.

At the charge conference, the State was no longer satisfied with the instruction agreed to during the ex-girlfriend's testimony.[53] The prosecutor said he was concerned jurors would think a life sentence was not possible.[54] And that instruction had been in the abstract.[55] The State wanted one that told jurors what *Petitioner's* punishment would be if *they* convicted him.[56]

The defense objected.[57] The possible penalties Petitioner would face should not concern jurors and should play no role in their deliberations.[58] Petitioner objected both to an instruction tied to Petitioner and any discussion of sentencing during closing argument.[59]

The court gave the State's instruction.[60] Just prior to telling jurors how to pick a foreperson and conduct their deliberations, the last substantive instruction jurors heard was:

> [I]f you find the Defendant, Gavin Smith, guilty of First Degree Murder, the Defendant will be confined to the penitentiary of this state for life … and as a juvenile when these subject acts occurred, he will be eligible to be considered for parole after serving a minimum of 15 years."[61]

The judge also explained factors governing parole.[62]

In rebuttal closing, the State argued, "For you to reduce a first degree murder to second degree murder, or voluntary manslaughter in this case, means you didn't follow the law … Because this young man is a juvenile, if you convict of first degree murder, it will be a life sentence, but guess what?"[63] The defense objected.[64] This was exactly Petitioner's fear about instructing jurors on penalties.[65]

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[53] A.R. 630–31.
[54] *Id.*
[55] A.R. 630–31.
[56] *See id.*
[57] A.R. 631–32.
[58] A.R. 632.
[59] *See* A.R. 632–33.
[60] A.R. 634–36.
[61] A.R. 677–78.
[62] A.R. 678–79.
[63] A.R. 721.
[64] *Id*.
[65] A.R. 721–22.

The court sustained the objection, so instead the prosecutor finished by reminding jurors they would have a copy of the instructions to read themselves if they had any concerns.[66]

Those instructions stated that if jurors convicted Petitioner of first degree murder, the court would sentence him to life but with parole eligibility.[67] The charge did not warn jurors that the future consequences of their verdict were irrelevant to their deliberations.[68]

SUMMARY OF ARGUMENT

No one disputes the power of juries to nullify, but Petitioner is unaware of any jurisdiction in the United States that approves of jurors acquitting to avoid a penalty they see as too harsh.[69] The same rule applies when prosecutors "attempt to alleviate the anxiety or reluctance to convict by minimizing the jury's sense of responsibility for its decision."[70]

This Court settled the matter when it reversed in *State v. Guthrie*: "The universal rule is that punishment is the trial court's role and is not a proper matter for the jury."[71] The error is even more prejudicial when jurors learn about the penalty from the judge rather than the prosecutor because "it carrie[s] the authority of the court."[72]

No one would dispute that this was a difficult case. The uncontested facts are heinous. Jurors understandably struggled with the *why*, and whether Petitioner's mental state mitigated his culpability. But that was their sole and solemn duty. To ease that burden by shifting responsibility for Petitioner's fate to the parole board deprecates both the crime's gravity and the jury's vital role.

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[66] A.R. 722.
[67] A.R. 677–78.
[68] *See generally* A.R. 643–82.
[69] *See* Lawrence W. Crispo et. al., *Jury Nullification: Law Versus Anarchy*, 31 Loy. L.A. L. Rev. 1, 4, n. 9 (1997).
[70] Bennett L. Gershman, *Prosecutorial Misconduct*, 609 (Thompson Reuters, 2nd Ed. 2021–22).
[71] *State v. Guthrie*, 194 W. Va. 657, 678, 461 S.E.2d 163, 184 (1995); *accord. Shannon v. U.S.*, 512 U.S. 573, 579 (1994).
[72] *State v. Parks*, 161 W. Va. 511, 516, 243 S.E.2d 848, 852 (1978).

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner, who turned nineteen a month before this writing, is facing the very real possibility of spending the rest of his life in prison. This alone justifies the Court's attention.

Moreover, it is well-established—not only by this Court, but the great weight of authority across the country—that in the United States, jurors should not know the penalty that will result from their verdict.[73] It is irrelevant to their application of fact to law. Knowing the sentence can only serve to distort deliberations by impressing that they could work an injustice, or as happened here, do the opposite and shift ultimate responsibility for the defendant's fate to another body.

Finally, the case warrants oral argument because it is a rare opportunity to write on a an important subject.[74] Criminal penalties tend to ratchet upwards, and so proponents of jury nullification envision it as a defense tool.[75] But when jurors acquit or hang because the punishment does not fit the crime, the State cannot appeal.[76] The Court can use this case to further articulate that the same rule governs defendants and the State.[77]

Jurors should not acquit because the penalty is too harsh, nor should they over-convict because the penalty is too lax. No party, and certainly not the judge, should inform them of the verdict's consequences.

Petitioner therefore requests a Rule 19 argument and a signed opinion reversing and remanding his case for a new trial.

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[73] *See* Lance Cassak & Milton Heumann, *Old Wine in New Bottles: A Reconsideration of Informing Jurors About Punishment in Determinate-and Mandatory-Sentencing Cases*, 4 Rutgers J.L. & Pub. Pol'y 411, 412 (2007) ("[C]alling it a general practice understates the matter; it is more of a hard and fast rule with few exceptions.").

[74] Lawrence W. Crispo et. al., *Jury Nullification: Law Versus Anarchy*, 31 Loy. L.A. L. Rev. 1, 3 (1997).

[75] *See* Cassak, 4 Rutgers J.L. & Pub. Pol'y at 412; Jeffrey Bellin, *Is Punishment Relevant After All? A Prescription for Informing Juries of the Consequences of Conviction*, 90 B.U. L. Rev. 2223 (2010).

[76] *Cf.* Judge Pamela Baschab, *Jury Nullification: The Anti-Atticus*, 65 Ala. Law. 110, 111 (2004) (expressing judicial frustration caused by nullification).

[77] The error below deviates from the norm so much that only one West Virginia case is truly on point. It is from 1978 and concerns a misdemeanor. *See Parks*, 161 W. Va. at 511.

ARGUMENT

Blackletter law and sound policy counsel against informing jurors of the legal consequences of their verdict.[78] The punishment range is irrelevant to their fact-finding mission and can have no effect but to encourage nullification, either for or against the accused.[79]

Here, the court had no legal basis to instruct jurors that a guilty verdict would mean a life with mercy sentence.[80] The State's aborted rebuttal argument shows that automatic mercy could induce jurors to find a greater degree of culpability, or undervalue their role in assuring a just outcome.[81] And the serious nature of this case only made it more crucial that neither party invite jurors to nullify, let alone the court.

I. The trial court should not have informed jurors that the parole board, rather than their verdict, would ultimately determine Petitioner's fate.

"The jury's sole function in a criminal case is to pass on whether a defendant is guilty as charged based on the evidence presented at trial and the law as given by the jury instructions. The applicable punishments for the lesser-included offenses are not elements of the crime[.]"[82] The State may not inform jurors of the penalties to suggest a guilty verdict will not be significant or that ultimate responsibility for assuring fairness lies elsewhere.[83] Nor can the defense use a harsh sentence to seek leniency.[84] It is even worse when jurors learn about the sentence from the judge. Then "the error is more substantial since it carrie[s] the authority of the court."[85]

This Court's review is *de novo*. Unless mercy is a jury question,[86] it is improper as a matter of law to inform the jury of the consequences that will result from its verdict.[87]

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[78] *See Parks*, 161 W. Va. at 515; *State v. Lindsey*, 160 W. Va. 284, 287, 233 S.E.2d 734, 736 (1977).
[79] *Shannon*, 512 U.S. at 579.
[80] A.R. 677–78.
[81] *See* A.R. 722 ("I should be able to argue the instructions.").
[82] *Guthrie*, 194 W. Va. 657 at Syl. Pt. 8.
[83] *See id*. at 678.
[84] Syl. Pt. 3, *State v. Johnson*, 187 W. Va. 360, 419 S.E.2d 300 (1992).
[85] *Parks*, 161 W. Va. at 516.
[86] *See State v. Reeder*, ____ W. Va. ____, n. 3, ____S.E.2d ____, n. 3 (W. Va. 21-0554, June 12, 2023); *Lindsey*, 160 W. Va. at 290.
[87] *See Guthrie*, 194 W. Va. at 678.

The court's instruction is so outside the norm that it is without contemporary precedent in West Virginia.[88] But in 1978, the Court addressed this issue in *State v. Parks* and reversed.[89] There, the court instructed that if jurors convicted, the defendant would receive probation.[90] Here, the court instructed that if jurors convicted, Petitioner would be eligible for parole in fifteen years.[91]

Both instructions—the one in *Parks* and the one here—implicate the same policy concern: "[I]nstructions of the trial judge dealing with the possibility of parole foster the dual vice of foisting upon the jury alien issues and concomitantly diluting its own sense of responsibility."[92] Both instructions violate the same rule: "It is the duty of the jury to determine the guilt or innocence of the accused in accordance with the evidence introduced at the trial and it must not concern itself with matters of possible parole or probation."[93] And both instructions warrant reversal. "[I]t is reversible error for a trial court to advise the jury that a suspended sentence will follow from a guilty verdict."[94]

The illegal instruction concerning the consequences for *Petitioner* stands in stark contrast to the proper instruction given during the State witness's testimony. There was nothing wrong or unusual with Petitioner's cross-examination of his former girlfriend.[95] Codefendants often face the same charges, and Petitioner had the right to confront the witness with her interest in testifying.[96] That included the magnitude of the deal that induced her. Pleading to accessory after the fact allowed her to see the board in months rather than fifteen years.[97]

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[88] *See People v. Karika*, 48 A.D.3d 980, 981, 851 N.Y.S.2d 731, 732 (2008) (Finding it "inexplicabl[e]" that the trial court had bucked the well-established rule by hinting at a lenient sentence).
[89] *See Parks*, 161 W. Va. at 516.
[90] *See id.* at 515.
[91] A.R. 677–78.
[92] *Parks*, 161 W. Va. at 516.
[93] *See id.*
[94] *Id.* at 515; *cf. Lovely v. U.S.*, 169 F.2d 386, 391 (4th Cir. 1948) (error to instruct jury that life sentence would make defendant parole eligible after fifteen years).
[95] *See*, *e.g.*, A.R. 405.
[96] *See Giglio v. U.S.*, 405 U.S. 150, 154 (1972).
[97] *See supra* at n. 45.

Nor was the State's concern at that time improper. To understand the witness's testimony, the jury needed to know the penalty she had avoided. And it was appropriate for the court to instruct jurors—limited to that context.[98]

But if the State is concerned jurors may misunderstand the sentence and nullify for Petitioner,[99] the remedy is not to invite jurors to instead nullify for the State.[100] The proper response would be to 1) instruct jurors on the penalty the State witness hoped to escape, and then 2) instruct them not to make assumptions about Petitioner's possible sentence or to consider sentencing at all when deciding which homicide degree is appropriate.[101] The above-procedure would have vindicated Petitioner's interest in a zealous impeachment, the State's interest in a correctly-informed jury, and the judiciary's interest in juries applying facts to the elements rather than the penalty.

But that did not happen. Instead, the court told jurors if they convicted Petitioner of the most serious offenses, the judge would sentence him to parole eligibility.[102] Specifically Petitioner. It did not limit the instruction to the ex-girlfriend, or to an abstract statement of law. The judge told jurors the consequence of their verdict for this defendant—and now they had it in writing.[103]

Whatever the court's intent, just as in *Parks* the instruction's effect was to distract jurors from their legitimate task. After all—that's why the State offered it.[104] It wanted an instruction specific to Petitioner and this jury.[105] And it wanted to argue the sentence in closing.[106] The State wanted, in other words, for jurors to convict based upon the penalty rather than the elements.[107] And the court's instruction invited them to do that.

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[98] *Cf. Shannon*, 512 U.S. at 587 (instruction appropriate to correct misstatement).
[99] A.R. 426–27.
[100] *See Shannon*, 512 U.S. at 586.
[101] *See*, *e.g.*, *People v. Vining*, 28 N.Y.3d 686, 692, 71 N.E.3d 563, 567 (2017).
[102] A.R. 677–79.
[103] *Id.*; *see* A.R. at 722.
[104] *Compare* A.R. 633 *with* A.R. 721–22.
[105] A.R. 631.
[106] A.R. 721.
[107] *See id.* at 722 ("I think I should be able to argue the instructions.").

II. This error prejudiced Petitioner because the only issue at trial was which homicide degree the *elements* warranted, rather than the *penalty*.

In *State v. Parks*, this Court reversed without any discussion of harm or prejudice.[108] When an error diverts jurors from their structural role,[109] factors which otherwise might indicate harmlessness are themselves the root of prejudice. "[P]roviding jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion."[110] Therefore the harm is intrinsic to the error, and the court prejudiced Petitioner.[111]

When courts instruct juries on the statutory penalties, the risk is that 1) jurors may select a homicide degree based upon blameworthiness rather than applying facts to elements, and 2) they may underappreciate the significance of their verdict because the parole board, rather than themselves, can ensure fairness.[112] Petitioner's case implicates both concerns.

The evidence Petitioner committed a homicide was indisputable. Indeed, the defense did not contest identity at all.[113] The only question was the *why*, and if Petitioner's mental state rendered him less culpable than first degree murder.[114] If jurors believed the State's theory, they could legitimately convict Petitioner as charged. If they believed the defense's, they could have found a lesser included offense instead.[115]

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[108] *See Parks*, 161 W. Va. at 515–16.
[109] *See* Cassak, 4 Rutgers J.L. & Pub. Pol'y at 416.
[110] *Shannon*, 512 U.S. at 579.
[111] *See Karika*, 48 A.D.3d at 981 ("[There must be a reversal" where the trial judge "inexplicably" implied to jurors the sentence would be lenient); *cf. State v. Doman*, 204 W. Va. 289, 291–92, 512 S.E.2d 211, 213–14 (1998) (reversing where court mis-instructed jurors on the law when they deliberated on mercy because the Court could not "confidently declare beyond a reasonable doubt that [the] instruction in no way contributed to conviction[.]").
[112] *See Parks*, 161 W. Va. at 516.
[113] A.R. 278.
[114] A.R. 278–92.
[115] *See Harden*, 223 W. Va. 796 at Syl. Pt. 4; *see also* W. Va. Code § 61-2-4.

But only if they applied the facts to the *relevant* law—the *elements*. The court instructed the jury to consider the law as a whole, including the sentence.[116] Nothing in the instructions told jurors otherwise. Thus, jurors could base a sentence on blameworthiness. "[T]he inevitable result of such an instruction would be to draw the jury's attention toward the very thing—the possible consequences of its verdict—it should ignore."[117]

Worse, the court only instructed jurors about the penalty for first degree murder.[118] It left to the jury's imagination the penalty, if any, for the lesser included offenses. Jurors voting based on blameworthiness may not have wanted to risk a greatly-reduced sentence, but in actuality *any* conviction would have carried substantial prison time.[119] But again—this should not have informed their verdict *at all*. The facts and the elements should have, but the court's instructions led them to irrelevant matters instead.[120]

The case's undeniable graphic nature also deepens the prejudice because jurors may have undervalued their role in ensuring fairness. In addition to telling jurors that the penalty may be too lenient if they did not convict of first degree murder, the instruction also told them that the parole board could act as a release valve if they over-convicted.[121]

Applying the facts to the elements would require jurors to review and discuss difficult, sometimes painful evidence to reach a correct verdict. This would have been a tempting case to slough that responsibility and instead focus on blameworthiness and penalties. Just as the State intended,[122] the instruction could have "alleviate[d] the anxiety or reluctance to convict by minimizing the jury's sense of responsibility for its decision."[123]

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[116] A.R. 645.
[117] *Shannon*, 512 U.S. at 586.
[118] A.R. 677–78.
[119] *See* W. Va. Code § 61-2-4 (fifteen to sixty years for four voluntary manslaughter convictions); W. Va. Code § 61-2-3 (fifteen to one-hundred sixty for second degree). Given the court's comments at sentencing, it is doubtful a lesser conviction would have led to less than the maximum penalty. "[Y]ou will receive the harshest penalty that the law will allow me to give you … I sentence you to life with mercy, only because the law requires me to give you mercy." A.R. 762.
[120] *See Shannon*, 512 U.S. at 586.
[121] *See Parks*, 161 W. Va. at 516; *see also infra* at n. 123.
[122] *See* A.R. 721.
[123] Bennett L. Gershman, *Prosecutorial Misconduct*, 609 (Thompson Reuters, 2nd Ed. 2021–22).

Finally, jurors did, in fact, struggle with the case. They initially deadlocked on some charges and were ordered to continue deliberating.[124] With no dispute of the basic facts, the only issue upon which they could have hung was the appropriate degree for each count. And the case was not open-and-shut as to intent. When the jury did reach a verdict, they reduced one of the murder charges.[125] Enabling jurors to apply the facts to the penalty and telling them the buck would stop with the parole board therefore prejudiced Petitioner.

CONCLUSION

This is a difficult case. But that doesn't make the error harmless. It makes it all the more important not to invite jury nullification.

Respectfully submitted,
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[124] A.R. 950–51.
[125] A.R. 948.