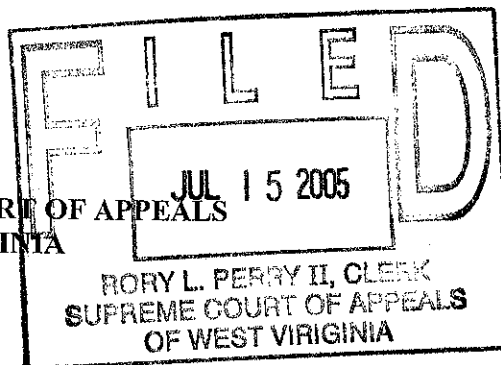


IN THE SUPREME COURT OF APPEALS
WEST VIRGINIA



STATE OF WEST VIRGINIA,
Appellee

vs.

SUPREME COURT NO. 32551
RALEIGH COUNTY INDICTMENT NO. 99-F-213

MARVIN MILLS,
Appellant

BRIEF OF APPELLEE,
STATE OF WEST VIRGINIA

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25. *Webster's New World Dictionary, 2nd Ed.*

STATEMENT OF FACTS AND PROCEEDINGS BELOW

The Statement of Facts in Appellant's Brief (at 3) dismisses the facts surrounding the first degree murder of Pamela Cabe (Mrs. Cabe) in two short sentences, and misstates the evidence even then. The second sentence claims that in his statement to police "Mills admitted impulsively shooting Mrs. Cabe when he went to talk to her because he was upset about a custody dispute. . . ." Mills, who did not testify or offer any evidence at trial, never admitted the volitional act of shooting Mrs. Cabe -- he claimed he "didn't realize (he) pulled the f _ _ king trigger til she fell." And Mills explained that he -- a convicted felon -- had the .38 Special revolver in his possession to "scare" Mrs. Cabe. He complained that she faced him, wearing a "smirk," and that he did not know whether or not she had a gun. A copy of the transcript of Mills' tape-recorded statement, which was played to the jury at trial, is attached hereto. At trial the State proved that Mills' version of his killing of Mrs. Cabe was a lie.

Mills offered no evidence to mitigate the proof that he emptied his .38 Special into the chest and head of Mrs. Cabe and into the floor, walls and windows of her workplace. He offered no evidence that he acted "impulsively" and steered clear of any defense of mental condition, despite having received a score of psychiatric and psychological evaluations at State's expense since his arrest. Indeed, defense counsel stated that his review of such records led him to conclude "that (a) defense (of mental condition) was not going to work." (TR. 333). This

was because the State had agreed to refrain from offering evidence of Mills' long, violent criminal history under Rule 404 (b), WV Rules of Evidence, unless Mills offered a defense of mental condition or a claim of good character. (Rec. 70, 7/28/03 pre-trial hearing at 25).

The basis of the jury verdict in this case was not juror bias or prejudice or judicial abuse of discretion or prosecutorial misconduct, but the following facts proven - - and un rebutted - - at trial.

Dr. Zia Sabet, W.Va. Deputy Chief Medical Examiner, performed the autopsy on 48- year-old Pamela Cabe after her murder on September 8, 1999. She had suffered two gunshot wounds. The first was a through and through shot through her chest. The second was a through and through shot entering into the back of her head and exiting out her right temple. Either wound, alone, necessarily was fatal. (TR. 402-409).

Dr. Amy Cabe Wateska, one of Mrs. Cabe's three grown children, testified that Mrs. Cabe's son had been married to Mills' daughter, Christy Mills Cabe. The couple had a baby girl named Kailey, who was eighteen months old when Mrs. Cabe was murdered, and they were at that time in the midst of a divorce and a child custody dispute.

Dr. Wateska was attending the College of Dentistry in Morgantown, West Virginia on September 8, 1999. She spoke by telephone with her mother, Mrs. Cabe, several times on that day. Mrs. Cabe was working at her job as counter

person at Richmond Cleaners on Kanawha Street in downtown Beckley, West Virginia. Dr. Wateska's last conversation with her mother was at approximately 4:15 p.m. on September 8, 1999. Mrs. Cabe was finishing up her work to prepare for the scheduled arrival of her granddaughter, Kailey, who was to be brought to Mrs. Cabe at Richmond Cleaners at 4:30 p.m. on that day. (TR. 414-420).

Danette Lynn Cabe, the victim's other daughter, testified that Mrs. Cabe served as a "mediator" between Kailey's estranged parents. She also explained that Mrs. Cabe "never owned a gun at any time" and never had a gun at her home or at her workplace. (TR. 422-423). Mrs. Cabe was not attempting to assert any claim to Kailey in the custody dispute between Mrs. Cabe's son and Mills' daughter. And Mrs. Cabe had expressed to Danette Lynn Cabe her state of mind concerning Mills: Mrs. Cabe was "very much afraid of him." (TR. 429).

C. Elton Byron, Jr., was counsel for Mrs. Cabe's son, Jimmy Cabe, in the divorce proceedings against Mills' daughter, Christy Mills Cabe. Mr. Byron testified that a domestic violence protective order issued in August, 1999 against Christy Mills Cabe, with Jimmy Cabe as the petitioner. By such order Jimmy Cabe was granted custody of Kailey, with Christy Mills Cabe having visitation rights. (TR. 435-436). On September 8, 1999, Christy Mills Cabe was to bring Kailey to Mrs. Cabe at Richmond Cleaners at 4:30 p.m. (TR. 436-439).

Mr. Byron also confirmed that Mrs. Cabe was not asserting any rights to Kailey, but acted as the go-between when the baby was passed between Kailey's parents before and after visitation periods. (TR. 440).

Two eyewitnesses to the murder testified at trial. They were a young woman, Teila Echols, and her mother, Patricia Echols Price.

Ms. Echols was fifteen years old when she rode with her mother to pick up hangers from Richmond Cleaners on September 8, 1999, right before 4:30 p.m. (TR. 465, 471). Ms. Echols went inside the cleaners, while her mother stopped the car directly by the entrance. Mrs. Cabe "was very happy" as she chatted with Ms. Echols. As Ms. Echols walked back out of the cleaners, she saw Mills walking at a fast pace from behind the rear of the Richmond Cleaners building, carrying a large envelope, with his hand inside it. (TR. 471-474).

As Ms. Echols and her mother, Ms. Price, began to drive away, Ms. Echols heard a loud bang and looked through the floor-to-ceiling windows on the Kanawha Street side of Richmond Cleaners. (TR. 474). Ms. Echols testified:

We saw - we saw the man shoot the lady, had to be two or three times, and then (he) walked up to the counter pretty fast. He took - - it had to been two steps and he fired the rest of the gun, and she tried to run, and we heard her screams. She was screaming for someone to help her, but . . .

(TR. 475).

Ms. Echols disproved the claim in Mills' later statement to police - - echoed in Appellant's Brief - - that he went to Richmond Cleaners to "talk to Mrs. Cabe."

When asked how much time elapsed between the time Mills walked into Richmond Cleaners and the time he fired the first shot, Ms. Echols explained: "There wasn't - - there wasn't really any time for anything. It happened like that (snaps her fingers)." (TR. 475).

Ms. Price confirmed her daughter's testimony that instead of walking into Richmond Cleaners from the Kanawha Street side, Mills walked up "H" Street from behind the building. Ms. Price described looking through the full-length windows on the Kanawha Street side and seeing Mrs. Cabe "trying to run, and that's when he shot her. He shot her in the head." (TR. 487-488). Ms. Price, with her daughter, immediately drove to the closest business to call 911. (TR. 490).

The route Mills chose, with his .38 Special concealed in the large manila envelope, from where he'd parked his vehicle, established his intent to ambush Mrs. Cabe. Jurors walked through this route as part of the jury view. The direct route from Mills' white van to the Richmond Cleaners entrance would have been straight down Kanawha Street, and he would have been clearly visible to Mrs. Cabe at her counter through the floor-to-ceiling windows on that side. Instead, Mills took a route nearly four times longer, so that he could sneak up from behind the large building, on the side where there were no windows from which Mrs. Cabe could have spotted him. Instead of strolling 264 feet in a straight line, he walked in another direction, down a block, across a block, and up a block, at a distance of 964 feet, ensuring he would take Mrs. Cabe by surprise and by terror. (TR. 492-493).

Mills walked out of Richmond Cleaners immediately after gunning down Mrs. Cabe. This was proven by the final customer of the day, Ms. Carman, who is an Army Reserve nurse. When she entered the cleaners she found Mrs. Cabe face down in a pool of blood on the floor. Ms. Carman confirmed that there was no weapon on or near Mrs. Cabe. She established that Mills did not wait around for

Mrs. Cabe's final heart beats - - Ms. Carman "felt a pulse beat and then prayed that the Lord would be with her, because her pulse had gone." (TR. 512-515).

Christine Riley, Mills' wife for twenty-six years, was called by the State at this trial. She was married to Mills through the murder and not yet divorced from him at the time of his first trial and conviction in this case. She testified that she and Mills kept no firearms. If -- as Mills told police -- he'd had the .38 Special for "four years," his wife did not know of it. (Although not disclosed to the jury, Mills as a convicted felon was prohibited from possessing a firearm). (TR. 545-547).

Ms. Riley testified that on September 8, 1999 Mills directed her to attend the family court hearing involving their daughter, and that he chose not to attend. She testified that after the hearing it took her some twenty minutes to drive from downtown Beckley to the home she shared with Mills. She told Mills what had occurred at the hearing, and "maybe three hours later," Mills got in his white van and drove away. Before leaving, Mills "just popped in the door, and he said, 'I'll be right back,' and then he left." When asked to describe Mills' demeanor as he drove off, Ms. Riley testified: "He seemed fine." (TR. 550-552).

Beckley Police Department Sgt. Deems testified that the 911 call to respond to Richmond Cleaners on September 8, 1999 came in at 4:28 p.m. Shortly after his arrival at Richmond Cleaners, which was "under two minutes" from the call, Mills' daughter, Christy Mills Cabe, arrived carrying two babies. It was now shortly after the court-ordered 4:30 p.m. time for her to bring the one baby, Kailey, to Mrs. Cabe at Richmond Cleaners. (TR. 564-566). When Sgt. Deems told Christy Mills Cabe that Pamela Cabe had been shot, Christy Mills Cabe immediately asked if police

knew "who did it" and asked "was it Steve (Marvin) Mills?" Christy Mills Cabe then informed Sgt. Deems that the suspect was her father. (TR. 567).

Beckley Police Department Sgt. Bowers heard the description of the assailant provided by Ms. Echols and Ms. Price and saw Mills, matching that description, sitting on a block wall across the street from Richmond Cleaners. When Sgt. Bowers observed Mills he was "calm, and he just seemed to be watching what was going on." (TR. 571-572). Mills' .38 Special was on the ground next to him, and he had eight extra bullets in his jeans pocket. (TR. 575-577, 586).

Beckley Police Department Detective Jeffries examined the bullet holes and other bullet damage left by Mills at Richmond Cleaners, and collected the bullets and bullet fragments from the murder scene. He testified that Mills fired five rounds during the murder, including the two that went through Mrs. Cabe's chest and head. (TR. 627-643).

The former testimony of C.R. Lane, W.Va. State Police firearms examiner, was read to the jury, as Mr. Lane had passed away after Mills' first trial and conviction. Mr. Lane's testimony was that the .38 Special revolver recovered by police next to Mills had five expended casings, with one live round remaining. His examination of the bullets and bullet fragments recovered from Richmond Cleaners after the murder enabled him to conclude that the bullets were fired from Mills' .38 Special. (TR. 683, 688- 689).

Beckley Police Department Detective Shumate testified that he responded to Richmond Cleaners at 4:40 p.m. on September 8, 1999 and immediately recovered from the entrance floor the large manila envelope in which Mills had concealed his

.38 Special. Mills' name and address were written on the envelope. (TR. 697). Detective Shumate also located Mills' white van, registered to Mills' wife, parked a block straight up Kanawha Street from Richmond Cleaners. (TR. 698-699).

Detective Shumate met with Mills after he was arrested and taken to the Beckley Police Department on September 8, 1999. The detective swabbed Mills' hands for a gunshot residue test. At trial the parties stipulated to the results from the W.Va. State Police trace evidence analyst, that "gunshot residue was identified on the swabs taken from the hands of the defendant, Marvin Mills." (TR. 705).

Detective Shumate also twice advised Mills of his Miranda rights. The detective observed that Mills was neither upset nor confused, and that Mills stated that he understood his rights but wanted to "wait before he talked." Detective Shumate allowed Mills to confer with his wife and daughter and to think over what he might say. Detective Shumate then took a tape-recorded statement from Mills, which was played for the jury at trial. The detective testified that Mills never shed a tear. Defense counsel had no cross-examination of Detective Shumate, the lead investigator. (TR. 706-713).

Mills had no evidence to offer at trial and declined to testify. So the fact, recited in Appellant's Brief (at 3) that his lawyers in their opening statement and closing argument "agreed Mills fatally shot Pamela Cabe" must not be mistaken as an indicator of contrition on the part of Mills. Rather, it means only that his lawyers were disinclined to make fools of themselves in the presence of the jury.

On November 7, 2003, following a four day trial, the jury found Mills guilty of first degree murder by use of a firearm, and declined to add a recommendation of

mercy. By Order of Judge John A. Hutchison entered January 27, 2004, Mills was sentenced to life imprisonment without eligibility for parole.

RESPONSE TO ASSIGNMENTS OF ERROR

- I. Appellant contends that the trial court abused its discretion in declining to strike two jurors for cause.

RESPONSE: Judge Hutchison did not abuse his discretion because neither juror was “unalterably opposed to making a recommendation of mercy in any circumstances.”

- II. Appellant asserts that the prosecutor’s closing argument, responding to defense counsel’s closing argument concerning mercy, “denied Mills due process of law and denied him a fair trial.”

RESPONSE: The prosecutor’s remarks accurately stated the penalty for first degree murder and properly rebutted defense counsel’s misstatements concerning mercy. Further, Mills is disentitled to relief because the record negates any claim that the prosecutor’s argument resulted in “manifest injustice.”

- III. Appellant complains that the trial court committed reversible error in denying the defense motions for a mistrial and a poll of the jury after the press appeared at the jury view and published a photograph of such view.

RESPONSE: Judge Hutchison properly found that members of the press never were within the crime scene and that their presence outside was brief, inconsequential and harmless. Further, Judge Hutchison correctly declined

to poll the jury concerning a newspaper photograph when there was no reason to believe that jurors had seen the photograph.

- IV. Appellant claims that the trial court abused its discretion by permitting a state's witness to testify that the victim was afraid of Mills.

RESPONSE: The victim's expression of her state of mind was not evidence of

Mills' character, but was relevant evidence tending to show the absence of provocation by the victim and the falsity of Mills' statement to police concerning the victim's words and conduct. Further, since in such statement Mills claimed that his intent was to "scare" his victim, the isolated testimony that she was afraid of him -- even if error -- necessarily was harmless error.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO STRIKE FOR CAUSE TWO PROSPECTIVE JURORS

Over the State's objection, juror questionnaires prepared by defense counsel were distributed to prospective jurors in this case. The State repeatedly voiced its observance that several of the questions were incomprehensible to prospective jurors. (Rec. 74, 10/16/03 hearing at 28-30; TR. 29, 32, 34-36, 111, 180-181).

These questions also misstated applicable law and failed to address the only legitimate test of jurors' qualifications in this regard. That test is "whether any of

them are unalterably opposed to making a recommendation of mercy in any circumstances in which a verdict of guilty is returned." *State v. Williams*, 305 S.E. 2d 251, 263-264 (W.Va. 1983).

Question number 44 informed prospective jurors: "The sentence for First Degree Murder in West Virginia is life in prison." Jurors then were asked in question number 46 "If you found the defendant guilty of First Degree Murder, would you be able to consider a life sentence with the possibility of parole eligibility after fifteen years?" To this question Prospective Jurors George and Haga answered "no," after just having been informed that the sentence by law *is* life in prison.

This is the form of question disapproved by the Court in *Williams*. The purpose of *voir dire* is whether jurors have beliefs "which would preclude them from considering the imposition of a particular penalty in the event of conviction regardless of the circumstances of the case. The inquiry must go to the willingness of the prospective jurors to exercise their discretion to determine the penalty." Additionally, the *voir dire* questions concerning mercy "should be specific enough to adequately inform the jury of the substance of counsel's inquiry" and should "explain . . . the consequences of such (mercy) recommendation."

The questionnaire omitted any mention of the fact that "parole eligibility" does not guarantee a defendant's release. The standard court's instruction informs jurors of this fact because it is recognized that without such instruction, jurors tend to believe that a mercy verdict means that the defendant will be released when he is parole eligible. (TR. 835). Accordingly, the question failed to inform the jury of the consequences of a mercy recommendation, as required by *Williams*.

In question number 44 prospective jurors were informed -- erroneously -- that a "recommendation of no mercy" would be one of their options. *W.Va. Code §62-3-15* provides for no such option: rather, the penalty for first degree murder is life imprisonment without parole unless, in its discretion, the jury recommends mercy. Never did the questionnaire make "specific inquiry" as to whether prospective jurors would be "unalterably opposed to making a recommendation of mercy in any circumstances in which a verdict of guilty is returned."

Accordingly, Appellant's Brief (at 8) misstates the record in characterizing the two prospective jurors' answers to question 46 as reflecting "bias." And Appellant's Brief omits those portions of the jurors' responses that made it clear that neither juror was "unalterably opposed to making a recommendation of mercy in any circumstances."

Appellant's Brief (at 11) charges that "after these two jurors voiced their bias, the prosecutor and the trial court attempted to rehabilitate them." In fact, Judge Hutchison made no inquiry at all of Prospective Juror George, and as to questions asked of Prospective Juror Haga, both the State and Judge Hutchison made inquiry for the approved "purpose of clarification or elaboration." Indeed, this Court has instructed that even when a prospective juror indicates bias, "further probing . . . is required." *Syl. Pt. 2, O'Dell v. Miller, 565 S.E. 2d 407 (W.Va. 2002)*.

Although no one engaged in improper attempts to rehabilitate Prospective Jurors George and Haga, defense counsel sought to impeach them.

MR. SULLIVAN: And, you also said that, in a murder case, that you wouldn't be able to consider lesser included charges, such as second degree murder or manslaughter; is that correct?

PROSPECTIVE JUROR HAGA: Well, there again, I wouldn't know second degree, manslaughter, because I've never been through this process. I was just answering what was (in the questionnaire) in black and white.

MR SULLIVAN: So why did you answer the question that way?

PROSPECTIVE JUROR HAGA: Well, that's just my feelings on it.

MR. SULLIVAN: Okay. No further questions.

PROSPECTIVE JUROR HAGA: I mean, not knowing that that would be an option, because it wasn't stated there that -- to me, it wasn't.

(TR. 107-108).

In just two questions by the State, Prospective Juror Haga confirmed that, despite (or because of) the defense-created questionnaire, she had no idea what the legal consequences of a mercy recommendation were, and that she would follow what Judge Hutchison instructed her in this regard. (TR. 108-109). Judge Hutchison then inquired:

THE COURT: Okay, if I told you, Ms. Haga, that . . . if the State proves a series of specific things . . . then you can find a person guilty of first degree murder. But I also tell you that, in your discretion, based upon all the facts that you hear in this case, that the jury has the right to recommend that mercy be granted (and) I . . . tell you . . . that the individual would be eligible for parole after having served 15 years. If I told you those were your options, could you, in good conscience, consider those options?

PROSPECTIVE JUROR HAGA: I would consider them.

(TR. 109).

In declining to strike Juror Haga, Judge Hutchison found:

Okay, I made a decision . . . based upon not only the words, but the demeanor, and . . . my responsibility in making decisions on these is to judge the totality of the circumstances with each individual juror.

I think this lady was confused, based upon her responses to the questions regarding . . . 46 and 47 of the questionnaire, and that she was confused about her obligations and options . . . and I firmly believe that she was affirmative in her statement that she . . . could and would consider mercy and . . . follow my instructions.

(TR. 111-112).

Thus, there was utterly no showing that Prospective Juror Haga was “unalterably opposed to making a recommendation of mercy in any circumstances,” the test set forth by this Court in *Williams*.

In the case of Prospective Juror George, Appellant’s Brief (at 10) quotes her statement that she *would* consider mercy “if there were circumstances that gave that right.” (TR. 178). On further inquiry, Prospective Juror George was definite in stating that she could consider mercy, depending upon the circumstances of the case and the court’s instructions, as the law requires:

MS. KELLER: And, if . . . Judge Hutchison should tell you that even in the case of a premeditated or malicious first degree murder . . . the jurors may consider parole eligibility . . . would you follow the instruction and consider it?

PROSPECTIVE JUROR GEORGE: Yes.

MS. KELLER: Is what you’re saying . . . when you talk about all the circumstances, obviously you want to hear the evidence before you say what you would do?

PROSPECTIVE JUROR GEORGE: Absolutely.

(TR. 179).

In properly denying defense counsel’s motion to strike Prospective Juror George, Judge Hutchison found:

She was, both in her words and her demeanor, assertive, forceful in indicating that, if given the instruction to consider (mercy), she would consider it. And I don't believe that, based upon anything else in the record, that she is disqualified for cause . . .

(TR. 182).

While Appellant's Brief (at 11) correctly cites the maxim that when "the trial court has any doubt about a juror, that doubt should be resolved in favor of the defendant," the record in this case demonstrates that the trial court had no doubts whatsoever that Prospective Jurors George and Haga were qualified to serve.

Appellant's Brief (at 11) misquotes Syl. Pt. 5 of *O'Dell, supra* and Syl. Pt. 2 of *State v. Griffin, 566 S.E. 2d 645 (W. Va. 2002)*. It is not, as Appellant's Brief contends, "that once a juror has made a statement indicating the presence of a disqualifying bias or prejudice, that juror is disqualified by law . . ." It is, rather, that "once a prospective juror has made a *clear* statement reflecting a *disqualifying* prejudice or bias" that disqualification occurs. Stating a belief that the statutory penalty for first degree murder -- life imprisonment without parole -- should, in fact, be the penalty for first degree murder, cannot be deemed a "disqualifying prejudice or bias" when, as here, the prospective jurors definitely affirm that they are willing to consider the option of parole eligibility once they know the circumstances of the case and hear the court's instructions.

Voir dire is not supposed to be a game of "Gotcha." This Court previously has refused to find judicial abuse of discretion in refusing to strike a juror when, after the prospective juror's initial statement indicating bias, further inquiry reveals

that the juror is qualified. *State v. Williams*, 524 S.E., 2d 655, 658-659 (W.Va. 1999); *State v. Miller*, 476 S.E. 2d 535, 550-553 (W.Va. 1996).

This Court stated in *Miller*:

(We), as an appellate court, are not to decide whether we would have made the same determination (as the trial court), but whether the trial court abused its discretion. (Citation omitted). More significantly, the challenging party bears the burden of persuading the trial court that the juror is partial and subject to being excused for cause.

And in *Miller* this Court recognized that: "In the final analysis, a trial court is entitled to rely upon its self-evaluation of allegedly biased jurors in determining actual bias," because "the trial court is in the best position to judge the sincerity of a juror's pledge to abide by the court's instruction."

Appellant's Brief fails even to make a claim that Prospective Jurors George and Haga were "unalterably opposed to making a recommendation of mercy in any circumstances," and the record of *voir dire* in this case would contradict any such claim. Judge Hutchison, who properly based his decisions concerning these prospective jurors on factors accessible only to the trial court - - demeanor in addition to words -- did not abuse his discretion in declining to strike them for cause.

II. THE CIRCUIT COURT DID NOT ERR IN OVERRULING THE DEFENSE OBJECTION TO THE STATE'S REBUTTAL ARGUMENT CONCERNING MERCY, AS SUCH ARGUMENT WAS A LIMITED RESPONSE TO DEFENSE COUNSEL'S CLOSING REMARKS.

Appellant's Brief (at 14) acknowledges that upon the evidence in the case, defense counsel expected a verdict of guilty of first degree murder: this is why

“defense counsel acknowledged in closing argument that the jury would most likely have to decide the critical issue of whether to recommend mercy.”

The State in its initial closing argument made no remarks urging that the jury refrain from making a recommendation of mercy. (TR. 844-850). Instead, the State reviewed the evidence with no objections by the defense.

Defense counsel in closing argument obliquely acknowledged the proof of defendant’s guilt of first degree murder:

Now, standing here, I know that I’m going to have to address the issue of mercy. I was in the same courtroom that you were, and I saw the evidence that you did. So I know very well that the final issue that might be decided today is whether there’s going to be a recommendation of mercy for . . . Mills.
(TR. 857).

Defense counsel then discussed the defendant’s failure to testify: “Does he have a good answer for why he killed Pam Cabe on September 8, 1999? He doesn’t . . . “ (TR. 857). The State carefully refrained from accepting defense counsel’s “invitation” to discuss the defendant’s failure to testify.

Next, defense counsel opened the door to argument concerning the defendant’s character: “But can he be a better person? I submit to you that he can. (He) . . . can still be capable of redemption . . . a person who can show redemption, who can prove himself . . .” (TR. 858). Once again, the State refrained from stepping through the door concerning remorse and redemption, and Mills’ lack thereof, opened by defense counsel in closing argument.

Appellant's Brief (at 14-15) omits mention of the defense "an-eye-for-an-eye" argument, and the defense argument decrying prison conditions, to which the State properly responded. Defense counsel argued:

Life in the penitentiary is a punishment. You are confined to a cell. Your freedom is completely restricted as to the daily routine and regimen that is given you by the guards. There is the violence, the noise, the smells. . . . Just know that it is punishment. It is real. It is somebody's life.

And if he does get a life sentence . . . with the possibility of parole, it's still very likely that he could die in prison.

(TR. 858-859).

Defense counsel concluded his argument by misstating the law concerning the factors which a jury may consider in determining whether or not to exercise its discretion to grant mercy. Defense counsel argued:

Now, it could be said and it's often said that somebody who's shown somebody no mercy does not deserve mercy themselves. It's said many times. I cannot - - nobody can - - say that what happened to Pam Cabe that day showed her any mercy, but that is not what you're here to judge, and you know that. You know that you didn't swear on oath to make these determinations, to be a fair juror, in order to make a judgment like that. You . . . took an oath to give a fair and honest verdict

(TR. 859).

Such argument was contrary to *W.Va. Code §62-3-15*, which mandates that the jury has "unfettered discretion (to make) the determination of mercy based solely on their impression of the defendant and the circumstances of the case," including the unmerciful nature of the defendant's conduct. *State v. Miller*, 363 S.E. 2d 504, 508 (*W.Va.* 1987).

It was in response to these arguments of defense counsel - - omitted from Appellant's Brief - - that the State responded with the comments noted in Appellant's Brief (at 14-15).

Appellant's Brief (at 20) claims that the State "improperly raised the issue of the death penalty." Actually, it was defense counsel, in opening statements, who first raised the matter of executions. Defense counsel stated to the jury:

This is not California. A guilty person that killed someone is not going to walk at the end of this trial. It's also not Iraq. We don't grab American citizens off the street, accuse them of a crime -

MS. KELLER: Objection, Your Honor.

THE COURT: Overruled, go ahead.

This trial was held just seven months after the United States commenced war with Iraq, for which the stated purpose was, if not related to weapons of mass destruction, to rid the world of a tyrant who regularly executed innocents. Defense counsel to the jury backhandedly likened this prosecution to Iraq's murderous regime, and now complains that the same prosecution was "unfair" in later mentioning that, here, the State does not execute its citizens.

Appellant's Brief complains of two remarks in the prosecution's closing -- all made in response to defense counsel's closing argument, in which the defense urged that the jury reject "an eye-for-an-eye" analysis in determining the issue of mercy. Defense counsel argued that it would not be "fair" for the jury to decline to grant Mills mercy: indeed, defense counsel erroneously informed jurors that this would violate their oath. The State properly responded, "But, if we were talking fairness -- if we were talking about (Mills) getting what he gave -- we would have

the death penalty in West Virginia.” The State did not argue that we *should* have the death penalty, and in fact, immediately stated, “We do not.” This was an appropriate and obvious response to defense counsel’s misstatement that to deny Mills mercy would be the “unfair” equivalent of Mills’ unmerciful conduct in murdering Mrs. Cabe. The State was entitled to point out that under West Virginia law, the jury’s refusal to grant mercy would not be “an-eye-for-an-eye” justice because such verdict would not result in Mills’ death.

The second sentence highlighted in Appellant’s Brief is, “We do not, so the defendant necessarily is getting mercy.” This was an appropriate response to defense counsel’s argument that to deny mercy to Mills would be to “unfairly” impose upon him the same fate he imposed upon Mrs. Cabe, and that he would “likely . . . die in prison” even if given mercy. The next sentences, concerning the “nasty” conditions in prison, are directly responsive to defense counsel’s argument, quoted above. The final sentence of the prosecutor’s closing argument quoted in Appellant’s Brief is a correct statement of law, urging this jury to impose the maximum sentence for first degree murder in West Virginia. The State simply noted what the jury already knew, “The West Virginia legislature has decided that first degree murder, intentional deliberate premeditated murder, will not result in the death penalty but will result . . . in life imprisonment.” (TR. 862). In no way did the State argue that we *should* have the death penalty, or that life imprisonment without parole eligibility was an insufficient sentence.

Appellant’s Brief (at 15-19) makes a tortured attempt to misinterpret the prosecutor’s words so that they appear to be something other than what they were:

“generalized comment in the closing argument by the prosecutor in response to the defendant’s (closing) statement in the same area.” *State v. Mullins*, 301 S.E. 2d 173, 177 (W.Va. 1983).

Appellant’s Brief cites *State v. Suggs*, 456 S.E. 2d 469 (1995), in which this Court confirmed that even when a prosecutor’s remarks are improper, “a judgment of conviction will not be set aside (if such remarks) do not clearly prejudice the accused or result in manifest injustice.” *Ibid.* Syl. Pt. 5. Appellant’s Brief speculates that the prosecutor’s “powerful, emotional argument quite likely motivated some of Mills’ jurors to act on those emotions.” Undoubtedly, Mills would have preferred an impotent and disengaged prosecution willing to violate its duty to “vigorously pursue the State’s case.” Syl. Pt. 3, *State v. Boyd*, 233 S.E. 2d 710 (1977). The record supports neither the claim that the prosecutor’s closing was “emotional” nor the claim that the verdict of life without parole eligibility was based on anything other than the undisputed evidence introduced at trial. As this Court recently repeated in Syl. Pt. 3, *State v. Gray*, No. 32051, July 6, 2005:

An appellant must carry the burden of showing error in the judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment. (Citations omitted).

A review of the evidence before this jury establishes that nothing in the prosecutor’s closing remarks “clearly prejudiced” Mills, and that the jury’s decision declining to exercise its discretion to grant him mercy was the only just verdict a reasonable jury could have returned. As summarized under *Statement of Facts*,

above, Mills had hours after the custody ruling of September 8, 1999 to consider his actions. He was "fine" when he left home that afternoon, armed with the fully-loaded .38 Special and extra bullets. His wife had no knowledge that he owned either a firearm or ammunition. He drove several miles, parked and walked a long, circuitous route so that he could take Mrs. Cabe by ambush. He had his hand inside the manila envelope in which he concealed the loaded revolver. He walked into Mrs. Cabe's workplace in broad daylight, past a young customer, and gunned Mrs. Cabe down, emptying his .38 as she screamed and attempted to flee. He left her to die face down in a pool of her own blood and brain matter. He then watched the comings and goings of the ambulance and police officers, awaiting the scheduled 4:30 p.m. arrival of his daughter and eighteen-month-old Kailey. He timed his execution of Mrs. Cabe so that the results would have been witnessed by his own daughter and by Mrs. Cabe's infant granddaughter. In his subsequent statement to police, Mills claimed nothing but contempt and envy toward his victim. The jury was offered nothing whatsoever by the defense in mitigation of these facts. Accordingly, there was no "manifest injustice" in the verdict caused by the prosecutor's closing remarks.

Under the four factors set forth in Syl. Pt. 6 of *Suggs*, the prosecutor's remarks in this case cannot possibly warrant reversal. The first factor is "the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused." As discussed above, the remarks were neither misleading nor prejudicial, but were accurate statements of law. In response to defense counsel's "an-eye-for-an-eye" argument, it was entirely proper to point out that

since Mills would live regardless of the sentence imposed, the State was not seeking “an-eye-for-an-eye” justice.

Appellant’s Brief (at 17) quotes from *Romine v. Head*, 253 F.3d 1349, 1367 (11th Cir. 2001), a case wholly inapplicable to this one. In *Romine* the prosecutor argued that, despite the jury’s discretion to grant mercy (meaning life without parole eligibility), instead of imposing the death penalty, the “law of God (made) death . . . the mandatory penalty for patricide.” In the instant case the State never, ever argued that God or any other “higher authority” mandated that Mills be denied parole eligibility. Indeed, the State in its closing argument reiterated the court’s instruction that the penalty for first degree murder is life imprisonment “unless . . . the jury, in its discretion -- it’s your job -- if you decide, upon the evidence that there’s a reason to do so, to grant what’s called mercy” (TR. 862, instruction at 835).

The second *Suggs* factor is “whether the remarks were isolated or extensive.” Appellant’s brief (at 18) contends that the “improper” comments were “extensive” because “they were made twice.” surely “twice” is not synonymous with “extensive.” Additionally, there was no argument concerning mercy in the State’s relatively lengthy initial closing argument. The claim that the prosecutor’s remarks “can only be viewed as a calculated strategy” is without merit unless one assumes that the prosecutor had the precognitive powers to form a strategy to respond to a defense argument that had not yet been heard.

The third *Suggs* factor is “absent the remarks, the strength of competent proof introduced to establish the guilt of the accused.” Appellant’s Brief (at 18-19)

attempts to skirt this factor by illogically arguing that the “comments . . . were not blunted or rendered harmless by the strength of the State’s evidence as they might be if the prosecutor’s comments were addressed to the issue of guilt.” Whether addressing Mills’ guilt or addressing whether he should be granted mercy, the same overwhelming evidence of his commission of a particularly calculated, scheduled and vicious first degree murder and the same absence of any mitigating evidence would render the prosecutor’s remarks harmless even if they *had* been improper.

The final *Suggs* factor is “whether the comments were deliberately placed before the jury to divert attention to extraneous matters.” Appellant’s Brief (at 19-21) fails to explain how, upon this record, the prosecutor could be blamed for “diverting attention” to “extraneous matters” when it was the defense closing argument that largely (and for good reason) ignored the facts of the murder itself and instead discussed such matters as the defendant’s failure to testify, his possible “redemption,” the likelihood that he would die in prison even if granted mercy, the unsavory conditions in prison and the “unfairness” of taking his life, through imprisonment without parole, as a means of rendering justice for the life he took.

Appellant’s Brief (at 20-21) engages in a dishonest and unprofessional personal attack which does not deserve a response.

This Court consistently has held that a “judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice.” Syl. Pt. 4, *State v. Ocheltree*, 289 S.E. 2d 742 (W.Va. 1982); Syl. Pt. 3, *State v. Bell*, 432 S.E. 2d 532 (W.Va. 1993).

Accordingly, the State's closing argument cannot be grounds for reversal.

III. THE CIRCUIT COURT DID NOT ERR IN DENYING THE DEFENSE MOTION FOR MISTRIAL AND FOR POLLING THE JURORS, AS NO PREJUDICIAL ERROR OCCURRED DURING THE JURY VIEW AND THERE WAS NO REASON TO BELIEVE JURORS VIEWED A NEWSPAPER PHOTOGRAPH OF SUCH VIEW.

Appellant's Brief (at 22-27) repeatedly and erroneously claims that Mills was "prejudiced" because the jury was "distracted" during the jury view when photographers "substantially interfere(ed)" with such view. However, according to defense counsel's position at trial, any so-called "distraction" would have been beneficial to Mills. This is because defense counsel adamantly and repeatedly objected to the State's motion for a jury view, claiming that any such view in itself would be "prejudicial" to Mills. (Rec. 75, 10/29/03 pre-trial hearing at 38-39, TR. 334). So Mills is foreclosed now from complaining that the jury was "distracted" from a jury view that, for reasons having nothing to do with press coverage, he never wanted to occur.

Appellant's Brief (at 1, 3-4, 22-27) also fails to mention that there was no press coverage of, and no reporter or camera within, the crime scene itself. (TR. 342-344, Rec. 77, 12/19/03 hearing at 8). Defense counsel during post-conviction hearings conceded that, except for the presence of the press outside the murder scene, there was no press intrusion about which the defense had any complaints. (Rec. 77, 12/19/03 hearing at 6-7).

Appellant's Brief repeatedly mischaracterizes the jury view as a "walking parade," a term never used by the trial court or anyone other than defense counsel to

describe the proceeding. And Appellant's Brief quotes only defense counsel's version of events, recited during the defense counsel's motion for mistrial, and omits mention of the fact that the State and, more importantly, Judge Hutchison observed the jury view quite differently.

The State noted:

I also observed the jurors -- the cameras never stepped foot inside the murder scene itself. If the Court will recall, the jurors . . . were on their knees closely inspecting the bullet holes in the walls that we had pointed out, closely inspecting the gouges in the furniture and in the rug. So, there was no media interference whatsoever with the scene of the murder because no media was present. The only area presumably the defense is talking about is the public area outside the dry cleaners

(Rec. 77, 12/19/03 hearing at 8).

Although Judge Hutchison had thought that defense counsel objected during the jury view, (TR. 356), the State "had not even heard him object while we were on the jury view. And I believe that was because I was focusing on the task at hand." (Rec. 77, 12/19/03 hearing at 7). It is presumed that the jury, too, was focused on its task during the jury view, and there is nothing whatsoever in the record to support the wholly speculative claims to the contrary contained in Appellant's Brief.

In fact, the record confirms that there was no defense objection made during the jury view. The following is the brief incident to which Appellant's Brief refers:

MS. KELLER: I'd ask the jurors to observe the grassy area behind the block wall, and then from this block wall to look down toward Richmond Cleaners.

MR. SULLIVAN: Your Honor -- (Court admonished public to not be near the jury and remain at a distant).

MS. KELLER: Your Honor, I'd ask if we could go just a few feet to the Childers lot where we started and just walk down to Richmond Cleaners.

THE COURT: You want us to stop here; right?

MS. KELLER: Yes, Your Honor.

THE COURT: Come on up, folks.

MS. KELLER: If the jurors could go on to the other side of the street and walk to the intersection of "H" and South Kanawha, observing through the window of Richmond Cleaners.

MR. SULLIVAN: Your Honor, I hate to have to ask this again, but the view is being obstructed by these people.

THE COURT: Keep back, clear out of there. (To Deputy) Keep the camera folks back. Okay, where do you want to go now?

(TR. 342).

The jury view continued without interruption.

After the noon recess following the morning jury view, defense counsel moved for a mistrial. Judge Hutchison found:

There has been no showing in my mind of prejudice, no showing of a taint . . . to the jury, and I do not believe that the presence of camera folk in this courtroom or at the jury (view) scene is sufficient to warrant my granting a mistrial in this case.

As the jurors are aware that those camera folks had an interest and were out at the jury view, they are aware, under the rules, that they're in the courtroom. So they understand that the media is interested in the case, and the First Amendment clearly requires that we make allowance for the presentation of public information.

I don't believe there's been sufficient showing of . . . taint or prejudice, and I'm going to deny your motion

(TR. 356-357).

After opening statements were made and several witnesses were called by the State, trial resumed for the second day of testimony and defense counsel moved the trial court to poll the jury because the local newspaper published a photograph

showing only the backs of jurors -- no faces -- as they walked on Kanawha Street. Defense counsel did not claim that there was any reason to believe that any member of the jury had seen the photograph. In denying the defense motion, Judge

Hutchison correctly ruled:

(T)here is in the law a presumption of regularity with regard to the instructions I've given the jury. And I've instructed the jury not to read the newspaper, not to listen to the radio and not to watch television. That being the case, I can presume, in the absence of evidence to the contrary, that they've not seen that picture and that they're not aware that that picture is in there.

Number two, I've looked at the newspaper again, and I personally can't identify any of the jurors although I know some of them . . . But there is no indication that any of these jurors have been affected by this.

I've ruled previously. I can presume that they are following -- in the absence of evidence to the contrary, I can . . . assume that they are following my rules and obeying my instructions. Therefore, I'm . . . not going to *voir dire* this panel.

(TR. 449-450).

The trial court correctly applied the rule of the presumption of regularity. Syl. Pt. 3, *State v. Gray, supra*. The photograph as issue complied with *W.V. T.C.R. 8.10* because no "face of a juror (was) shown (and) the identity of (no) juror (was) stated or was otherwise discernible."

Appellant's Brief (at 30) erroneously relies upon *State v. Williams, 230 S.E. 2d 742, 746 (W.Va. 1976)*, a case in which, following the defendant's conviction, the jury was polled and it was discovered that the foreman had read a newspaper article about the case. *Williams* does not mandate that the jury be polled whenever there is newspaper coverage during a trial. Rather, this Court cited with approval the ABA standard recommending such polling when "it is determined that material

disseminated during the trial raises *serious questions of possible prejudice.*" (Italics added). There was no evidence of any "dissemination" of the newspaper photograph in the instant case, and no "serious questions" raised about prejudice.

Estes v. Texas, 381 U.S. 532, 536 85 S.Ct. 1628 (1965), also cited in Appellant's Brief (at 25-27), is inapplicable because it concerned televising of court proceedings in which "at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings." There is no claim of such "considerable disruption" in this case.

The final "authority" relied upon in Appellant's Brief (at 26-27) concerning the press presence at the jury view is *Commonwealth v. Davis*, 635 A. 2d 1062 (Pa. 1993), which discusses Pennsylvania's rationale for "prohibit(ing) any photographs or broadcasting from the courtroom or its environs," a decision which sheds no light whatsoever on the case at hand.

Appellant's Brief (at 27-28) descends into hyperbole. It includes speculation that jurors "became acutely aware of the . . . community interest in the trial." If jurors did not already recognize that the community always is "interested" when one of its members is a homicide victim, there was nothing in the two-minute event outside the murder scene, or the photograph of jurors' backs, that would have made them suddenly and "acutely" aware of this fact. A brief insignificant event in a

four-day trial now is mischaracterized as a "major interference which created a manifest necessity for a mistrial."

Judge Hutchison correctly found no such manifest necessity:

(T)he interference part by the media at the jury view in my mind was (a) not overwhelming, if there was any interference, (b) was short-lived, and (c) if at all improper, it was harmless.

And I believe that there is overwhelming evidence for conviction. And, if, in fact, there was some error in the way the Court managed the . . . jury view, then I believe that it was harmless error to this case because the remaining evidence that took place over the next couple of days of the trial or during the actual evidence portion of the trial, in my mind, was overwhelming regarding the guilt of this gentleman.
(TR. 111).

After confirming that the jury view was "not improper," Judge Hutchison concluded his analysis:

So . . . the whole argument comes down to the conduct of the media at the time from when we walked down the street from where we parked to . . . a position generally across the street from the . . . scene of the crime. I don't think that's significant enough for this Court to warrant a new trial. I don't think that the prejudice, if any, was anything more than harmless. And I believe that the . . . evidence in this case is so overwhelming as to the guilt of this defendant that a new trial is not warranted in this matter.

(TR. 112-113).

The record is devoid of any basis for finding that the trial court committed reversible error, either in refusing to declare a mistrial or in declining to poll the jury.

IV. THE COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING ONE WITNESS TO TESTIFY THAT THE VICTIM WAS AFRAID OF MILLS

The State exercised restraint in asking only one witness one question concerning Mrs. Cabe's state of mind toward Mills. This was through Danette Lynn Cabe, who testified that Mrs. Cabe was "afraid" of Mills. By the time Danette Lynn Cabe testified, the trial court already had ruled that Mills' tape-recorded statement to police would be admissible and it was, in fact, played for the jury. (Rec. 70, 7/28/03 hearing at 71). Defense counsel, to the jury, characterized it as "an important piece of evidence," and reviewed how Mills had claimed to have been "scared" and attempted to explain (with no evidentiary support) why Mills claimed to police that he did not know whether Mrs. Cabe had a gun at the time of the murder. (TR. 855-856).

Appellant's Brief makes the claim that because defense counsel denied that Mills was relying on a defense of legal provocation, the State should have been precluded from introducing evidence that Mrs. Cabe was afraid of Mills. The fact that she had expressed her state of mind in this regard was relevant for the jurors' consideration of Mills' state of mind during the murder, because he had claimed the following to police on September 8, 1999:

I went there, I wanted to scare her. I wanted to talk some sense into her. But the lady told me before . . . that money could do whatever she wanted. And there was no justice.

* * *

I wanted, I just, I just wanted her to make sense. She had told me man, people with money can do what they want and they did.

* * *

But the more, more I thought about it, man, I seen money flashing, O.J. Simpson, rich people just do whatever they want.

* * *

(DET. SHUMATE): Uh, did she make any statements to you when you walked in?

(MILLS): At first she was startled, then a smirk.

* * *

(DET. SHUMATE): Did you get angry when you saw her?

(MILLS): Scared more.

* * *

(DET. SHUMATE): Ok. Did you ever see her with any type of weapon, I guess is what I'm asking?

(MILLS): I don't know.

Indeed, Appellant's Brief (at 3) describes Mills' statement to police as his admission to "impulsively shooting Mrs. Cabe when he went to talk to her because he was upset."

The State was entitled both to have the jury hear Mills' voluntary statement following the murder, and to rebut his portrayal of his victim as an overbearing, boastful, maybe armed woman who "smirked" at the sight of him, causing in him such a flood of "impulses" that Mills, "didn't realize (he) pulled the f__king trigger til she fell."

The fact that Mrs. Cabe had expressed her fear of Mills is evidence tending to show that his characterization of her conduct toward him, including her supposed "smirk," was a lie.

Having characterized Mills' statement as a claim of "impulsive" killing, Appellant's Brief then argues that the trial court erred in permitting the State to offer evidence disproving Mills' claim of "impulsivity." (TR. 427-429). Appellant's brief erroneously contends that since the State was introducing Mills' statement, the

State was bound by its contents and should not have been permitted to disprove any portion of it. No authority is cited for such claim, because none exists. Indeed, in *State v. Miller*, 401 S.E. 2d 237, 247 (W.Va. 1990) the defendant claimed self-defense in his statement to police after committing murder but did not rely on self-defense at trial. On appeal, his counsel argued that the State should not have been permitted to introduce evidence disproving such claim, and to have an instruction concerning such claim, because it was not raised by the defense at trial. This Court disagreed, citing the State's evidence at trial "includ(ing) the appellant's statement to the police," and ruled that "the appellant's statement to police and the evidence presented by the appellant constituted sufficient facts to support instructing the jury as to self-defense prior to their deliberations." (Italics added).

Appellant's Brief (at 34-35) mischaracterizes the single reference to Mrs. Cabe's fear of Mills as character evidence under Rule 404, W.Va. Rules of Evidence, and charges that the State was "wanting to inflame the jury." No evidence of Mills' legion "other crimes, wrongs or acts" was offered by the State at trial. In his statement to police Mills offered as his own explanation for confronting Mrs. Cabe on September 8, 1999, that he wanted to "scare" her. Even if one could make the leap urged in Appellant's Brief, that if Mrs. Cabe expressed that she was afraid of Mills, it must mean Mills had a bad character, Appellant's Brief fails to show how such "character evidence" prejudiced Mills, since his claimed intent on September 8, 1999 was to make Mrs. Cabe afraid. The record does not support the claim in Appellant's Brief that Mills was "denied his right to a fair trial" by the

admission of any character evidence, much less unfairly "prejudicial" character evidence.

Throughout Appellant's Brief the term "prejudice" consistently is misused. The definition of the word is: "A forejudgment; bias; preconceived opinion. A leaning towards one side of a cause for some reason other than a conviction of its justice." *Black's Law Dictionary, 4th Ed.*

Appellant's Brief is littered with claims that this trial included rulings and evidence and closing remarks that were "prejudicial" to Mills, when what actually is meant is that these were "unfavorable" to him. And throughout Appellant's Brief the complaint of "prejudice" is made without the necessary allegation that such "prejudice" was "unfair." Rule 403, W.Va. Rules of Evidence.

Indeed, all of the evidence heard by the jury at trial was unfavorable to Mills, but this, of course, does not mean that the proceedings were unfairly prejudicial. Rather, as Judge Hutchison recognized, it means that there was "overwhelming evidence," of Mills' guilt of the premeditated, intentional and malicious killing of Mrs. Cabe, with no mitigating evidence whatsoever offered by the defense.

Appellant's Brief (at 35-36) concludes by demonstrating a fundamental misunderstanding of what "mercy" means and how mercy is applied pursuant to W.Va. Code § 61-2-2 and § 62-3-15. "Mercy" is defined in *Black's Law Dictionary, 4th Ed.*, as "to mitigate the severity of (a) sentence," and in *Webster's New World Dictionary, 2nd Ed.*, as "a refraining from . . . punishing offenders . . . ; kindness in excess of what may be expected or demanded by fairness." Under §61-

2-2 and §62-3-15, the sentence of life imprisonment without parole is the presumptive penalty for first degree murder. It is not incumbent upon the State to present evidence of aggravating circumstances in order for the jury to decline to grant mercy. Rather, § 62-3-15 permits a jury discretion to grant the murderer "kindness in excess of what may be . . . demanded by fairness," by adding a recommendation of mercy to the verdict. As this Court recognized in *State v. Miller*, 363 S.E. 2d 504, 507-508 (W.Va. 1987), citing with approval *Hicks v. State*, 27 S.E. 2d 307, 309 (Ga.1943):

The jury in determining whether or not to recommend mercy is not controlled by any rule of law, nor could the Court under any circumstances instruct them as to when they should or should not make such a recommendation. They may do so with or without reason, and they may decline to do so with or without a reason. It is a matter wholly within their discretion.

Appellant's Brief (at 35) inappropriately complains: "This character assignation (sic) was prejudicial to Mills because when the jury is instructed on the mercy phase of their decision, there are no standards or guidelines for them to follow. Instead, twelve, ordinary citizens make a decision about whether someone should ever be eligible for parole, possibly on a mere whim." One does not hear murderers who are granted mercy "on a whim" complain of such "ordinary citizens'" discretion. And this Court noted in *Miller*:. "In jurisdictions where the decision to recommend mercy is left entirely within the discretion of the jury and is made binding on the trial court, it is uniformly held that an instruction which enumerates instances or suggests when a mercy recommendation might be appropriate is reversible error." This is because the jury has the "unfettered discretion of

making the determination of mercy based solely on their impression of the defendant and the circumstances of the case.”

Based upon the State’s “overwhelming evidence,” and the absence of any evidence mitigating the “impression of the defendant” as a murderer and the “circumstances of the crime” as an act of calculated cruelty scheduled by Mills so that Mrs. Cabe’s infant granddaughter would come upon her corpse, the only verdict a fair and impartial jury could return was the verdict this jury did return.

CONCLUSION

There was no error in Mills’ second trial and conviction for first degree murder by use of a firearm without mercy, and the judgment of the Circuit Court and the conviction and sentence of Marvin Mills should be affirmed.

VOLUNTARY STATEMENT

DATE: SEPTEMBER 8, 1999 PLACE:

TIME STATEMENT STARTED: a.m. 7:23 p.m.

I, the undersigned, MARVIN STEVE MILLS, of 107 DUBLIN ST., GLEN MORGAN, being 46 years of age, born at , on 2/22/53, SSN , do hereby make the following statement to DET. J. S. SHUMATE, he having first identified himself as a Police Officer for the City of Beckley Police Department, knowing that before I am asked any questions or make any statements that I must understand the following rights to which I am entitled. I HAVE THE RIGHT TO REMAIN SILENT, that ANYTHING I SAY CAN AND WILL BE USED AGAINST ME IN A COURT OF LAW, that I HAVE THE RIGHT TO TALK TO A LAWYER FOR ADVICE and that IF I CANNOT AFFORD AN ATTORNEY ONE WILL BE APPOINTED FOR ME BEFORE QUESTIONING, if I wish. I understand that if I decide to answer questions without a lawyer present, that I still have the right to stop answering at any time and will remain silent or ask for an attorney to be present for any further questioning. I declare that this statement is made without any threat, coercion, offer of benefit, favor or offer of favor, leniency or offer of leniency by any person or persons whomsoever.

JS; OK IT IS 7:23 P.M. IT'S THE 8TH DAY OF SEPTEMBER 1999. I'M DET. J. S. SHUMATE. THIS IS GONNA BE IN REFERENCE TO SERVICE NUMBER 99-10848. COULD YOU STATE YOUR NAME SIR?

MM; MARVIN STEVE MILLS.

JS; MARVIN WHAT UH, WHERE DO YOU LIVE?

MM; 107 DUBLIN ST. GLEN MORGAN.

JS; AND HOW OLD ARE YA?

MM; 46.

JS; OK. AND YOUR DATE OF BIRTH?

MM; 2/22/53.

JS; OK. I JUST ASK, NEED TO ASK YOU A FEW QUESTIONS. THERE WAS AN INCIDENT THAT OCCURRED AT UH, AT UH, RICHMOND'S DRY CLEANERS ON SOUTH KANAWHA ST. TODAY. AND YOU WAS AT THAT LOCATION CORRECT?

MM; THAT'S CORRECT.

JS; AND HOW DID YOU GET THERE?

MM; I DROVE A WHITE VAN.

JS; OK. WHERE DID YOU PARK THE VAN AT?

MM; UM, I DON'T KNOW THE FRONT OF THE BUILDING BUT IT WAS RIGHT BESIDE, RIGHT BEHIND, ON THE CORNER WHERE THE MAIN DOOR IS, RIGHT BEHIND THE BUILDING THERE.

JS; OK. WAS ANYONE IN THE VEHICLE WITH YOU?

MM; NO.

JS; OK. UH, WAS ANYONE IN THE VEHICLE WITH YOU AT ANY TIME FROM THE TIME YOU LEFT THERE TIL YOU WENT TO RICHMOND CLEANERS?

MM; NO.

JS; OK. AND THERE WAS GUN RECOVERED, WHICH YOU ADVISED WAS YOUR GUN CORRECT?

MM; YES.

JS; OK. AND HOW LONG HAVE YOU HAD THAT GUN?

MM; IT'S BEEN IN MY POSSESSION PROBABLY FOUR, FOUR YEARS.

JS; OK. AND WHERE YOU USUALLY KEEP THAT GUN AT?

MM; AREA IN THE GARAGE IN SOME OLD JUNK.

JS; AND, WHEN DID, WHEN DID YOU PUT IT ON YOUR PERSON? TODAY?

MM; YES.

JS; OK. DID YOU PUT IT BEFORE YOU LEFT YOUR HOUSE?

MM; YEAH.

JS; DID ANYONE GIVE YOU THE GUN TODAY?

MM; NO.

JS; OK. AND WHEN YOU LEFT THE HOUSE, WHAT WAS THE REASON FOR YOU LEAVING THE HOUSE AND GOING TO RICHMOND DRY CLEANERS?

MM; I WASN'T GOING THERE. I WAS GOING TO FITZPATRICK PARK. SUDDEN I GET A LITTLE CONTROL OF MYSELF. CAUSE LIKE I SAID I'M NOT THAT KIND OF MAN. I DIDN'T WANT TO SEE MY FAMILY...(UNCLEAR)....

JS; I UNDERSTAND.

MM; (UNCLEAR)...

JS; HERE YA GO.

MM; I WENT THERE, I WANTED TO SCARE HER. I WANTED TO TALK SOME SENSE INTO HER. BUT THE LADY TOLD ME BEFORE AND EVERYBODY, THAT MONEY COULD DO WHATEVER SHE WANTED. AND THERE WAS NO JUSTICE.

JS; OK.

MM; I DON'T KNOW WHAT HAPPENED.

JS; YOU SAID YOU WANTED TO SCARE HER.

MM; I WANTED HER TO MAKE REASON, MAKE SENSE.

JS; OK. WHAT, AND, AND THE PROBLEM BETWEEN YOU AND THEM WAS OVER A GRANDCHILD IS THAT CORRECT?

MM; YES.

JS; OK AND IT WAS A CUSTODY BATTLE OVER A GRANDCHILD CORRECT?

MM; YEAH I, YES.

JS; OK. AND YOU SAID YOU WANTED TO SCARE HER, YOU WENT TO SCARE HER WITH THE GUN?

MM; I WANTED, I JUST, I JUST WANTED HER TO MAKE SENSE. SHE HAD TOLD ME MAN, PEOPLE WITH MONEY CAN DO WHAT THEY WANT AND THEY DID.

JS; NOW WHEN YOU SAY THAT YOU'RE TALKING ABOUT AS FAR AS CUSTODY OF YOUR GRANDCHILD CORRECT?

MM; YEAH THAT'S CORRECT.

JS; UM, DID ANYONE ASSIST YOU IN ANYWAY ON THIS?

MM; NO.

JS; OK.

MM; NOT AT ALL.

JS; OK SO YOUR WIFE WASN'T INVOLVED OR NONE OF YOUR CHILDREN?

MM; NO. THEY, I DIDN'T TELL EM WHERE I WAS GOING OR NOTHING.

JS; OK.

MM; I JUST TOLD MY WIFE I HAD TO GO SOMEWHERE AND THAT'S IT.

JS; OK.

MM; AND THAT'S, AND THAT'S WHERE I WAS GOING. I WAS GOING TO FITZPATRICK PARK. BUT THE MORE, MORE I THOUGHT ABOUT IT MAN, I SEEN MONEY FLASHING, O.J. SIMPSON, RICH PEOPLE JUST DO WHATEVER THEY WANT. AND I....

JS; STEVE DO YOU REMEMBER HOW MANY TIMES YOU SHOT THE GUN?

MM; NO. NO I DON'T. I DIDN'T REALIZE I PULLED THE FUCKING TRIGGER TIL SHE FELL.

JS; OK. DID UH...

MM; I RAN TOWARDS MY VAN. I REALIZED AT THAT POINT WHAT I HAD DONE MAN. I DIDN'T WANT NOBODY ELSE TO GET HURT. I WALKED ACROSS THE STREET, I LAID THE GUN DOWN AND SAT THERE. I DIDN'T KNOW WHAT TO DO MAN. I DIDN'T WANT IT TO HAPPEN.

JS; OK.

MM; I DON'T KNOW MAN.

JS; UH, DID SHE MAKE ANY STATEMENTS TO YOU WHEN YOU WALKED IN?

MM; AT FIRST SHE WAS STARTLED THEN A SMIRK. DON'T KNOW.

JS; DID YOU SAY ANYTHING TO HER?

MM; I THINK I TRIED TO SPEAK. (UNCLEAR)

JS; OK.

MM; I TRIED TO SPEAK I REALLY DID. BUT SOMETHING JUST BUILT UP IN ME.
I'M, I'M...

JS; OK. UH, WAS THERE ANYONE ELSE INSIDE THE BUSINESS WHEN THIS
HAPPENED? DID YOU SEE ANYBODY ELSE?

MM; I DON'T KNOW. I HONESTLY AND TRULY DON'T KNOW. I SEEN HER.
THAT WAS IT.

JS; DID YOU GET ANGRY WHEN YOU SAW HER?

MM; SCARED MORE.

JS; DID SHE HAVE ANY GUN OR ANYTHING LIKE THAT?

MM; I HAD IT IN A BROWN ENVELOPE.

JS; SO YOU HAD PUT IT IN A BROWN ENVELOPE WHEN YOU GOT OUT THE
CAR?

MM; I PUT IT IN A BROWN ENVELOPE BEFORE I GOT IN THE VEHICLE.

JS; OK. AND WHEN YOU GOT, WHEN YOU PARKED THE VEHICLE AND WENT
INSIDE YOU HAD IT INSIDE THE ENVELOPE?

MM; THAT'S CORRECT.

JS; AND YOU PULLED IT OUT OF THE, ONCE YOU WERE INSIDE THE
BUSINESS DID YOU PULL IT OUT OF THE ENVELOPE? YOU JUST SHOOK
YOUR HEAD NO...

MM; I DON'T....

JS; LIKE YOU DON'T REMEMBER RIGHT? OK.

MM; I DON'T KNOW.

JS; OK. DID YOU EVER SEE HER WITH ANY TYPE OF WEAPON, I GUESS IS
WHAT I'M ASKING?

MM; I DON'T KNOW.

JS; IS THERE ANYTHING ELSE YOU CAN REMEMBER ABOUT THE WHOLE INCIDENT? BASICALLY WHAT ALL THIS WAS OVER WAS OVER CUSTODY OF A GRANDCHILD RIGHT? WHAT THE PROBLEM BETWEEN YOU AND HER WAS CORRECT?

MM; RIGHT.

JS; OK AND YOU SAID YES. UH, WELL I'M NOW GOING TO END THIS STATEMENT. IT'S 7:28 P.M. BEFORE I DO, EARLIER I ADVISED YOU OF YOUR MIRANDA RIGHTS CORRECT?

MM; YES YOU DID.

JS; AND YOU UNDERSTOOD THOSE RIGHT?

MM; YES I DID.

JS; OK. AND I'VE NOT THREATENED YOU IN ANY WAY HAVE I?

MM; NO.

JS; COERCED YOU IN ANY WAY OR ANYTHING LIKE THAT RIGHT?

MM; NO.

JS; OK. IT'S NOW 7:28 P.M. NOW ENDING THIS STATEMENT.

I have read this statement consisting of 6 page(s) and the facts contained herein are true and correct.

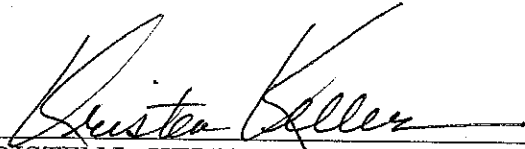
TIME STATEMENT FINISHED: ___ a.m. 7:28 p.m.

Witnesses: _____

Signature of Person Giving Voluntary Statement

CERTIFICATE OF SERVICE

I, Kristen L. Keller, Chief Deputy Prosecuting Attorney for Raleigh County, West Virginia, do hereby certify that a true copy of the foregoing *Appellee's Brief* has been served upon the defendant herein by MAILING a true copy thereof to his attorney, Greg Ayers, Attorney at Law, PO Box 2827, Charleston, West Virginia 25330, by United States Mail, postage prepaid, this 14th day of July, 2005.



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