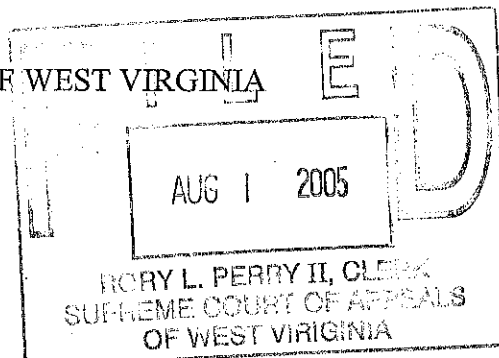


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Appellee,

v.

MARVIN MILLS,

Appellant.

Supreme Court No. 32551

Circuit Court No. 99-F-213-H  
(Raleigh)

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APPELLANT'S REPLY BRIEF

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Wendy A. Campbell  
Assistant Public Defender  
W.Va. Bar No. 8111

Gregory L. Ayers  
Deputy Public Defender  
W.Va. Bar No. 7824

Office of the Public Defender  
Kanawha County  
Charleston, WV 25330  
(304) 558-2323

Counsel for Appellant

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## REPLY ARGUMENT

### **I. The Trial Court Abused Its Discretion By Refusing To Strike Two Jurors For Cause Who Stated They Could Not Consider A Recommendation Of Mercy, Violating Mills' Right To A Trial By A Fair And Impartial Jury.**

The prosecutor contends that jurors Haga and George did not express a clear bias against considering mercy. (Appellee's Brief, 15). To support this contention, the prosecutor suggests that they were confused or did not understand the questions because the juror questionnaire "misstates applicable law and failed to address the only legitimate test of jurors' qualifications in this regard." (Appellee's Brief, 11-13). The State's argument is not supported by the record.

The questions in the questionnaire (44-46) relating to mercy are unambiguous, were approved by the trial court, and not once did jurors Haga or George indicate that they did not understand them. While the juror questionnaire did not ask if the jurors were "unalterably opposed to making a recommendation of mercy," per State v. Williams, 172 W.Va. 295, 305 S.E.2d 251 (1983), question 46 asked the same question more simply, in understandable English: "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?" Both jurors Haga and George responded, "No," indicating they would not, which satisfies the Williams test.

As stated in Williams, "[t]he purpose of such questioning should be to discover whether any of the prospective jurors hold any personal, moral, religious or philosophical beliefs, convictions, scruples or opinions which would preclude them from considering the imposition of a particular penalty in the event of conviction regardless of the

circumstances of the case.” Id. at 307, 305 S.E.2d at 264. Jurors Haga and George confirmed their initial expression of bias when defense counsel followed up with individual voir dire. Noticeably absent from the State’s brief is hardly any mention of jurors Haga’s and George’s following responses clearly indicating an unwillingness to consider mercy. Juror Haga said:

\* \* \*

MR. SULLIVAN [defense counsel]: Right. I’m just trying to make sure that -- that, as far as you’re concerned, if somebody is convicted of first degree murder, it’s your opinion that they should never get out of jail again; is that your opinion?

PROSPECTIVE JUROR HAGA: I think I feel that way, yes.

MR. SULLIVAN: Okay. Now, why do you feel that way?

PROSPECTIVE JUROR HAGA: Well, if it has been proven that they have done what they’ve done, then I just think they need to -- to do what needs to be done.

MR. SULLIVAN: Which is stay in prison for the rest of their life?

PROSPECTIVE JUROR HAGA: Right.

\* \* \*

(Tr. 107).

Juror George went even further in clearly expressing her bias against considering mercy for someone convicted of first degree murder. When questioned individually she clearly and unequivocally explained her answer on the questionnaire that she could not consider mercy:

MR. SULLIVAN: Okay. There was questions on here about what would happen if the defendant was convicted of first degree murder, that the jury would have to decide whether he would be -- ever be eligible for parole. And you understood that question when you wrote it, right --

PROSPECTIVE JUROR GEORGE: Yeah.

(Tr. 177-178).

This answer clearly shows that the questions placed on the questionnaire were unambiguous and understood by this juror. She went on:

MR. SULLIVAN: -- when you read it, right? And your answer to it was that you could not consider a mercy recommendation. You could not consider that Mr. Mills ever be eligible for parole if he was found guilty of first degree murder?

PROSPECTIVE JUROR GEORGE: Well, that's the way I feel. If a person is guilty of first degree murder, then they should do the time.

MR. SULLIVAN: Okay. And the time that we're talking about is the rest of their life in prison without ever being released; correct?

PROSPECTIVE JUROR GEORGE: The victim gave her life.

MR. SULLIVAN: And so you feel that you couldn't consider the possibility that the person would be eligible for parole after 15 years?

PROSPECTIVE JUROR GEORGE: Well, if there were circumstances that would give that right, but just a malicious killing no. I couldn't consider it.

MR. SULLIVAN: So for a malicious -- for a malicious killing, you could not consider it?

PROSPECTIVE JUROR GEORGE: No.

\* \* \*

(Tr. 178-79).

Both of these jurors made very clear statements "reflecting a disqualifying prejudice or bias," O'Dell v. Miller, 211 W.Va. 285, 565 S.E.2d 407 (2002), i.e., an unwillingness to consider mercy; and not only were these clear statements made once, but twice. The jury questionnaire was very clear about the different options available to the jury with respect to first degree murder. No juror claimed to misunderstand the

questions, and even juror George said she understood the question. These jurors did not equivocate when questioned individually; if anything they became more adamant in their position. These clear statements reflect a bias. Because of that bias, these jurors are disqualified as a matter of law, and they cannot be rehabilitated by “subsequent questioning, later retractions, or promises to be fair.” Syl. Pt. 5, O’Dell v. Miller, 211 W.Va. 285, 565 S.E.2d 407 (2002). The fact that they subsequently said they could follow the court’s instructions and consider mercy does not remove their clearly expressed bias on that issue. See State v. Griffin, 211 W.Va. 508, 511, 566 S.E.2d 645, 648 (2002) (“The prior decisions of this Court have made clear that “[a] prospective juror who admits a prejudice to an issue central to the outcome of the case cannot negate the prejudice merely by stating [he or she] would follow the law as instructed by the court.” Syl. pt. 2, in part, Davis v. Wang, 184 W.Va. 222, 400 S.E.2d 230 (1990) [*overruled on other grounds*, Pleasants v. Alliance Corp., 209 W.Va. 39, 543 S.E.2d 320 (2000)]).

The State also argues that the trial judge properly based his decisions concerning these prospective jurors on demeanor, in addition to words. However, this Court has held that “trial courts should endeavor to secure those jurors who are not only free from but who are not even subject to any well-grounded suspicion of any bias or prejudice.” Id. at 289 (citing State v. Dephenbaugh, 106 W.Va. 289, 145 S.E. 634 (1928); State v. Siers, 103 W.Va. 30, 136 S.E. 503 (1927)). Jurors Haga and George initially made it very clear that they could not consider a mercy recommendation if Mills was convicted of first degree murder.

As this Court said in O’Dell, “A trial judge should err on the side of caution by dismissing, rather than trying to rehabilitate, biased jurors because, in reality, the judge is

the only person in the courtroom whose primary concern, indeed primary duty, is to ensure the selection of a fair and impartial jury.” *Id.* at 290. (citing *Walls v. Kim*, 250 Ga.App.259, 260, 549 S.E.2d 797, 799 (2001)). Here, the trial judge abused his discretion by failing to dismiss for cause the two prospective jurors who indicated on two separate occasions they could not consider a mercy recommendation.

**II. The Prosecutor’s Closing Argument, That Because West Virginia Doesn’t Have the Death Penalty Mills “Necessarily Is Getting Mercy,” Improperly Misstated West Virginia Law And Unfairly Prejudiced The Jury’s Critical Decision Whether To Recommend Mercy.**

The prosecutor attempts to justify her comments concerning the death penalty by arguing that she was merely responding to defense counsel’s “eye for an eye” argument with respect to mercy, and defense counsel’s request for a “fair and honest verdict.” (Tr. 859) (Appellee’s Brief, 19). The prosecutor’s argument should be rejected because (1) defense counsel never said anything to warrant mention of the death penalty; (2) the prosecutor’s comments were a misstatement of West Virginia law; and (3) they invited the jury to decide the mercy issue based upon the fact West Virginia does not have a death penalty, an improper consideration under our law.

First, defense counsel argued for mercy within the parameters of West Virginia law by stating that even though Mills did not show the victim mercy, the jury had a duty to fairly consider the issue of mercy. (Tr. 857-59). The prosecutor’s comments regarding the death penalty were not a justifiable response to this argument by defense counsel.

What the prosecutor essentially argues is that any time defense counsel asks the jury to fairly consider and grant the accused mercy, even though he obviously showed the victim no mercy, that somehow justifies comments like those made here, that fairness

would require the death penalty. That is an argument outside the bounds of West Virginia law, which requires that the jury fairly and impartially consider whether to make a recommendation of mercy even though the accused is guilty of first degree murder, a purposeful, malicious, and premeditated homicide. See W.Va. Code Sec. 62-3-15 (1994) (2000 Repl. Vol.). If this Court adopts the prosecutor's argument, it will effectively allow West Virginia prosecutors to talk about the fact our state does not have the death penalty in virtually every first degree murder case in which the defense asks the jury to fairly consider the issue of mercy.

Moreover, the prosecutor did not just mention the death penalty; she made a clear misstatement of West Virginia law, i.e., that because West Virginia does not have the death penalty, "[Mills] necessarily is getting mercy." (Tr. 860). "Mercy" under West Virginia law is not life in prison, but life in prison with parole eligibility after fifteen (15) years. W.Va. Code Sec. 62-3-15 (1994) (2000 Repl. Vol.).

This Court has held that a prosecutor's misstatement of the law in closing argument is reversible error when the defendant is prejudiced. Syl. Pt. 1, State v. Starr, 158 W.Va. 905, 216 S.E.2d 242 (1975); Syl. Pt. 2, State v. Oxier, 175 W.Va. 760, 338 S.E.2d 360 (1985). In this instance, Mills was prejudiced. The prosecutor's misstatement of the law invited the jury, in deciding the mercy issue, to improperly conclude that because West Virginia does not have a death penalty, Mills "necessarily is getting mercy." (Tr.860). It is common knowledge the death penalty is a very emotional and controversial issue for many people. In this case, a juror who believed West Virginia should have the death penalty would likely agree with the prosecutor's improper argument and forego any further consideration of mercy. To permit the prosecutor to

make this improper, unfairly prejudicial argument to the jury that the jury has no right to consider, because it is a misstatement of law, clearly “encourage[s] jurors to act with an improper motive.” State v. Swofford, II, 206 W.Va. 390, 397, 524 S.E.2d 906, 913 (1999) (Justice Starcher, concurring).

In addition, the trial court sanctioned the prosecutor’s powerful death penalty argument by overruling defense counsel’s two objections to it. (Tr. 860, 862). This further increased the likelihood the jury viewed the prosecutor’s improper argument to be valid and appropriate to consider in deciding the issue of mercy.

The State argues that Mills would have preferred an “impotent and disengaged prosecution willing to violate its duty to vigorously pursue the State’s case.” (Appellee’s Brief, 21). What Mills is entitled to and deserves is a fair trial. The United States Supreme Court has held that while the prosecutor “may strike hard blows, [s] he is not at liberty to strike foul ones. It is as much [her] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935). Bringing up the death penalty is striking a foul blow because it interjects a controversial and emotional issue that has no place in the jury’s consideration of mercy under West Virginia law. The prosecutor’s argument improperly interfered with the jury’s unfettered discretion to grant mercy as it clearly sent a message to the jury that any further consideration of mercy is unnecessary and unwarranted. Mills was unfairly prejudiced and deserves a new trial.

**III. The Trial Court Denied Mills His Right To A Fair Trial By A Fair And Impartial Jury When It Denied His Motion For A Mistrial And Refused To Individually Voir Dire The Jurors**

**On the Impact Of The Media's Interference With The Jury View After The Jurors' Pictures Were Published On The Front Page Of The Local Paper Along With An Article Containing Prejudicial Information Concerning The Case.**

The State incorrectly characterizes the jury's exposure to the press/media during the jury view as a brief, insignificant, harmless event in a four-day trial. (Appellee's Brief, 29-30). The jury view, along with the newspaper article showing a picture of the jurors and containing prejudicial information regarding Mills' previous trial and conviction, is neither insignificant nor harmless. It is quite the opposite. First, the jurors are taken to the crime scene and are surrounded by members of the press on the street. As described by defense counsel, the jury view became a "walking parade" in which "members of the press were walking stride-in stride with the jurors, indistinguishable from the pack of people... [t]hey weren't separated in any way." (Tr. 352-53). That made them acutely aware, if not intimidated, of the public interest in this high profile murder case and their ultimate decision as the triers of fact.

The jury's over exposure to and coverage by the press necessarily interfered with how the jurors viewed and thought about the case. As defense counsel argued, "[t]here is no way that the jurors can experience that without it affecting their ability to look at the evidence in this trial." (Tr. 354). The trial court's ruling, that "[t]here has been no showing in my mind of prejudice, no showing of taint on the jury. . .," (Tr. 356), simply ignores the obvious adverse effects on a jury of exposure to intense media coverage and publicity. Because this situation created a strong probability of prejudice to Mills' right to a fair trial, the trial court erred in denying defense counsel's motion for a mistrial.

This strong probability of prejudice due to press/media coverage was further enhanced the next day when a picture of the jurors was published above the crease in the

local newspaper with an article stating that “[a] jury convicted Mills in 2000, but the State Supreme Court overturned the decision and remanded the case back to circuit court due to technicalities.” Defense Exhibit 3 (November 6, 2003, Register-Herald newspaper article). The prosecutor asserts there was no evidence any member of the jury saw the newspaper photograph. (Appellee’s Brief, 28). However, that photograph was visible in any area of the town where the newspaper was sold. Also, while the picture was of the back of the jurors, the identity of the jurors is still discernible to those in the community who knew them. Given all the media interest in the case, including the high profile photograph and article, it is quite possible one of the jurors could have seen the picture and accompanying article containing the above prejudicial information. This could have further affected the jurors’ perception of the case and ultimate verdict. Under these circumstances, the trial court erred in denying defense counsel’s request to voir dire the jury.

Significantly, the State fails to address this Court’s pertinent decision in State v. Williams, 172 W.Va. 295, 305 S.E.2d 251 (1983), discussed in Appellant’s Brief, at 31, which requires the trial court to voir dire jurors when publicity during the trial “raises serious questions of possible prejudice.” Id. at Syl. Pt. 5. After noting that the defendant has the burden to show “that the jurors have in fact been exposed to such publicity [,]” the Court stated that in many instances it will be impossible for the defendant to make this showing without a voir dire of the jurors:

Since in many instances it would be impossible for a defendant to show actual juror exposure to prejudicial publicity without a direct inquiry of the jurors themselves, we believe the proper method of making such a showing is a poll of the jury at the time the motion for a mistrial is made. (footnote omitted).

Id. at 305, 305 S.E.2d at 261. Accord State v. Moss, 180 W.Va. 363, 367 n.2, 376 S.E.2d 569, 573 n.2 (1988).

As shown above, the intense media coverage of the jury view, coupled with a photograph of the jurors and an article containing prejudicial information about the case, raised serious questions of possible prejudice. Williams required the trial court to grant defense counsel's request to voir dire the jury. The trial court's refusal compromised Mills' state and federal due process rights to a fair trial by a fair and impartial jury.

**IV. The Trial Court Erred In Allowing The State To Introduce Prejudicial Testimony Of Mills' Character In Its Case-In-Chief In Violation Of W.Va.R.Evid. 404(a) (1).**

Mills believes the State's arguments are adequately addressed in his initial brief and that further reply is unnecessary.

**RELIEF REQUESTED**

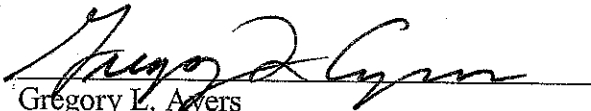
Mills respectfully requests that his conviction and sentence be reversed and his case remanded to the circuit court for a new trial.

Respectfully submitted,

MARVIN STEVE MILLS  
By Counsel



Wendy A. Campbell  
Assistant Public Defender  
W.Va. Bar No. 8111  
Kanawha County Public Defender Office  
P.O. Box 2827  
Charleston, WV 25330  
(304) 558-2323

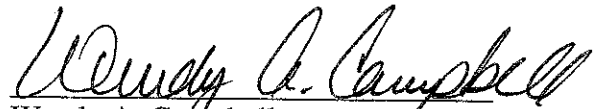


Gregory E. Ayers  
Deputy Public Defender  
W.Va. Bar No. 7824  
Kanawha County Public Defender Office  
P.O. Box 2827  
Charleston, WV 25330  
(304) 558-2323

Counsel For Appellant

**CERTIFICATE OF SERVICE**

I, Wendy A. Campbell, hereby certify that on the 1<sup>st</sup> day of August, 2005, I mailed a copy of the foregoing Appellant's Reply Brief to Kristen L. Keller, Chief Deputy Prosecuting Attorney, Raleigh County, P.O. Box 907, Beckley, West Virginia 25801.

  
Wendy A. Campbell  
Counsel for Appellant