No. 34860 – *State of West Virginia v. Billy Ray McLaughlin*

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Ketchum, J., dissenting:

I dissent from the majority's opinion for two reasons.

First, the statute pertaining to the verdict and sentencing in murder cases, *W.Va. Code*, 62-3-15 [1965], does not provide for bifurcated trials. The statute speaks of one trial by one jury. It simply says that if a person is indicted for murder, the jury must (1) decide if the person "is guilty of murder of the first degree or second degree," and (2) if the person is adjudged guilty of murder of the first degree, "the jury may, in their discretion, recommend mercy[.]" There is nothing in the statute clearly saying a trial must be split into two parts, or worse, that the two parts can be tried by two separate juries.

I concede that the statute could be read – if it is constitutionally necessary for a fair trial – to allow bifurcated trials. And that brings me to the second reason for my dissent: I don't believe bifurcation gives criminal defendants a fair trial.

When this Court adopted discretionary bifurcation of the penalty and mercy phases of murder trials in 1996,[1] it adopted an idyllic academic dream into our jurisprudence. The problem is that, in reality, it created a procedural nightmare that allows the State to

[1]*See* Syllabus Point 4, *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996) ("A trial court has discretionary authority to bifurcate a trial and sentencing in any case where a jury is required to make a finding as to mercy.").

introduce egregious, formerly inadmissible, "bad character" evidence at the penalty phase of the trial.

In a unitary trial, it is the option of the defendant as to whether evidence of the defendant's good character will be introduced at trial. If the defendant introduces character evidence, then the door is opened to the prosecutor to rebut that evidence with something to show the defendant's bad character.

The ivy tower theory behind bifurcation is that it would help defendants in their quest to introduce evidence of good character. What happens in reality is that prosecutors encourage and seek bifurcation, and then use that bifurcated system to *initiate* the introduction of character evidence – before the defendant ever opens the door by introducing any character evidence. What I believe bifurcation has really done is assist West Virginia's prosecutors in their quest to bury defendants in irrelevant, misleading evidence of the defendant's bad character. Prosecutors proffer witnesses who know the defendant kicked a dog 20 years ago, or saw the defendant jaywalk on the way to the courthouse, or heard the defendant say an unkind word to his mother, and then argue to the jurors, "Is this the kind of person we ever want walking our streets?"

Unitary trials worked without a hitch until *LaRock* was decided in 1996. Since then, I believe first degree murder trials have become a legal nightmare. The facts of the case *sub judice* (and the cases mentioned in footnote 2) are typical examples. I have tried many unitary murder trials as a lawyer, and I never saw the procedural or evidentiary

problems like we are now experiencing. The jury that heard the facts surrounding the crime determined mercy, not another jury many years later.

My practical experience taught me that one juror could shift the verdict from a lifetime-in-prison murder verdict, to a verdict of murder with mercy where the defendant had a shot at release in the future. Under a bifurcated system, where separate juries are adjudicating guilt and the penalty, that leverage by the defendant is largely lost. The second, penalty-phase jury begins knowing the defendant is guilty of murder, and the only question they must unanimously resolve is whether the defendant is entitled to mercy. The defendant begins this second phase essentially judicially stripped of his or her constitutional "benefit of the doubt," which is exactly the opposite what is supposed to occur under *W.Va. Code*, 62-3-15.

In *LaRock* and its progeny, the Court obviously was trying to ensure that defendants got a fair trial. The problem is, I think the bifurcated process that resulted is pretty much ensuring that defendants *aren't* getting a fair trial.

Accordingly, I respectfully dissent.