A Door Closed: The Right to Full Appellate Review of Sentences of Life Imprisonment without Parole in West Virginia

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A DOOR CLOSED: THE RIGHT TO FULL APPELLATE REVIEW OF SENTENCES OF LIFE IMPRISONMENT WITHOUT PAROLE IN WEST VIRGINIA

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Suppose that two years ago a murder occurred in a small town in West Virginia. Bear within. the local police apprehended Robert Smith, a twenty-two year old local resident. The murder grabbed local news media attention instantly and became the biggest headline in all the surrounding media outlets. After two years of news stories and rumors about the murder swirling around the town, the local judge set the date for trial, denying the defendant’s motion to change the venue. As a result of the small town nature of the case, the jury pool quickly became limited as most people in the surrounding area had prior knowledge of the facts of the case. Eventually, two jurors asked to be dismissed,

1 This hypothetical is intended to illustrate the objective of this Note. The hypothetical is based on a real-life case; however, the name and facts have been changed and altered slightly for dramatic effect.
believing that they could not be impartial. These requests were granted, leaving no alternates to take the jurors’ places. During the trial, rumors swept through town that some of the defendant’s friends had threatened a juror and that the victim’s family were acquaintances of another member of the jury. This eventually resulted in yet another rumor that a third juror wished to be excused but was denied by the judge because no more alternates were available.

During the trial, experts testified about whether the defendant could have possessed the requisite mens rea to commit murder after prolonged periods of drug and alcohol abuse, including intoxication on the night of the murder. After both sides rested, the jury deliberated for a few hours before reappearing in the courtroom to deliver its verdict. The jury found the defendant guilty of first degree murder. During the sentencing phase, the prosecutor pushed for “life without mercy,” which imposes life imprisonment with no opportunity for parole. The jury granted the prosecutor’s request and the judge sentenced young Robert to life imprisonment without parole at the age of twenty-two.

For a criminal defendant in any state other than West Virginia receiving the harshest sentence allowed at the trial court level would not be absolute. Most states provide the right to an automatic full review on the merits of the trial court’s decisions. But, in West Virginia, Robert Smith has no right to full appellate review of his trial record.

For any possibility of review, Robert Smith can only petition the West Virginia Supreme Court of Appeals for a discretionary review of his record. This review does not guarantee that the court will agree to hear his appeal and write an opinion affirming or overruling the decisions made at the trial level.

West Virginia is the only state in the nation that does not require mandatory full review of its stiffest penalty by its only appellate court. This Note will make the argument that this practice be changed, and, in doing so, its author recognizes that although the Note focuses on a traditionally unsympathetic class of citizens, preserving the constitutionally sacred notions of due process and a fair trial are surely paramount to the integrity of our judicial system. This Note will first address the current state of law in West Virginia regarding review of life imprisonment cases, including a written order of the justices of the West Virginia Supreme Court of Appeals. The second section of the Note will compare West Virginia to other states in the nation by examining appellate casel-

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3. Russell Cook, Esq., In Pursuit of Justice: The Right to Appeal A Life Sentence Or Its Equivalent in West Virginia, W. VA. LAWYER, Oct. 2002, at 19 (West Virginia does not have mandatory review of sentences of life imprisonment. Virginia requires mandatory review only in death penalty cases, the state’s stiffest penalty. For purposes of this Note, the use of “stiffest penalty” does not exclude life imprisonment without parole, as some states have both life imprisonment without parole and the death penalty. Additionally, Virginia’s appellate system provides for two levels of state review, whereas West Virginia’s only provides one level of appellate review at the state level.).
oads, appellate structure, and the differences in appellate review by constitutional requirements. The third section of the Note will discuss how and why West Virginia should adopt a mandatory full review on the merits of every sentence imposing life imprisonment without parole handed down in the state. In doing so, the Note will explore the most viable outlets for adopting mandatory review: adoption of a statute, constitutional revision, or promulgation of judicial rules. This section will also include analysis of the final report from a special commission authorized by the West Virginia Supreme Court of Appeals to make recommendations on the future of the West Virginia judiciary as well as potential outcomes from a new commission headed by former Supreme Court Justice Sandra Day O’Connor created in the summer of 2009. Lastly, the Note will conclude by summarizing the implications of the previously presented information and making a recommendation to the court and the legislature of West Virginia about how to ensure fair and just trials in our most serious criminal cases.

I. THE CURRENT STATE OF LAW AND OPINION IN WEST VIRGINIA

A. The Law

Any person in the state of West Virginia subject to the final judgment of a circuit court, in either a civil or criminal matter, may appeal to the West Virginia Supreme Court of Appeals to have the judgment reviewed. The West Virginia Constitution provides that the Supreme Court of Appeals “shall have appellate jurisdiction in criminal cases, where there has been a conviction for a felony or misdemeanor in a circuit court.” While the state constitution acknowledges that the Supreme Court of Appeals has appellate jurisdiction over criminal convictions, the constitution does not expressly provide for a mandatory appeal or a full review on the merits of any criminal case by the state’s only appellate court. As a result, the justices of the Supreme Court of Appeals have interpreted the constitution to mean that the court has discretionary jurisdiction in criminal and civil cases.

Upon receiving a petition for an appeal, the Supreme Court has three options for disposing of the petition: refuse and dispose of the case by a memorandum order, which ends the appeal; grant, which allows both parties to fully brief and argue the case before the court followed by a written opinion; or allow the case to be presented ex parte on the court’s oral motion docket, which permits appellant’s counsel an oral opportunity to persuade the court to advance the case to a full briefing, argument, and written opinion status.

5 W. VA. CONST. art. VIII, § 3.
In 2008, the West Virginia Supreme Court of Appeals disposed of 4102 petitions for appeal.8 Of the 4102 petitions, 2880 were refused without a written opinion.9 Only 128 cases were fully briefed, argued, and decided with a written opinion.10 Sixty percent, or 2411, of the petitions filed were workers’ compensation cases.11 Civil cases made up thirteen percent or 308 petitions, and criminal cases amounted to just seven percent or 159 petitions.12

Unlike every other state in the country, West Virginia’s Constitution does not provide for mandatory full review of decisions rendering the state’s harshest penalty: life imprisonment without parole. Nor does the state have any other mechanism — statute or court rule — to provide such review. According to the National Center for State Courts, West Virginia and New Hampshire were previously the only two states to not have mandatory appellate review of any kind.13 However, New Hampshire’s Supreme Court recently promulgated rules providing that all criminal convictions are subject to mandatory review on the merits.14 Thus, West Virginia is left as the only state in the country without mandatory full appellate review of its harshest criminal sentence.

B. The Court’s Opinion

In a recent order denying a petitioner’s request for appellate review, the West Virginia Supreme Court of Appeals addressed the issue of whether individuals convicted and sentenced to life imprisonment without parole should have the right to a mandatory appeal and decision on the merits of their case. In February 2003, a jury convicted Tracy Haggerty of first degree murder and sentenced him to life in prison without the possibility of parole for the stabbing murder of his Texas Roadhouse co-worker.15 At the time of the murder, Haggerty was only twenty-one years old.16 In his appeal, Haggerty set forth four reasons why he did not receive a fair trial in the Nicholas County Circuit Court.17 In addition, Haggerty pleaded that it would be a violation of due

8 Id.
9 Id.
10 Id.
11 Id. at 3.
12 Id.
13 COURT STATISTICS PROJECT, NAT’L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS 164 (2007), available at http://www.ncsconline.org/D_Research/esp/CSP_Main_Page.html. (Mandatory jurisdiction cases for New Hampshire cannot be separately identified and are not reported in Table 12. Rather, mandatory petitions are reported with discretionary petitions.) [hereinafter COURT STATISTICS PROJECT: STATE COURT].
14 N.H. SUP. CT. R. 3 & 7.
17 Brief of Petitioner-Appellant, supra note 15.
process of law to condemn him to prison for the rest of his natural life without full appellate review of whether he received a fair trial in the circuit court. In response to Tracy Haggerty’s motion to grant an appeal of his sentence, the West Virginia Supreme Court of Appeals issued a brief written order explaining its stance on mandatory review of criminal convictions. Justices Starcher and Albright filed a dissent that starkly contrasted with the majority view.

1. The Dissent

In the dissenting opinion, Justices Starcher and Albright’s rationale was based upon the premise that all criminals convicted of life imprisonment should be afforded the right to have their appeal heard and reviewed on its merits by the court in order to assure that the defendants received a fair trial. The justices addressed the reasoning of the majority — that it would be unfair to carve out a special review policy for defendants sentenced to life imprisonment and that the Fourth Circuit has upheld the present system. First, in regard to unfairness to carve out a review only for defendants sentenced to life imprisonment, the dissent looked to the 1991 civil case of Garnes v. Fleming Landfill, Inc. In Garnes, the Supreme Court stated that “upon petition, this court will review all punitive damage awards.” The court reasoned that, in civil cases, according to the United States Supreme Court case of Pacific Mutual Life Insurance Co. v. Haslip, excessively harsh punitive damages in a civil case could result in a denial of Fourteenth Amendment due process. Thus, West Virginia had a duty to adopt the standards set forth by our nation’s highest court in order to ensure uniformity of laws among the states. Regardless of whether the West Virginia Supreme Court of Appeals uniformly implements its decision in Garnes, the court’s decision in Garnes, a civil case, when compared to its more restrictive position on criminal defendants who receive the state’s harshest criminal penalty, creates an unsettling quandary: Could it be said that the court assigns a greater constitutional value to civil damages than the right of a criminal defendant to a fair trial? Moreover, the Garnes decision carves out a special review for cases involving civil punitive damages to ensure the requirements of due process are met, yet, in the Haggerty order, the court majority refused to carve out a special review for cases involv-

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18 Id.
19 See generally Haggerty, No. 061089.
20 Id. at 1.
21 See id. at 1–2 (citing Billotti v. Legursky, 975 F.2d 113, 115 (4th Cir. 1992)).
23 Id. at 900.
24 Id. at 903 (citing Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991)).
25 Id. at 905.
ing the possibility of wrongfully imprisoning individuals for the rest of their lives with no assurance that they were provided due process at the trial level.

The second prong of the dissent’s rationale addressed the Fourth Circuit’s approval of the current system from an inherent fairness perspective. In 1992, the Fourth Circuit held that because West Virginia’s process did not “offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,” discretion review of sentences of life imprisonment without parole is constitutional. In the Haggerty order, the dissent stated that “judicial notions of due process are not frozen in time,” and that the court should reconsider the question of whether West Virginia’s discretionary review in sentences of life imprisonment without parole violates due process requirements. The dissent declared “that the right to a mandatory full appeal in these cases is an integral part of every other state’s criminal justice system is convincing evidence that it is essential to ensure that adjudications of guilt are correct.” The dissent then explained that relying upon the Fourth Circuit as a back stop against unfair trials and erroneous convictions is an ineffective method of appellate review, especially considering that the Fourth Circuit has the lowest criminal reversal rate of any appellate court in the country.

In addition to refuting the majority’s primary contentions, the Haggerty dissent articulated five principle reasons for the need of mandatory review of life imprisonment cases. First, without a full review on the merits, criminal convictions in West Virginia have no “stamp of approval” that the defendants received a fair and just trial in the circuit court. A case graphically illustrating the significant implications of this lack of appellate review is Flippo v. West Virginia. In Flippo, the defendant sought to suppress evidence illegally obtained at the crime scene, but his motion was denied. After conviction for the murder of his wife, the defendant sought an appeal at the West Virginia Supreme Court of Appeals, which was denied in accordance with the court’s discretionary review for criminal appeals. Flippo appealed to the Supreme Court of the United States, where the Court found that the evidence was improperly admitted at the trial, and the case was remanded. The dissent in the Haggerty

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26 Billotti, 975 F.2d at 115 (quoting Medina v. California, 505 U.S. 437, 444 (1992)).
27 Id.
28 Haggerty, No. 061089 at 2.
29 Id.
30 Id. at 3.
31 Id. at 4 (citing Marc. M. Arkin, Rethinking the Constitutional Right to a Criminal Appeal, 39 UCLA L. REV. 503, 514–15 (1992)).
33 Id. at 12.
34 Id. at 13.
35 Id. at 14.
order expressed dismay at the fact that the last court to examine the full record in Flippo was the trial court of Fayette County.\textsuperscript{36}

Second, full appellate review allows for interested members of the bar and the public to gain necessary information and contribute to important issues in the case.\textsuperscript{37} This allows the state to further develop its jurisprudence by gaining knowledge from experts from the West Virginia bar and \textit{amicus curiae} briefs. When appeal petitions are not granted, the public has no ability to acquire this information through the full briefing and argument process.\textsuperscript{38} As a result, the court is then denying itself valuable input from other knowledgeable individuals in the legal community when important issues are presented by cases involving life imprisonment without parole.\textsuperscript{39}

Third, the dissent believed that opinion writing forces the court to recognize and articulate its reasoning in order to better formulate the state’s criminal jurisprudence.\textsuperscript{40} The dissent asserted that it is the court’s responsibility to reflect through written opinions on the court system itself and the current state of society that is causing such severe criminal sentences.\textsuperscript{41}

Fourth, by fully reviewing all petitions for appeal in life without parole cases, the court can better determine when there has been ineffective assistance of counsel in preparing the petition.\textsuperscript{42} When appropriate, the court would appoint new counsel and allow the defendant the chance to present a well-written petition that clearly articulates the issues presented from the trial below.\textsuperscript{43}

Lastly, the dissent focused on the extreme consequences of errors at trial and the legitimate concern created by studies over the past two decades. One such study, although not specifically cited in the dissent, revealed that sixty-eight percent of death sentences were erroneous.\textsuperscript{44} The study, conducted by

\textsuperscript{36} Haggerty, No. 061089 at 6. The defendant in \textit{State v. Youngblood} took the same route to the United States Supreme Court after his appeal before the West Virginia Supreme Court of Appeals was denied. In \textit{Youngblood}, the West Virginia court completely overlooked the federal law at issue regarding the improper withholding of evidence beneficial to the defendant. In \textit{Youngblood}, that evidence bolstered the defendant’s primary defense and acted as favorable impeachment evidence against the prosecution’s witnesses. On remand, the West Virginia Supreme Court of Appeals found that the failure of the state to turn over the evidence to the defendant resulted in a violation of his due process rights and remanded the case for a new trial. \textit{State v. Youngblood}, 547 U.S. 867 (2006), \textit{remanded to 650 S.E.2d 119 (W. Va. 2007)}.

\textsuperscript{37} Haggerty, No. 061089 at 6.

\textsuperscript{38} \textit{Id.} at 6–7.

\textsuperscript{39} \textit{Id.}

\textsuperscript{40} \textit{Id.} at 7.

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} \textit{Id.}

\textsuperscript{43} \textit{Id.}

\textsuperscript{44} \textit{Id.; see generally} Marcia Coyle, Sixty-Eight Percent Error Rate Found in Death Case, \textit{The Nat’l L.J.}, June 9, 2000, \textit{available at} http://www.law.com/jsp/article.jsp?id=900005519489. The study’s author, James Liebman of Columbia University, stated that the purpose of the study was to examine the frequency of error in our current system of justice. In so doing, Liebman discovered
James Liebman of Columbia University, defined “serious error” as that which “substantially undermines the reliability of the guilt finding or death sentence imposed at trial” and “that led a court to overturn the conviction, the sentence or both.” The dissent pleaded that, with the knowledge that trials can be unfair or convictions completely erroneous, the court cannot take a position that criminals convicted and sentenced to life imprisonment do not deserve a full appellate review of their trial records.46

2. The Majority

The opinion for the majority asserts that the court’s discretionary review procedure in cases of life imprisonment without parole is constitutionally sound.47 The majority articulated five reasons why the court’s current system of discretionary review should remain unchanged. First, the West Virginia Supreme Court of Appeals has previously affirmed the constitutionality of discretionary review involving cases of life imprisonment without parole.48 The majority used a historical argument to support its declaration that discretionary review is constitutional by pointing to both West Virginia precedent49 as well as United States Supreme Court precedent.50 This argument reflects the position that the United States Supreme Court has taken for over a century — there is no constitutional right to an appeal because none existed at common law.51 Of course, this view is fundamentally at odds with those of dissenting Justices Starcher and Albright sitting on the West Virginia Supreme Court, who countered that “judicial notions of due process are not frozen in time.”52 This is also reflected in the views of United States Supreme Court Justices Rutledge, Murphy, and Douglas who believe that “[i]t is the very nature of a free society to advance in its standards of what is deemed reasonable and right.”53

The majority’s second reason in the Haggerty order is that the Fourth Circuit’s affirmance of the constitutionality of West Virginia’s discretionary review in cases of life imprisonment without parole confirmed the practice’s

that error was epidemic in both state and federal courts. The article indicated that in cases demanded “for retrials, 82 percent of convicted capital defendants received new sentences that were other than death — including 7 percent who were found innocent.”

45 See generally Coyle, supra note 44.
46 Haggerty, No. 061089 at 7.
47 Id. at 8.
48 Id. (citing Billotti v. Dobrill, 394 S.E.2d 32 (W. Va. 1990)).
49 Dobrill, 394 S.E.2d 36–40.
50 McKane v. Durston, 153 U.S. 684 (1894).
51 Id. at 687; see also Dobrill, 394 S.E.2d at 36.
52 Haggerty, No. 061089 at 2.
constitutionality. The West Virginia Supreme Court majority cited to Billotti v. Legursky, in which the Fourth Circuit rejected the petitioner’s argument that his due process rights were violated as a result of the West Virginia Supreme Court’s discretionary review standards. According to the Fourth Circuit, state courts must merely “satisfy the basic demands of due process.”

Third, the majority reasoned that it would be unfair to establish a special review policy only for defendants sentenced to life imprisonment without parole. The majority suggested that special treatment for this category of appeals would discriminate against cases in all other categories of appeals in which appellants believe their petitions should be fully examined on the merits.

Fourth, the majority reasoned that the court’s current system of discretionary review needs no adjustment. The court pointed to the low number of West Virginia cases overturned by federal courts and the lack of habeas petitions granted to West Virginia defendants.

Finally, the majority contended that the majority of states provide for discretionary review by their highest courts, which comports with the system used in West Virginia. The majority then went on to cite state constitutions and appellate court rules to advance its argument.

However, by merely looking at states’ highest courts rather than focusing upon whether actual full appellate review is available, the majority in the Haggerty order appears to elevate form over substance. The majority focused on the courts of last resort for all fifty states, while neglecting the fact that all but eleven states in the nation have intermediate appellate courts. Therefore, while it may be said that the majority of states’ courts of last resort have only discretionary review for most crimes, the majority in Haggerty fails to acknowledge that the intermediate appellate courts generally provide the mandatory review of criminal convictions involving life imprisonment without parole sentences. The majority’s misapplication of facts makes its opinion in the Haggerty order disingenuous because, of the eleven states with no intermediate ap-

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54 Haggerty, No. 061089 at 9.
55 Billotti, 975 F.2d 113.
56 Id. at 116.
57 Haggerty, No. 061089 at 10.
58 Id.
59 Id. at 11.
60 Id. The low number of West Virginia cases overturned by federal courts could be a result of the fact that federal review on appeal is strictly limited to federal constitutional errors and does not address state common law, statutory, or constitutional issues. See generally Murdock v. City of Memphis, 87 U.S. 590 (1874).
61 Haggerty, No. 061089 at 12.
62 Id.
63 COURT STATISTICS PROJECT: STATE COURT, supra note 13, at 165–69.
64 See id. at 16–67.
pelleter court, West Virginia is now the only state that does not provide mandatory full review of its harshest criminal sentence, life imprisonment without parole. Thus, West Virginia is the only state in the nation that fails to provide mandatory full review of such cases on the merits at some level.

II. COMPARATIVE ANALYSIS OF WEST VIRGINIA’S APPELLATE STRUCTURE AND CASELOAD

Why is West Virginia so anomalous with regard to mandatory appeals of its harshest sentence, life imprisonment without parole? This section will attempt to explain why West Virginia treats criminal appeals so differently than other states with similar caseloads, appellate structures, and constitutions. By reviewing these three factors, it is hoped that sufficient questions may be raised about the current system that will provoke either the West Virginia Supreme Court of Appeals or the West Virginia Legislature to consider changing the current system in order to ensure full appellate review for all cases involving life imprisonment without parole.

A. Caseloads

The West Virginia Supreme Court frequently makes reference to handling the highest caseload of all similarly situated appellate courts in the country, and this characterization is not entirely inaccurate. Caseloads are generally defined based on the number of petitions filed, not reviewed, in each state’s appellate courts. However, when comparing West Virginia’s caseload across all fifty states, it was ranked twenty-sixth in 2006, falling right in the middle of the states. In fact, West Virginia’s caseload is comparable to such large, highly populated states as South Carolina, Indiana, Tennessee, Massachusetts, and North Carolina. Between the years 1997 and 2006, West Virginia’s caseload increased seventeen percent, ranking it eighth in the country in percentage change in caseloads. While West Virginia’s caseload increased, the average caseload change for other courts decreased by four percent. As a result of the caseload increase, West Virginia’s caseload grew to more than one thousand cases higher than Nevada’s caseload, the second ranked state without an inter-

65 See id.
66 See id.
67 2008 STATISTICAL REPORT, supra note 7, at 6.
68 See COURT STATISTICS PROJECT: APPELLATE, supra note 2, at 64.
69 See id. at 63.
70 Id. In 2006, caseloads for South Carolina, Indiana, Tennessee, Massachusetts, and North Carolina were as follows, respectively: 3054, 3680, 3474, 3635, and 3344. Id.
71 Id. at 64.
72 Id.
mediate appellate court, by over 1000 cases.\textsuperscript{73} In fact, West Virginia’s caseload is equivalent to the combined caseloads of Vermont, Montana, Wyoming, South Dakota, Maine, and Rhode Island.\textsuperscript{74}

West Virginia’s largest number of petitions come from workers’ compensation appeals,\textsuperscript{75} making up on average over thirty-five percent of the court’s granted petitions for appeal since 1999.\textsuperscript{76} Of the petitions for appeal received by the court, workers’ compensation petitions amounted to sixty percent in 2008.\textsuperscript{77} Comparatively, civil cases made up thirteen percent of the total petitions received, and criminal cases added up to just seven percent.\textsuperscript{78} Of those petitions received, the court granted thirty-two percent of civil petitions and only twelve percent of criminal petitions.\textsuperscript{79} Although workers’ compensation petitions make up a substantial majority of petitions filed, they account for a small amount of the actual workload handled by the court based on the number of petitions actually granted, twenty-three percent in 2008 and only eight percent in 2006.\textsuperscript{80}

Because this Note’s primary focus is on the need for mandatory review of appeals for sentences of life imprisonment, it is also important to compare the number of criminal cases in West Virginia to the number of criminal cases in other states.\textsuperscript{81} According to the National Center for State Courts, West Virginia has one of the lowest numbers of felony cases in the country at 6265.\textsuperscript{82} West Virginia’s total incoming felony caseload per 100,000 adults after population-

\begin{itemize}
  \item \textsuperscript{73} \textit{COURT STATISTICS PROJECT: APPELLATE}, supra note 2, at 63.
  \item \textsuperscript{74} See id.
  \item \textsuperscript{75} 2008 \textit{STATISTICAL REPORT}, supra note 7, at 2. As a result of the workers’ compensation legislation that was enacted in the 1990s, the court began experiencing a substantial increase in petitions. See \textit{SUPREME COURT OF APPEALS OF W. VA., 1998 STATISTICAL REPORT} 1 (1998), available at http://www.state.wv.us/wvscu/clerk/statistics/1998StatRept.pdf [hereinafter 1998 \textit{STATISTICAL REPORT}]. In order to best manage its caseload, a number of alternatives have been discussed in the legislature and the Commission on the Future of the West Virginia Judicial System. Among the options discussed are creating an intermediate appellate court or establishing another forum for workers’ compensation cases. Should either of these alternatives be used, ample time and resources may be freed to better evaluate the other appellate petitions sent to the court, particularly cases involving life sentences without parole. See \textit{COMM’N ON THE FUTURE OF THE W. VA. JUDICIAL SYS., SUPREME COURT OF APPEALS OF W. VA., FINAL REPORT 25–27} (1998), available at http://www.state.wv.us/wvscu/future/report/contents.htm.
  \item \textsuperscript{76} 2008 \textit{STATISTICAL REPORT}, supra note 7, at 12 (The percentage is found by adding percentage granted of workers’ compensation appeals during the years 1999–2007 divided by the number of years (9 years)).
  \item \textsuperscript{77} \textit{Id.} at 3, 5.
  \item \textsuperscript{78} \textit{Id.} at 3.
  \item \textsuperscript{79} \textit{Id.} at 5.
  \item \textsuperscript{80} \textit{Id.}
  \item \textsuperscript{82} \textit{COURT STATISTICS PROJECT: APPELLATE}, supra note 2, at 42.
\end{itemize}
adjustment is 446, higher only than that of Hawaii (408) and Massachusetts (113).\footnote{Id.}

Additionally, after review of the West Virginia Supreme Court of Appeals’ petitions, motions docket, and argument docket, the court received only four petitions for review from individuals sentenced to life imprisonment without parole in 2006 and only four petitions for review in 2007.\footnote{See West Virginia Supreme Court Docket and Calendar, 2005 through 2007, http://www.state.wv.us/wvsca/calendar/calendar.htm (last visited Sept. 4, 2009). In 2006, the court received petitions for the following cases in which the defendant was sentenced to life without the possibility of parole: State v. Delgado, State v. Gosolow, State v. Nelson, and State v. Thomas. In 2007, the court received petitions in the following such cases: State v. Perry, State v. Walker, State v. Demere, and State v. Spears. Id.} Of those four petitions, the court only granted full review one time.\footnote{See Supreme Court of Appeals of West Virginia, Sept. 20, 2006, Motion Docket, http://www.state.wv.us/wvsca/calendar/sept20_06md.htm, in which the court granted review in the case of State v. Nelson. See also State v. Nelson, 655 S.E.2d 73 (W. Va. 2007).} Notwithstanding the court’s high overall number of petitions for appeal, with such a low rate of felonies and an even smaller number of petitions from those sentenced to life imprisonment without parole, it may easily be argued that it would not be too great an imposition upon the Supreme Court of Appeals if mandatory full review was required for the rare case involving a sentence of life imprisonment without parole, especially considering the seriousness of the crime and the liberty interest at stake for the defendant.

B. Appellate Structure

According to the National Center for State Courts, “[t]he primary function of state appellate courts is to review lower court determinations” in order to correct irregularities and provide consistent direction on the law.\footnote{COURT STATISTICS PROJECT: APPELLATE, supra note 2, at 62.} Generally, intermediate appellate courts provide the first stage of appellate review, with the court of last resort acting as a second level of review and having the final say on state law interpretation.\footnote{Id.} In states without intermediate appellate courts, like West Virginia, the courts of last resort provide the only review of trial court decisions.\footnote{Id.}

As a result of increased caseloads nationwide beginning in the mid-1900s, states began creating intermediate appellate courts to help better manage demanding caseloads.\footnote{2008 STATISTICAL REPORT, supra note 7, at 6.} In 1950, only thirteen states had intermediate appellate courts.\footnote{Id.} By 2001, thirty-nine states had created intermediate appellate courts.\footnote{Id.}
In the past ten years, Mississippi, Nebraska, and Utah created intermediate appellate courts.\textsuperscript{92} All three states have lower total caseloads than West Virginia, with Mississippi at 2051; Nebraska managing 1715; and Utah dealing with 1644 in 2006.\textsuperscript{93} In fact, many states with significantly smaller total caseloads have intermediate appellate courts. The question remains as to why West Virginia has failed to institute such a court.

Generally, both state intermediate appellate courts and courts of last resort have mandatory and/or discretionary appellate review, depending on the type of case. Mandatory appellate review cases are defined as “those in which an appellate court is required to hear the merits of the case.”\textsuperscript{94} Conversely, courts with discretionary review are permitted to choose whether to grant full appellate review or not.\textsuperscript{95} Five states have one hundred percent mandatory review — Nevada, Delaware, Wyoming, Iowa, and North Dakota.\textsuperscript{96} Excepting the five states just mentioned, thirty-nine states have a combination of discretionary and mandatory review with mandatory petitions making up over half of their caseload.\textsuperscript{97} The remaining six states, Louisiana, Michigan, California, Virginia, New Hampshire, and West Virginia, have discretionary caseloads that make up over fifty percent of their total caseloads.\textsuperscript{98}

West Virginia is the only state in the country to have only discretionary review in all cases, including criminal cases resulting in the state’s harshest penalty, life imprisonment without parole.\textsuperscript{99} Accordingly, one could conclude from the practice of every other state that “judicial notions of due process are not frozen in time,” and that West Virginia has fallen behind what appears to be an accepted legal standard of requiring mandatory full review of all cases which threaten the permanent deprivation of liberty.

C. Constitutional Requirements

The current majority of the West Virginia Supreme Court of Appeals consistently cites the state’s constitution as the reason for not having mandatory review of life sentences without parole. The West Virginia Constitution states that the Supreme Court of Appeals “shall have appellate jurisdiction in cases involving personal freedom . . . [and] criminal cases, where there has been a

\begin{itemize}
  \item \textsuperscript{91} Id.
  \item \textsuperscript{92} Id.
  \item \textsuperscript{93} COURT STATISTICS PROJECT: APPELLATE, supra note 2, at 63.
  \item \textsuperscript{94} Id. at 62.
  \item \textsuperscript{95} Id.
  \item \textsuperscript{96} Id. at 63.
  \item \textsuperscript{97} Id.
  \item \textsuperscript{98} Id. See COURT STATISTICS PROJECT: STATE COURT, supra note 13, at 45 (New Hampshire’s caseload is no longer 100 percent discretionary.).
  \item \textsuperscript{99} COURT STATISTICS PROJECT: APPELLATE, supra note 2, at 63; N.H. SUP. CT. R. 3 & 7.
\end{itemize}
conviction for a felony or misdemeanor in a circuit court."\textsuperscript{100} There is an absence of any reference to mandatory jurisdiction, and it is because of this absence that the majority of justices of the West Virginia Supreme Court of Appeals have interpreted the constitution to mean that all appeals are subject to discretionary review. In support of this position, the court also cites its opinion in \textit{State v. Legg}, which held that "one convicted of a criminal offense is not entitled to a writ of error as a matter of right."\textsuperscript{101} In \textit{Legg}, the court held that since the constitution does not "define the procedure for appeal from a circuit court to this court," the authority is left to the legislature to exercise by creating a statute.\textsuperscript{102} Because no statute or case law requires mandatory full review of criminal sentences, the court concluded that "the right of appeal or review is not essential to due process, provided due process has already been accorded in the tribunal of first instance."\textsuperscript{103}

The court’s reasoning in \textit{Legg} is troublesome because it uses a flawed circular logic to arrive at its conclusion: unless mandatory full review is granted, how can a court actually determine that in every instance "due process has already been accorded" in the lower court? Moreover, the decision disregards the court’s own rule-making authority and finds the \textit{inaction} of the West Virginia Legislature to be dispositive of a critical constitutional question. It can be argued that regardless of whether the legislature has spoken on the issue, the court has a duty to protect constitutional notions of due process and, with respect to life without parole sentences, should permit at least one appeal of right for those whose freedom is permanently at stake. Further, by ceding its powers to the legislature, the court in \textit{Legg} also diminishes its constitutional authority to adopt rules of appellate procedure requiring mandatory review of sentences of life imprisonment.

However, after the \textit{Legg} decision, the legislature passed the 1974 Judicial Reorganization Amendment, which essentially stripped the legislature of its ability to create statutes that affect the court’s rule-making authority granted by the West Virginia Constitution in Article 8, Section 3.\textsuperscript{104} The Amendment has been most recently interpreted in \textit{Louk v. Cormier}, where the court held that an amendment to the Medical Professional Liability Act violated constitutional separation of powers because "the Rule-Making Clause of Article VIII, § 3 grants th[e] Court the authority to promulgate rules concerning non-unanimous jury verdicts."\textsuperscript{105} In the \textit{Louk} decision, the court held that "in order to ascertain whether there is an infringement on th[e] Court’s rule-making authority, [the

\textsuperscript{100} W. VA. CONST. art. VIII, § 3.
\textsuperscript{101} State v. Legg, 151 S.E.2d 215, 218 (W. Va. 1966).
\textsuperscript{102} Id.
\textsuperscript{103} Id. at 219.
\textsuperscript{104} W. VA. CONST. art. VIII, § 3.
\textsuperscript{105} Louk v. Cormier, 622 S.E.2d 788, 794 (W. Va. 2005).
court] must first determine whether the statute is substantive or procedural."  

If the statute is found to be substantive, it will not be found unconstitutional for violating the court’s rule-making authority. However, if the statute is found to be procedural, the court may rightfully find it unconstitutional.

The West Virginia Constitution provides that “the court shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process practice and procedure, which shall have the force and effect of law.” In fact, most states that have adopted mandatory full appellate review of death penalty or life imprisonment without parole cases have done so through either rules of appellate procedure or statute. The most likely reason for adopting rules or statutes dealing with such a subject is to avoid the often difficult and long process of amending a state constitution. For example, New Hampshire recently enacted a rule providing for mandatory full review for all criminal cases. The New Hampshire Supreme Court’s newest rules of appellate procedure provide that “a mandatory appeal shall be accepted by the supreme court for review on the merits.” Mandatory review will be granted in every case except those that include a post-conviction review proceeding, a collateral challenge to any conviction or sentence, a sentence modification or suspension proceeding, divorce or separation proceedings, and landlord/tenant actions, among a few others.

West Virginia should follow other states’ examples of appellate rules and statutes when considering whether to adopt a rule requiring mandatory full review of sentences of life imprisonment without parole. And, should West Virginia choose to emulate models from other states, good examples generally exist in states that are statistically similar in caseload, appellate structure, and population. Thus, West Virginia should reasonably look to Kansas, Arkansas, Indiana, Vermont, Montana, Delaware, and Nebraska as states that have similar court systems, population sizes, and caseloads.

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106  Id. at 798.
107  Id.
108  Id.; see infra pp. 25–26 and note 136.
109  Legg, 151 S.E.2d at 219.
111  Id.
112  Id.
113  Id.
114  COURT STATISTICS PROJECT: APPELLATE, supra note 2, at 63.
III. HOW AND WHY WEST VIRGINIA SHOULD CHANGE

As a state, the people of West Virginia value their freedom so much that it is our state motto — Montani Semper Liberi — which means “Mountaineers are Always Free.” It is ironic then that our judicial system seems to be so far out of step with the norms of the rest of the nation on the issue of mandatory full review of sentences imposing life imprisonment. Fortunately, with the knowledge, expertise, and tools available to both the members of the West Virginia Supreme Court of Appeals and the West Virginia Legislature, the current lack of mandatory appeal could be easily addressed. The first part of this section will focus on the recommendations of the Commission on the Future of the West Virginia Judiciary, while the second section will focus on the various methods of adopting a mandatory full review of all life imprisonment without parole sentences, including examples from other states’ statutes, constitutions, and appellate rules.

A. The Recommendations of the Commission on the Future of the West Virginia Judiciary

Recognizing a need for change, modernization, and improvement in West Virginia’s judicial system, the Supreme Court of Appeals established a thirty-eight member commission to review court procedures and related issues and then provide recommendations. During Margaret Workman’s tenure as Chief Justice of the Court of Appeals, the court authorized the formation of the Commission on the Future of the West Virginia Judiciary to evaluate the legal system in West Virginia and make suggestions for improvement of the state judiciary. The Commission was comprised of legislators, attorneys, probation officers, legal aid providers, judges, and private citizens. As part of its charge, the Commission examined overall access to justice; expedition and timeliness; and equality, fairness, and integrity in the court system. In its report, the Commission identified various issues it believed needed to be addressed and made various recommendations to correct any inadequacies.

The most important recommendation of the Commission for this Note is that which addressed access to justice, specifically the accessibility and efficien-

117 Id. at ii–iii.
118 Id. at i.
119 Id.
cy of the appellate process.\textsuperscript{120} The Commission recognized that the Supreme Court of Appeals handles a vast amount of appellate petitions every year, much more than other states without intermediate appellate courts.\textsuperscript{121} According to the Annual Statistical Report for 1997 provided by the Office of the Clerk, the number of appeals was projected to grow, particularly in the fields of civil litigation and workers’ compensation cases.\textsuperscript{122} Moreover, according to the National Center for State Courts, the number of petitions to the Court of Appeals has already grown seventeen percent between 1997 and 2006.\textsuperscript{123} Despite the rise in petitions for appeal, however, the number of petitions granted has consistently decreased from fifty-two percent in 2000 to just seventeen percent in 2007.\textsuperscript{124} This means that the court is choosing to grant fewer appeals and is writing fewer opinions than it has in over twenty-five years.\textsuperscript{125}

Based on these statistics, the commission made several recommendations to the court. First, the commission advised that “the Legislature should create an Intermediate Court of Appeals as soon as possible.”\textsuperscript{126} In so doing, the commission commented that no other state without an intermediate appellate court operates with such a high caseload.\textsuperscript{127} The commission noted that creating an intermediate appellate court would provide the Court of Appeals the necessary time to better evaluate and consider cases, as well as write more opinions on matters of law.\textsuperscript{128} In fact, the state constitution clearly provides that the legislature may establish an intermediate appellate court, which implies that the framers of the state constitution anticipated the creation of an intermediate court of appeals.\textsuperscript{129}

In recommending an intermediate appellate court, the commission suggested parameters for its establishment. The commission recommended that the new court be located in close proximity to the Court of Appeals to alleviate some administrative costs.\textsuperscript{130} Further, the commission recommended that the new court be comprised of two, three-judge panels, elected in a state-wide election, just as the justices of the Court of Appeals.\textsuperscript{131} The commission suggested that for every case heard, a written opinion be issued.\textsuperscript{132} And, most importantly,

\textsuperscript{120} Id. at 25.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} COURT STATISTICS PROJECT: APPELLATE, supra note 2, at 64.
\textsuperscript{124} 2008 STATISTICAL REPORT, supra note 7, at 12.
\textsuperscript{125} See id.; see also 1998 STATISTICAL REPORT, supra note 75, at 5.
\textsuperscript{126} FINAL REPORT, supra note 116, at 26.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} W. VA. CONST. art. VIII, § 3.
\textsuperscript{130} FINAL REPORT, supra note 116, at 26.
\textsuperscript{131} Id. at 27.
\textsuperscript{132} Id.
for the purposes of this Note, the Commission recommended that “each litigant be guaranteed one appeal-of-right either at the Intermediate Court of Appeals or at the Supreme Court.”133

Following the release of the commission’s report, the Supreme Court of Appeals took measures to implement many of the recommendations. Some of the adopted suggestions include an overhaul of the family court system,134 new security measures in the courts,135 adoptions of more consistent circuit court rules,136 and more educational outreach programs to West Virginia youths.137 Notwithstanding the action taken on all of these commission initiatives, the Legislature has chosen not to create an intermediate appellate court and the court has chosen not to establish a guaranteed appeal of right for any litigants, including those criminals sentenced to life imprisonment without parole.

Due to concern about the efficacy of West Virginia’s judicial system and a desire to ensure the standards of justice are being met, Governor Joe Manchin III established a commission by executive order in April 2009.138 The Independent Commission on Judicial Reform is comprised of a nine member panel that includes Mary McQueen, president of the National Center for State Courts; former state Justice John McCuskey; retired Kanawha Circuit Judge Andy MacQueen; former gubernatorial aides, Thomas Heywood and Carte Goodwin; Sandra Chapman, State Bar President; Marvin Masters, prominent Charleston trial lawyer; and both Dean Joyce McConnell of West Virginia University’s law school and Associate Dean Caprice Roberts.139 Former Supreme Court Justice Sandra Day O’Connor is serving as the honorary chair of the study.140 The governor has requested that the new commission review the possibility of an intermediate appellate court, a chancery court to handle business matters, merit-based appointment rather than election of state court judges, and

133 Id.
139 Id.
140 Id.
campaign finance reform for judicial elections. The governor has requested that a report be submitted by November 15, 2009.

B. Options for Establishing Full Review for those Sentenced to Life Imprisonment without Parole

Despite the current position of the court on mandatory full appellate review, actions could be taken by either the court or the legislature to establish mandatory full appellate review for those sentenced to life imprisonment without parole.

1. Legislative Enactment

The first option would be for the legislature to enact a statute mandating full appellate review in cases of life imprisonment without parole. In the past, the legislature has enacted legislation declaring when appellate relief in the Supreme Court of Appeals lies. However, there are major risks with employing the legislative process for this type of statute.

The most prominent risk with legislation relating to establishing mandatory full review of all life without parole sentences would be to surmount obstacles created by the 1974 Judicial Reorganization Amendment and the court’s current interpretation of its implications. According to Louk v. Cormier, the legislature is free to enact substantive law that “creates, defines, and regulates primary rights.” Conversely, the legislature may not enact procedural law that pertains “to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.” Most importantly, the decision in Louk states that

if a statute purports to regulate a matter that is within the exclusive control of the judiciary under a specific grant of constitutional authority, then it makes no difference whether the right created by the statute is characterized as substantive or procedural. In neither case could the statute prevail over conflicting provisions of a court rule implementing the constitutional authority in question.

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141 Id.
142 Id.
144 Louk, 622 S.E.2d at 798 n.13.
145 Id. at 798–99 n.13.
146 Id. at 799 n.13.
Despite the language put forth in the Louk opinion, an argument may still be made that, in creating legislation that would guarantee a right to full appellate review, the legislature would be writing a substantive law rather than procedural law. Such a statute would create a right for criminal defendants, and the procedure for carrying it out would be left to the court, so as to not impose upon the court’s rule-making authority. This argument may not succeed, but it should be made considering the inaction of the court to adopt its own rule and the need to protect criminal defendants’ due process rights.

If the Supreme Court of Appeals feels that the contents of the statute have violated the separation of powers or encroached on its rule-making authority, the court may oppose the legislation providing for mandatory appeals. The West Virginia Legislature has historically been deferential to the Supreme Court when considering matters involving the court’s own jurisdiction, perhaps rightfully so considering the procedural and fiscal effects such legislation would have on the court. Thus, the legislation may be abandoned at the start due to a lack of support from the court. So, should members of the House or Senate hope to pass legislation creating mandatory appellate review on the merits in every case of life imprisonment without parole, those legislators will need to employ both determination and savvy in dealing with all three branches of government involved in the passage of the bill.

Additionally, if the before-mentioned hurdles may be surmounted, the legislation must also surpass the regular legislative process. Any legislation concerning mandatory full appellate review will be subject to amendment and must be passed by both houses of the legislature before being approved by the governor. This requires passage by at least one legislative committee in each chamber and then approval by majority vote in the full body of both the Senate and House of Delegates. After passage, any legislation must then survive the Governor’s veto pen. Clearly, this is a political process and, with 134 members in the West Virginia Legislature, the likelihood of agreement on such an issue is remote. Indeed, if the bill is disfavored by House or Senate legislative leadership to begin with, the legislation can be blocked from consideration, which effectively kills even a discussion or vote on the matter. Thus, the complexity and deliberative nature of the legislative process will make any effort to implement mandatory appellate review challenging.

Moreover, as mentioned earlier, it is evident that the issue of mandatory full appellate review from a sentence of life imprisonment without parole focuses attention on providing relief to a traditionally unsympathetic class of individuals. While compelling examples of injustice as the result of the lack of appellate review can easily be found to make an argument for change, political realities are that elected officials prefer to be “tough on crime,” whether fair or not, and this would likely weigh heavily on any debate considering the merits of mandatory full review of appeals. Passage of such legislation would require the support of key legislative leadership and possibly other groups, such as the West Virginia State Bar, that will serve as advocates for the proposition that upholding constitutional due process and the right to a fair trial are, in fact, essential
elements to being “tough on crime,” because they preserve the integrity of the judicial system.

Legislatures often look to the experience of other states when crafting legislation, and West Virginia is no different. For examples of well-written legislation that addresses the need for full mandatory appellate review in cases of life without parole, the legislature should look to Kansas, Montana, Nebraska, and Rhode Island.\(^{147}\) Although Kansas and Nebraska have intermediate appellate courts, both states are similarly ranked in terms of population, and Kansas has a very similar appellate caseload compared to West Virginia. Additionally, Montana and Rhode Island are both states without intermediate appellate courts. For instance, Montana’s statute states that

> [a]n appeal may be taken by the defendant only from a final judgment of conviction and orders after judgment which affect the substantial rights of the defendant. Upon appeal from a judgment, the court may review the verdict or decision and any alleged error objected to which involves the merits or necessarily affects the judgment.\(^{148}\)

The Montana commentary commission then proceeds to explain that this statute is intended to provide the defendant with the necessary machinery to obtain relief from an illegal conviction. It is the purpose of [this subsection] to provide one complete, full and adequate review by enlarging the power of the reviewing court. This is accomplished by allowing the court to decide all questions raised by the entire proceeding, below, including an appeal from a motion for a new trial.\(^{149}\)

Additionally, the Nebraska statute enumerates the extent of the review to be undertaken by the court when it receives a petition for appeal in homicide cases. The Nebraska statute says:

> The Supreme Court shall within a reasonable time . . . review and analyze all cases involving criminal homicide . . . . Such review and analysis shall examine (a) the facts including mitigating and aggravating circumstances, (b) the charges filed, (c) the crime for which defendant was convicted, and (d) the sentence


\(^{149}\) Id.
imposed. Such review shall be updated as new criminal homicide cases occur.\footnote{Neb. Rev. Stat. § 29-2521.02.}

Lastly, the Rhode Island statute is very straight-forward in its language and its intent. It states:

The defendant shall have the right to appeal a sentence of life imprisonment without parole to the supreme court of the state in accordance with the applicable rules of court. In considering an appeal of a sentence, the court, after review of the transcript of the proceedings below, may, in its discretion, ratify the imposition of the sentence of life imprisonment without parole or may reduce the sentence to life imprisonment.\footnote{R.I. Gen. Laws § 12-19.2-5.}

2. Constitutional Revision

It has been suggested that the only way for West Virginia to create a mandatory full appellate review would be through the adoption of a constitutional amendment. The process involved in amending West Virginia’s constitution is perhaps even more daunting than the legislative process.

Enacting a constitutional amendment is similar to passing legislation but with additional steps. A legislator must first sponsor a bill to change the constitution. A bill introduced to amend the state constitution to provide for mandatory appeals must be referred to the Constitutional Revision Committee of the legislature.\footnote{W. Va. Const. art. XIV, § 2.} If the bill is placed on the agenda (subject to the committee chairman’s discretion) and passes the Constitutional Revision Committee, then it proceeds to the Judiciary Committee.\footnote{Id.} If the chairman of this committee agrees to place the legislation on the agenda, it must pass the committee by majority vote. At this point, the legislation then proceeds to the floor of the House or Senate, where two-thirds of members of both houses must then vote in favor of the amendment.\footnote{Id.} If it is approved, the legislation must then be passed in the same fashion by the other legislative chamber. If the proposed amendment passes both houses, it is then subject to a public referendum.\footnote{See W. Va. House of Delegates R. 77, available at http://www.legis.state.wv.us/House/House_Rules/House_RulesFrm.htm.} This involves placing the amendment on the ballot for approval during the next general election, where it must be approved by the voters by a simple majority to become an
amendment. Finally, if challenged, the West Virginia Supreme Court of Appeals must hold that the new amendment is constitutionally sound.

Should this be the option that West Virginia decides to pursue, there are a few examples of state constitutions which provide for mandatory full review of sentences where life imprisonment without parole is imposed. Delaware’s constitution is a notable example, both because of its content and because of the similarity of Delaware’s court system to West Virginia’s. Delaware’s constitution provides that

[the accused if adjudged guilty of the offense charged against him or her, shall have the right at any time within the space of three calendar months next after sentence is pronounced to an appeal to the Supreme Court. . . . On such appeal the Supreme Court shall, with all convenient speed, review the evidence adduced in the cause in the court below, as well as the other proceedings therein, and the law applicable thereto, and give final judgment accordingly, either affirming or reversing the judgment below. 157

An amendment to the West Virginia Constitution similar to the provisions of the Delaware Constitution would ensure that all individuals sentenced to life imprisonment without parole would have the opportunity to have their appeal heard and their record fully reviewed expeditiously.

3. Adoption of a New Rule of Appellate Procedure by the Supreme Court of Appeals

Of all the options available to create mandatory review, this option seems to be the most viable, if supported by the members of the court. The West Virginia Constitution charges the Supreme Court of Appeals with the power “to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process practice and procedure, which shall have the force and effect of law.” 158 Information regarding the adoption of new rules of appellate procedure is generally less known, but may be obtained upon request from the Clerk of the West Virginia Supreme Court of Appeals. The West Virginia Supreme Court accepts requests for rule changes and promulgation from sponsoring organizations or the general public through the Clerk’s Office. 159 Upon receipt, and in the court’s discretion, the

156 Id.
157 DEL. CONST. art. V, § 8.
158 W. VA. CONST. art. VIII, §3.
159 E-mail from Rory Perry, Clerk of the W. Va. Supreme Court of Appeals (Jan. 30, 2009 13:19 EST) (on file with author).
proposal undergoes review and may then be open for public comment. After the public comment period ends, the court then reviews the proposal a second time and then issues an order accepting or rejecting the proposed rule. In fact, more than half the states that provide for mandatory review have done so through adoption of rules of appellate procedure.

If the Supreme Court of Appeals were to adopt such a rule, a few states provide good examples of well-articulated procedures. Arkansas, Indiana, Vermont, and New Hampshire have adopted rules of appellate procedure that provide for mandatory full review of sentences of life imprisonment without parole. In addition, these states have similar populations, caseloads, or appellate structures. For instance, Indiana’s Rule 4A provides that the “the Supreme Court shall have mandatory and exclusive jurisdiction over . . . [c]riminal appeals in which a sentence of death or life imprisonment without parole is imposed.” Upon receiving an appeal of a criminal conviction, “[t]he court may revise a sentence . . . if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” The Arkansas rule, adopted in 1995, states that “[t]he Supreme Court need only review those matters briefed and argued by the appellant, provided that where either a sentence for life imprisonment or death was imposed, the Supreme Court shall review the entire record for errors prejudicial to the right of the appellant.” The rules of appellate procedure in Vermont provide that in the instance of a sentence of life imprisonment, no appeal need be taken. Rather, the defendant has an appeal of right, and the record and transcript is to be forwarded to the court upon final judgment where it will be reviewed on its merits for any implications of error at the trial level. All of these rules of appellate procedure cited above were adopted by the respective supreme courts within the last eighteen years. This is evidence that notions of due process and the rights of criminal defendants across the country have evolved and changed over time and that state courts are responding accordingly.

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160 Id.
161 Id.
163 Id.
164 Id.
165 Ind. R. App. P. 4A.
166 Id. R. App. P. 7B.
169 Id.
170 Harden v. West Virginia, 679 S.E.2d 628 (W. Va. 2009), a recent decision of the West Virginia Supreme Court that overturned a battered wife’s murder conviction, provides hope that the court will be more willing to review sentences of life without parole and address inconsistencies.
C. Why West Virginia Should Adopt a Rule of Mandatory Full Review in Cases of Life Imprisonment Without Parole

West Virginia needs to keep up with national standards and adopt its own version of mandatory full appellate review for individuals sentenced to life imprisonment without parole. In the past, the West Virginia Supreme Court has emphasized the importance of uniformity among decisions of state and federal courts.\textsuperscript{171} The United States Supreme Court emphasized this very issue in \textit{Griffin v. Illinois}, when it said that “[b]oth equal protection and due process emphasize the central aim of our entire judicial system — all people charged with a crime must, so far as the law is concerned, ‘stand on an equality before the bar of justice in every American court.’”\textsuperscript{172} In \textit{Griffin}, the Court held that a defendant has the right to have a transcript of the trial record provided for review during appeal, regardless of the right of an indigent defendant to pay.\textsuperscript{173} In reasoning why the right to a transcript is so important during an appeal, the Court noted the importance of appellate review to ensure “correct adjudication of guilt or innocence.”\textsuperscript{174} The Court made it clear that denying adequate appellate review would result in some individuals losing their “life, liberty, or property because of unjust convictions.”\textsuperscript{175} As Justice Brennan eloquently stated in his dissent in \textit{Jones v. Barnes},

there are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property, and the reversal rate of criminal convictions on mandatory appeals in the state courts, while not overwhelming, is certainly high enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction.\textsuperscript{176}

West Virginia has chosen to ignore this unacceptable risk of erroneous conviction by allowing too many circuit court decisions to go unchecked.\textsuperscript{177} In

\textsuperscript{171} Garnes, 413 S.E.2d at 905.
\textsuperscript{172} 351 U.S. 12, 17 (1956).
\textsuperscript{173} \textit{Id.} at 19.
\textsuperscript{174} \textit{Id.} at 18.
\textsuperscript{175} \textit{Id.} at 19.
\textsuperscript{177} See, e.g., Flippo, 528 U.S. 11; see also Youngblood, 547 U.S. 867 (2006).
West Virginia, criminal defendants sentenced to life without parole do not have adequate appellate review. This is clearly evidenced by the fact that of the six petitions for review in 2007, the West Virginia Supreme Court only agreed to fully review one. The other five people sentenced to spend the rest of their lives in prison have not been guaranteed that their trials were conducted in accordance with due process or that their sentences were just. A wrongful conviction or an improperly imposed sentence not only infringes upon the life, liberty, and property of the criminal defendant, but it denies the defendant’s family of their son, daughter, father, mother, sister, or brother. And, in the context of seeking justice for what is surely a terrible crime, there is the tragic proposition that the failure to provide constitutional protections to the defendant creates another victim of that crime. Regardless of the facts of any particular case, in this most critical of instances, West Virginia must commit to zealously protecting our constitutional rights, due process, and a fair trial. Only then can justice truly be achieved.

IV. CONCLUSION

West Virginia needs mandatory full appellate review of all sentences of life imprisonment without parole for two reasons. First, the people serving these sentences deserve the right to have their appeal reviewed on the merits to ensure fairness, justice, uniformity, and peace of mind of the defendant and their families. Second, evolving notions of due process require that West Virginia not fall behind accepted legal standards of every other state.

By examining the current restrictive position of the West Virginia Supreme Court of Appeals, this Note critiques the flawed rationale of the majority’s stance while also drawing attention to the disturbing realities of why mandatory full appellate review is needed in cases like Flippo.¹⁷⁸ In comparing West Virginia’s caseload, appellate structure, and constitutional requirements to other states, it is revealed that West Virginia is in a shrinking minority of states operating with only one appellate court. Reviewing other aspects of West Virginia’s caseload showed that despite an increasing number of petitions filed, the court is also increasingly granting fewer petitions full review. Moreover, constitutional analysis revealed that the West Virginia Supreme Court of Appeals has the most readily available power to change the current practice and enact mandatory full appellate review through its own rule-making powers.

Lastly, despite enacting numerous measures recommended by the Commission on the Future of the West Virginia Judiciary, the court has failed to act on arguably the most substantive and important recommendation — guaranteed full appeal of review. Although overcoming hurdles to address this issue exist in all three options to remedy the problem — statute, constitutional

¹⁷⁸ See generally Flippo, 528 U.S. 11.
amendment, and promulgation of a new court rule — three viable remedies are available to either the court or the West Virginia Legislature.

It is not only a legal but also a moral imperative that either of these two bodies act to remedy a judicial infirmity that has been duly recognized and corrected in every other state. The failure to provide the full measure of due process to defendants sentenced to life imprisonment without parole harms not only those defendants and their families, but most importantly harms the judicial system itself and its ability to authoritatively mete out its most severe punishments in the name of justice. West Virginians deserve a judiciary that values due process and ensures that all people threatened with permanent deprivation of life, liberty, and property are guaranteed fair trials and just sentences. Hopefully for all involved in these most critical of cases, this will occur soon.

_Linnsey Evick*

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