

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

SHANE SHELTON,)

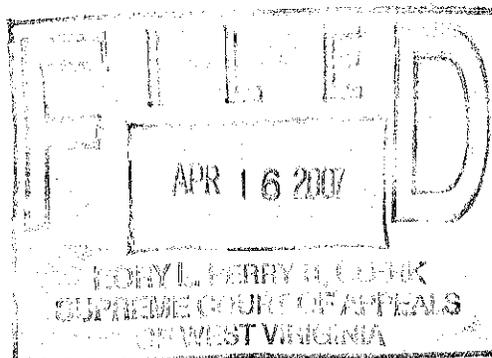
Petitioner,)

v.)

Case No. 00C-23

HOWARD PAINTER, WARDEN)
OF MOUNT OLIVE)

Respondents.)



PETITIONER SHANE SHELTON'S
BRIEF IN SUPPORT OF PETITION FOR APPEAL OF DENIAL
OF HABEAS CORPUS PETITION

Timothy F. Cogan, Esq.
W.Va. State Bar No. 764
CASSIDY, MYERS,
COGAN & VOEGELIN, L.C.
The First State Capitol
1413 Eoff Street
Wheeling, WV 26003
(304) 232-8100; (304) 232-8200 Fax

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Comes Shane Shelton (“Shelton,” or “petitioner,” or “defendant”), by counsel, Timothy F. Cogan, and CASSIDY MYERS COGAN & VOEGELIN, L.C., and files his brief, in which all emphases are added unless otherwise indicated.

This Court granted a petition for writ of certiorari only as to Issue 1, on or about 2/27/07. Pursuant to that Order, and without waiving any other issues, Shelton argues that issue only, though noting that the other issues, e.g. those raised in his petition to this Court and at the trial court, have to be considered as to the prejudicial effect of the action in Issue 1.

I. KIND OF PROCEEDING

This appeal is from the denial by the Circuit Court of Ohio County of a revised petition for Writ of Habeas Corpus. A previous petition had been originally filed with this Court and ultimately denied on 10/01. Record, *Shelton v Painter*, Ohio Co., 00-C-23, “Felony,” 1, 41, 74-75. See generally *Hamdan v Rumsfeld*, 126 S.Ct. 2749 (2006)(reversing denial of habeas relief for alien detained at Guantanamo Bay and designated for trial before a military commission).

Motions to transfer to another judge were denied. Habeas, pp. 81-6.

Current counsel filed an Amended Petition, Habeas, p. 87-106, to which the State responded. Response to Amended Petition for Writ of Habeas Corpus, "State Response," Habeas, p. 111-128, and Shelton filed a Revised and Amended Petition. Habeas, pp. 129-208.

II. STATEMENT OF FACTS

ORIGINAL CHARGE AND TRIAL

Shelton was arrested about three years after a shooting that occurred on or about 8/15/95. He was indicted on 9/11/95. Felony, p. 1, and an amended indictment of that same date was filed over two years later. Habeas, p. 118. After the public defender withdrew, Habeas, p. 14, Trial Counsel (also here known as "Defense counsel" or simply "Counsel") were appointed to represent Petitioner.

Pretrial hearings were conducted 2/19/98 Felony, 267, 1-55 and 268, 1-43; 3/16/98 Felony, 269, 1-25), and 3/19/98, Felony, 270, 1-65. It appears that one of the 2/19/98 hearings is misdated.

(Each day of 1998 hearings or trial bears a sequential number at the bottom of the first page, in the Felony section of the Record, from 267 to 273, then is individually paginated. Page numbers of the trial, Felony 271, are indicated here as "TT".)

The first hearing purported to consider an issue under *WVRE 404b*. Yet it dealt with no prior bad act by Shelton. As the court found Shelton was struck over the head with bottle by the decedent, Lawson, a few days to a few weeks pre-shooting.

The trial lasted three days, including voir dire and view. The court had reserved a week for the trial. 3/23/98 *Wheeling News Register*, Habeas, pp. 275-277. As Attorney Heather Wood

("Wood"), criminal defense expert, testified, "this was a very short trial." Habeas, p. 239.

Twenty-four witnesses testified for the state. TT, 3/23/98-3/25/98, Habeas, 272, 273. Only the petitioner testified for the defense. TT., 250-275. Petitioner was 23 at the time of shooting, TT. 260. A native of Atlantic City, New Jersey, his residence in Wheeling began after he had been "dropped off" in Wheeling. TT. 251.

The State proposed 51 exhibits and saw 47 of them introduced. TT. 69-70. Trial counsel introduced no exhibits.

On 3/25/98 Shelton was convicted of first degree murder and sentenced to life in prison without mercy. Habeas, pp. 247-9.

After a new trial motion was denied on 9/29/98, counsel filed a petition to this Court on 10/1/98. This petition was refused on 2/16/99. Habeas, 249.

THUS THIS PROCEEDING IS THE FIRST TIME THAT ANY OF THE MERITS OF THIS CASE HAVE BEEN CONSIDERED BY ANY COURT OTHER THAN THE TRIAL COURT, which had stated that "if ever there is a recommendation by a governor of the state of West Virginia to pardon or issue clemency, as long as this Court is alive, I will reject any such attempt." TT. 325.

Shelton filed a writ for habeas corpus on 1/13/00, Habeas, p. 1; it was dismissed on 5/30 (or 5/31) by the circuit court. Habeas, p. 41. This Court denied relief on 9/28/01. Habeas, p. 74, 75. (While not in the record, Petitioner's federal writ, 02-CV-38, was dismissed on 12/4/02 as untimely or for failure to exhaust state remedies).

Habeas counsel was appointed on 7/21/04. An Amended Petition was filed on 7/12/05. An Amended and Revised Petition was filed on 4/7/06. The State's response to one of the

petitions is cited *infra*. Two days of hearings were conducted regarding the amended petition, Habeas, 209-265.

At hearing on 4/7/06, Shelton testified, as did Atty. Wood. Without objection, Wood was classified as an expert in criminal defense. Habeas, p. 228. Wood's testimony in this case assigned deficiencies by Defense Counsel to four categories.¹

The issue upon which the Court granted certiorari came within the category that Wood termed a violation of duty of loyalty. Habeas, p. 231. At one point, Wood testified, counsel actually conceded guilt, Habeas, p. 231, citing TT. 312. Wood testified that conceding guilt without the consent of the client, *id*, together with the other facts showing the breach of the duty of loyalty, breached trial counsel's duty to the client, citing *Dorsey v Missouri*, 156 S.W.2d 825 (App. 2005), *People v Washington*, 5 Misc.3d 957, 785 N.Y.S.2d 885 (Co. Ct. 2004), and *King v Strickland*, 748 F.2d 1462, 1463 (11th Cir. 1984). Habeas p. 232. Wood testified that this category rises to the level of ineffective assistance when combined with lack of mitigation evidence,

¹ One category included failures under what she classified as "investigation, such as the "lack of a consistent trial strategy, such that the trial strategy doesn't seem to make sense." Habeas, p. 229. Wood believed that such "investigation" failures, particularly those related to mitigation evidence, breached the duty of Trial Counsel to their client and affected the jury verdict. Habeas, p. 231.

Another category contained the failure to prepare Shelton for testifying and cross-examination. As Woods testified, "without proper investigation it's very difficult to sit down with... your client and actually prepare them for testimony in any criminal case." Habeas, p. 230. The evidence of "input," the advice tendered by counsel, differs from Shelton's testimony, while the "output," Shelton's damaging testimony, is clear. TT. 250-275.

The final category that Woods listed were deficiencies by trial counsel "as a whole," e.g. to correct mistakes, to accurately object, e.g. regarding, St. Ex. 50, Habeas, 62; Habeas, p. 233-4. (Despite request, the clerk included only two trial exhibits.) Woods indicated that, with lack of structured trial theory, it did rise to ineffective assistance. Habeas, p. 233. This category contains an issue under *Crawford v Washington*, 541 U.S. 36 (2004).

Additional evidence was presented at the habeas evidentiary hearings, but not at the trial, supported Shelton's claim of, and request for, an intoxication defense. Petition, Habeas, p. 145-6, citing Habeas, p. 218.

despite Shelton's admission of guilt in his testimony. Habeas, p. 232. This is the first issue on which this Court granted the petition.²

A notice of appeal was filed 6/22/06. Habeas, p. 296.

III. ASSIGNMENT OF ERROR THAT THIS COURT GRANTED AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL

Counsel's closing argument was ineffective in that he essentially admitted petitioner's guilt, without consent of petitioner, and thereby abandoned counsel's advocacy role.

The lower tribunal found

² The tribunal addressed some but not all of the issues raised in the Amended Petition. See: Final Order, containing Findings of Fact, "FOF," and Conclusions of Law, "COL," p. 289-295. It did not specifically address the claim that counsel failed to impeach the state's witnesses by prior inconsistent statement, without strategic reasons. The court did state that counsel interviewed most of the State-disclosed witnesses, and reviewed the prosecutor's file FOF ¶ 12, 13. Nor did it specifically address any failure to prepare defendant, see n 1, *supra*, nor instances of failure to object, Petition, pp. 34-36, save to indicate that such decisions were strategic; nor failure to hire experts, nor that the prosecution committed misconduct (though it had addressed it in denying the motion for new trial, as set forth *infra* at p. 38, citing Habeas, p. 210).

Twelve court errors were specified and four focused upon but not specifically addressed: that the court erred in excluding evidence of drug use by the victim and by inference by the eyewitnesses; in explicitly restricting cross examination of a witness to the shooting about how long she had been running a crack house; in failing to give an intoxication instruction; in failing to give a self defense instruction; in admitting the flight route exhibit; and that Shelton, shackled at the time of the jury view, did not personally waive his right to be present, and was likely seen by jurors in foot shackles, and forced to choose between participating in the jury view and being seen in hand shackles as well as leg.

Regarding the tribunal's failure to follow the requirements of the "habeas corpus" statute, despite request, the court suggested that in preserving all Shelton's objections it dealt with all the issues he raised. Col, ¶ 38, Habeas, p. 295.

Regarding the failure to call Petitioner's brother as a witness, Petition, pp. 16-22, the tribunal faulted the brother with not arriving "near the end of the trial thereby not subjecting himself to be interviewed by trial counsel," FOF, No. 18, though trial counsel testified that "**at that point anything we could have used would have been helpful.**" Habeas, p. 254.

Regarding failure to seek bifurcation of the trial, Habeas p. 255, 261, the Court indicated that counsel "made a strategic decision not to move to bifurcate the guilt versus punishment phases of the trial based upon a reasonable and adequate investigation of this matter." FOF, ¶ 10.

Other exhausted issues from petition to the Supreme Court of Appeals were set forth in the Petitions, e.g. a statutory error, Habeas, p. 143-4.

“trial counsel did not breach their duty of loyalty to Mr. Shelton in that said portion of the closing arguments was trial strategy utilized in an attempt to maintain credibility with the jury to have a better chance of obtaining a favorable verdict,”

FOF, ¶ 23, relying entirely upon testimony of trial counsel, FOF ¶ 24, 25, all Habeas, p. 285.

IV. POINTS AND AUTHORITIES, DISCUSSION OF LAW AND THE RELIEF PRAYED FOR

A. PETITIONER WAS ENTITLED TO EFFECTIVE ASSISTANCE OF COUNSEL

His right to effective assistance is guaranteed by the *Sixth Amendment, U.S. Constitution*, and *Art. 3, Section 14, W.Va. Constitution; Rompilla v Beard*, 125 S.Ct. 2456, 2465 (2005) (counsel’s failure to examine defendant’s file on previous conviction at sentencing phase fell below level of reasonable performance and prejudiced defendant); *Roe v Flores-Ortega*, 528 U.S. 470 (2000)(failure to file notice of appeal without defendant’s consent was not per se deficient); *State v Miller*, 194 W.Va. 3, 14-17, 459 S.E. 2d 114 (1995), adopting two-part test of *Strickland v Washington*, 466 U.S. 668 (1984); *State v Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974)(raising the standard from “sham or farce”); *Schofield v W.Va. Dept. of Corrections*, 185 W. Va. 199, 203-204, 406 S.E.2d 425, 429-430 (1991)(counsel technically ineffective in failing to present any substantial evidence or argument on mercy); *Kimmelman v Morrison*, 477 U.S. 365 (1986)(ineffective assistance in failing to file a timely suppression motion); *State ex rel Wheeling Pittsburgh Steel v Eno*, 135 W.Va. 437, 63 S.E.2d 845 (1951)(denial of continuance to give counsel adequate time to prepare); *State v Smith*, 186 W.Va. 33, 410 S.E. 2d 269 (1991 (deficient failing to move to suppress blood-stained pants); *State ex rel. Quinones v Rubenstein*, 218 W.Va. 388, 624 S.E.2d 825 (2005)(*per curiam*)(counsel’s reliance on original counsel’s case file and failure to review prosecution file constituted deficient performance); *Wickline v House*, 188 W.Va. 344, 424

S.E. 2d 579, 583-584 (1992)(*per curiam*)(finding ineffective assistance); *People v Washington, supra* (concession of guilt in opening provided ineffective assistance); *Dorsey, supra*; *Glover v U. S.*, 531 U.S. 198 (2001) (increase in prison term from 6 to 21 months constituted prejudice, abrogating cases); *Wiggins v Smith* 539 U.S. 510 (2003)(rejecting counsel's decision to focus on 'residual doubt' rather than expand investigation). See generally 1 Cleckley, W.Va. Criminal Procedure (2nd ed), "Right to Counsel," I- 17-88, citing cases.

In contrast, recognizing the two-part test measuring her rights, various other cases have found that defendant failed to show one part or the other of the test. *Bell v Cone*, 535 U.S. 685 (2002)(rejecting application of the presumed prejudice standard of *U.S. v Chronic*, 466 U.S. 648 (1984), which is discussed and applied *infra at et. seq.*); *Florida v Nixon*, 543 U.S. 175, 192 (2004)(concession of guilt in capital case did not indicate complete failure of representation); *Yarborough v Gentry*, 540 U.S. 1 (2003)(*per curiam*) (rejecting the court of appeals, that had reversed a state court, which had approved a closing argument); *Cuyler v Sullivan*, 446 U.S. 335 (1980)(right to effective assistance applies to retained counsel but finding no actual conflict of interest); *State ex rel Dietz v Legursky*, 188 W.Va. 526, 425 S.E.2d 202 (1992) (finding gross neglect in failure to vouch the record with reports to support opinion testimony about the victim's propensity toward violence but not prejudice); *State ex rel Daniel v Legursky*, 195 W.Va. 314, 319-322, 465 S.E.2d 425 (1995)(failure to investigate incident of jury tampering and to request hearing on prejudicial effect was ineffective); *Marano v Holland*, 179 W.Va. 156, 366 S.E.2d 117 (1988)(counsel was not ineffective for failure to introduce tapes of wife's conversation, to support diminished capacity); and *State v LaRock*, 196 W.Va. 294, 310, 470 S.E.2d 613, 629 (1996)(court cannot make an intelligent analysis of the merits "without an adequate record giving trial counsel the courtesy of being able to explain his trial actions," citing *Miller*, 194 W.Va., at 17, 459 S.E.2d,

at 128). While *State v Sandor*, 218 W.Va. 469, 624 S.E.2d 906 (2005), shows that the right to assistance of counsel can be waived, no waiver has been asserted here.

In such cases as *State ex rel. Vernatter v Warden*, 207 W.Va. 11, 528 S.E.2d 207 (1999), this Court reaffirmed that, in reviewing counsel's performance, courts must apply objective standard. They must determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance. A presumption is entertained in favor of competence. Courts must refrain from engaging in hindsight or second guessing of counsel's strategic decisions. The test is whether the prisoner proves by preponderance that a reasonable lawyer would not have acted as defense counsel acted in the case at issue, *Id.*, relying upon *Strickland, infra*, and Syllabus point 5, *Miller, supra* at 7. See *Quinones, supra* at 7.

Deference is given to trial counsel's decisions, provided they "strategic" and made after a reasonable investigation. E.g. *King*, 748 F.2d, at 1463; see *Bess v Legursky, supra* (ineffective assistance shown by failure to investigate factual basis) and *Miller, supra*.

B. THE MEASURE FOR EFFECTIVE ASSISTANCE

Ineffective assistance is generally measured by a two-prong test. *Strickland*, 466 U.S. at 687, adopted in *Miller*. The first part is identification of specific deficient acts. Second is a reasonable probability that, but for counsel's performance, the outcome would have been different.

1. THE ACTS THEMSELVES

Regarding the first part, a habeas petitioner must show that trial counsel's performance fell below an objective standard of reasonableness. *Supra* at 8.

2. PREJUDICE IS NOT GENERALLY NECESSARY

In general, the defendant must show that counsel's deficient performance prejudiced the petitioner, and that in result the outcome was unreliable OR fundamentally unfair. *Glover v U. S.*, 531 U.S. 198, 204 (2001)(failure to argue that offenses should be grouped resulted in increased sentence); *Williams v Taylor*, 529 U.S. 362, 396-99 (2000); *Lockhart v Fretwell*, 506 U.S. 364 (1993).

Thus unreliability is one pole. Defendant can show prejudice if he or she shows that Assuming *arguendo* that Shelton must show prejudice, that "prejudice standard" is not as formidable as in other remedial situations. The standard is less than that for newly discovered evidence, which "presupposes that all the essential elements of presumptively accurate and fair proceeding were present in the proceeding whose result is challenged." *Strickland*, at 694. See Habeas, p. 219, counsel objecting that "the reliability of this [Shelton's testimony] is exactly what we're testing."

While defendant must show more than that errors had some conceivable effect on the outcome of the proceeding, Shelton need NOT show that counsel's conduct more likely than not altered the outcome in the case. *Strickland* at 693. Instead

"defendant must show that there is a **reasonable probability** that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Strickland, at 694. Accord: *LaRock*, 196 W.Va., at 309, 470 S.E.2d , at 628, n. 22.

("Counsel is constitutionally ineffective only if performance below professional standards cause the defendant to lose what otherwise **probably** would have won").

Here the effect of the actions and inactions “is ‘sufficient to undermine confidence in the outcome ‘actually reached at sentencing’.” *Rompilla*, 125 S.Ct., at 2469, quoting *Strickland*, 466 U.S., at 694.³

3. PREJUDICE IS NOT ALWAYS NECESSARY

In certain situations, prejudice is dispensed with as a requirement, or presumed, or both. See *Chronic*, typically indicated as the source for these exceptions.

While some courts have characterized the statements of *Chronic* as dictum, the Supreme Court did NOT do so in *Bell*, 535 U.S. at 695, noting though refusing to apply the *Chronic* exceptions.

Nor did this Court minimize the *Chronic* exceptions in *Daniel*, *supra*, at *id.*

Justice Cleckley stated in the 1993 edition of his criminal handbook that “[t]he point to be made is that *Thomas* is not only inconsistent with *Lockhart [v Fretwell]*, but it is also inconsistent with *Strickland*. Only *Thomas* discusses constitutional harmless error analysis as part of the prejudice prong.” Handbook on Criminal Procedure I-28.

Other courts have applied the presumption of prejudice in a variety of situations, e.g. *Scarpa v Dubois*, 38 F.3d 1, 12, and n. 7 (1st Cir 1994), citing cases.

One category of presumed prejudice occurs where various forms of state interference occurred. *Strickland*, 466 U.S., at 692, *Chronic*, 466 US at 658-61, *Bell*, 535 U.S., at 696, and n. 3 (giving example of denying opportunity for CLOSING argument in a bench trial under

³ While *Rompilla*, and some other cases, set forth a but-for causation, the lead case, *Strickland*, specifically rejects that bar. Cf. *Rompilla* (but for counsel’s conduct “the result of the proceeding would have been different, 125 S.Ct., at 2468 quoting *Strickland*, 466 U.S., at 694; and *Daniel*, that “in the absence of error the result of the proceeding would have been different,” 195 W.Va. at 325, 465 S.E.2d, at 427)

Herring, infra). See *Smith v Robbins*, 528 U.S. 259, 287 (2000), and *Bell*, describing cases where “counsel is called upon to render assistance under circumstances where competent counsel very likely could not,” 535 U.S., at 695.

A second exception occurs where counsel was “burdened” with an actual conflict of interest. See *Cuyler, supra* (not finding actual conflict). See also *Osborn v. Shillinger*, 861 F.2d 612, 626 (10th Cir. 1988)(conflict preserves preponderance because of violation of duty of loyalty).

The third involves situations where an actual or constructive denial of assistance entirely occurred. See *Strickland*, Brennan, J, concurring in part and dissenting in part, 466 U.S., at 703, n. 2, citing *Chronic*, giving example of counsel sleeping or unconscious, and *U. S. v. Swanson*, 943 F.2d 1070, 1073-74 (9th Cir.1991). This would obviously include situations where counsel was completely denied at a critical stage. *Bell, id*, at 696.

Related situations occur when counsel appears but “entirely fails to subject the prosecution’s case to meaningful adversarial testing.” *Bell* at 696, quoting *Chronic* at 659. *Bell* focused on the meaning of the word “entirely.” At 697.

C. THE CLOSING ARGUMENT WAS INEFFECTIVE

This closing argument was deficient under *Francis v Spraggins*, 720 F.2d 1193 (11th Cir. 1983). There counsel, at the guilt phase of a capital penalty trial, effectively conceded guilt. Like here, counsel admitted that he “committed the crime of murder.” 720 F.2d, at 1193, n. 7.

As the Sixth Circuit reasoned in a similar case, counsel’s complete concession of the defendant’s guilt nullifies his right to have the issue of his guilt or innocence presented to the jury as an adversarial issue and therefore constitutes ineffective assistance.

Id, at 1194, citing *Wiley v Sowders*, 547 F.2d 642, 650 (6th Cir. 1981)

The Eleventh Circuit found that counsel's argument MIGHT have been appropriate to the penalty phase. *Id.*, at 1194. In contrast, here there occurred no such separate phases, because counsel failed to move to bifurcate. *See infra* at 38-9.

Essentially there was no separate guilt argument phases. Since the closing argument concerned only the penalty for Shelton, concession of guilt could not have been appropriate. *Cf. Rodriguez v U.S.*, 286 F.3d 972, 985-6 (7th Cir. 2002)(counsel was not ineffective in conceding guilt to ONE drug transaction while denying guilt to a conspiracy; if successful, that strategy would have decreased the sentence, from life to ten years).

Wiley and Francis relied on *Dorsey, supra*, where counsel's admission in closing went beyond the testimony of defendant. At 834. While the admission that counsel did not know if Shelton deserved mercy was harmful, perhaps even more fatal was the follow through. The buildup was the sentiment that counsel did not know "[w]hether the story about the bottle was the only reason why someone would commit a murder or whether there was something else going on, I don't know. That's your decision. I'm not going to justify what Mr. Shelton said." *Habeas*, pp. 150-1, TT. 312.

Dorsey found ineffective assistance by a similar action, in connection with others. Counsel there as here undermined the credibility of defendant. Here counsel termed the testimony of Shelton "a story," once as in "the story about the bottle," and then as in "he had a different story for that," TT. 309. Here, as in *Dorsey*, counsel was ineffective in undermining defendant's credibility. Calling a crucial part of his testimony "a story" and "the story" made it sound made-up, particularly when repeated.

This closing is ineffective under *Haynes v Cain*, 272 F.3d 757 (5th Cir. 2001). It holds that counsel's strategy of explicitly conceding defendant's guilt on underlying felonies, in a first

degree murder prosecution, was ineffective *per se*.

Counsel in *Haynes* admitted that the victim died during the commission of a felony. As here, counsel argued that defendant was guilty of nothing less than a felony. At 759.

While the rationale differs to some extent from *Florida v Nixon*, *Haynes* relied upon state law, namely cases from North Carolina, *State v Harbison*, 337 S.E. 2d 504, 507 (1985), from Nevada, *Jones v Nevada*, 877 P.2d 1052, 1057 (1994), and from New Hampshire, *State v Anmaya*, 592 A.2d 1142, 1147 (1991), requiring consent before such a concession.

Counsel said, after quoting the Bible about vengeance being reserved to the Lord, “[i]f ever there was ever a time for vengeance, this could be it.” TT. 315.

Counsel earlier expressed doubt about whether petitioner deserved mercy:

“It’s kind of tough for me to stand here and look you in the face and tell you that my client deserves mercy. **I don’t know if my client deserves mercy.**” I, p. 151, TT. 312

The argument reminded the jury that it had no obligation to award mercy: **You don’t have to do that [give Shelton mercy].**” TT. 315.

Mercy was the only issue at the time of closing: while the defense initially hoped for second-degree, that hope was gone by closing. Yet the circuit court found that counsel made these statements to gain credibility for a second degree murder verdict, FOF, ¶ 25. Counsel admitted that second-degree murder was no longer at issue at the time of closing, *Habeas*, p. 265. See *Scarpa, supra*, focusing on what issues were in dispute at the time of summation. The prosecution said in its closing, “the only real question you might have when you go back to the jury room is whether to recommend mercy or not.” TT. 304. A similar prosecution argument stated “the real quick of it - is it mercy or is it no mercy,” TT. 316, and “[t]he questions really comes down to, is it mercy or no mercy,” TT. 319, see *Habeas*, pp. 152-3, confirms that mercy was the only issue at the time of closing.

Despite saying he was going to seek mercy, counsel repeatedly referred to this “murder.” He said that he would not have stopped Shelton from saying “he’s going to take the stand and tell 13 people on this jury that he basically **murdered** somebody.” TT. 311. See Francis, where a similar admission was ineffective. 720 F.2d, at 1193, n. 7.

Trial counsel conceded guilt to first degree murder:

TT. 307 --“There’s never any justification for any kind of killing, any kind of shooting. There is, but in this case, there was not.”

TT. 307 --“The facts and the circumstances of this case, as Mr. Gossett [the APA] has told you, would seem to suggest that it’s **first degree murder... And the only instruction he did give you was First Degree Murder, with or without mercy. We’re not disputing that**”

He said:

TT. 313. “You can assume **he was premeditating for a month** and let the State presume it. They can argue that. This is closing. We can say anything we want, within certain parameters.

He conceded that the state met its burden of proof beyond a reasonable doubt. The **State “could have proven this case beyond a reasonable doubt without us putting on any evidence at all.”** TT. 311 See People v Kryztopaniec, 429 NW2d 828 (Mich App.1988)(complete concession of guilt constitutes ineffective assistance of counsel). Counsel’s statement here suggests that trial was a waste of time – and that the defendant bore some burden of proof.

He emphasized by repetition. “Mr Shane Shelton took the stand and stated that he killed Kenny Lawson. Mr. Shane Shelton killed Kenny Lawson.” TT. 307 He stressed not Shelton’s remorse, TT. 269 (apart from an explanation about not shedding tears, TT. 310, ll. 5-15, and another statement that it was the jury’s decision about whether Shelton made a bon fide apology,

TT. 311, ll. 7-9). Instead, he returned again to the theme that Shelton admitted that he did it. TT. 311. “He has admitted to you that he killed Kenny Lawson.” TT. 314.

An acquittal, he said, “was not going to happen. Period.” TT. 311. “There’s no way you’re going to go back in that jury room and come back with a not guilty verdict... We wouldn’t suggest that.” TT. 307. Defense counsel made what amounts to an anti-jury nullification argument in favor of a not guilty verdict. “Mr. Shelton didn’t say that and the judge probably won’t allow it, based upon the instructions.” TT. 307.

Counsel rejection of Shelton’s claim of justification was contrary to the self-defense instruction sought: “Shelton **admitted** to you he killed Kenny Lawson. Whether that was justified in his mind, that doesn’t make it justified.” TT. 315.

Counsel inexplicably focused on the loss represented by the death of the victim, Habeas, p. 151, TT. 312, that “Mr. Lawson is completely innocent.” TT. 315. Counsel said, “Even if he [Lawson] was involved in something that was going on [e.g., drugs], that doesn’t justify what happened here.” *Id.*

The state said that this argument “was a strategic decision employed by counsel in an attempt to endear himself to the jury.” State’s Response, p. 7, Habeas, 117. This statement begs the question – of what further use the endearment was used.

The lack of strategy is indicated by lack of discussion between the two defenders. Counsel not making the argument stated that he could have been surprised by the statement by his co-counsel, about not knowing if his “client deserved mercy.” Habeas, p. 248. Cf. Bell, where the junior prosecutor opened the closing with a low-key closing and defense counsel waived closing argument, among other things, with the effect that “the lead prosecutor, who by all accounts was an extremely effective advocate, from arguing in rebuttal.” 535 U.S., at 691-2.

Counsel who made the closing argument testified that one statement, see ¶ 39, might seem “a bit extreme,” Habeas, 258-9.

Counsel indicated:

You don't have the self-defense instruction to consider. **That's why the only instruction you have to consider is life with mercy or life without mercy.** And I'm not going to try to argue that. Hey, you know, you've got to give him mercy, just because you have to. **You don't have to do that.**

TT. 315.

He said, “Mr. Shelton sold drugs...He was into the drug scene...the State will probably try to convince you, on rebuttal [he was] probably selling drugs in Atlanta, which there's no evidence of that” TT. 309-10. Thus even the “mercy argument” slammed Shelton: “[j]ust because you sell drugs to use doesn't mean he doesn't deserve mercy.” TT. 309.

The expert, Ms. Wood, testified that such “closing statements” violate the duty of loyalty owed by trial counsel to petitioner and that the statements amounted to an abdication of the duty of advocacy. Wood also stated that these statements were coupled with a lack of mitigation evidence. Habeas, p. 232.

There were statements of lesser harm. Counsel said the bottle incident “happened a month before,” TT. 312, when some witnesses put it as little as a few days before.

Wood also opined that these statements, alone and in combination with other failings, materially affected the jury verdict, as suggested by the length of deliberations (the jury was out for three hours, amid which it asked a question relating to mercy), TT. 321-323. This showed that the jury was seriously considering life with mercy. Habeas p. 231-2

Contrary to the tribunal's conclusion, no possible additional credibility that trial counsel got - or thought they might get, in return for this concession at closing - would be worth abandoning the fulcrum of this case, which was mercy. Habeas p. 239 (Wood testimony).

Rather than using any credibility he may have developed in his request for mercy, the argument said it was going to ask for mercy as part of his job: "I'm not going to request that this jury give him mercy? Of course I am. I'm not going to be a fool. It's part of my job." TT. 312. "But I have a duty to ask for mercy for my client and the facts may suggest that might be the way to go." Yet rarely did the argument actually ask or urge mercy. Rather than building credibility and transferring it to Shelton, the argument more often indicated discomfort in being associated with Shelton. TT. 306 ("And to me it's been a very difficult case"), 308, l. 4.

Beyond *Wiley*, *Francis*, and *Dorsey*, *supra*, and *Sawnsen*, *infra*, this closing statement was ineffective under *People v Washington*, 5 Misc.3d 957, 785 N.Y.S.2d 885 (Co. Ct. 2004)(concession of guilt to a lesser charge in argument cannot be made solely by defense counsel without defendant's consent; it breaches the duty to provide effective assistance). *Cf Bell*, *id* at 699, rejecting ineffective assistance where counsel, though he presented no closing during the sentencing phase, did make one during the closing. Shelton submits that the statements were, for example questioning whether mercy was appropriate, was more prejudicial than if no closing had been given.

As well, the closing here was unlike that in *Yarborough*, another case affected by the deference a federal court owes to a state court review of its own conviction. Where, as here, the "state court's application of governing federal law is challenged, it must be shown to be not only erroneous but objective unreasonable." At 5, citations omitted. *Yarborough*, merely failed to address all relevant issues in closing, surely a presumed matter of strategy. *Id* at 8.

Beyond several actions occurred omissions. The closing failed to highlight Shelton's side about the number of shots fired, that fewer were fired than the prosecution claimed. Since he said that the gun held 15-16 shots, TT. 267, and the pathologist counted 13 holes in Lawson,

TT. 88, and the gun was never found, the prosecution could and did claim that Shelton emptied a 9 mm handgun in firing at Lawson. The defense argument failed to mention evidence that some of the wounds were exit wounds, Habeas, p. 52, identifying three exit wounds), that some state witnesses heard as few as 5-6 shots, TT. 214. The closing omitted evidence some shells came from a previous interstate "war." Habeaus 213. This last evidence, if mentioned in closing, would have supported the undeveloped "Dodge City" theme. Such undeveloped arguments undercut Shelton's hope for mercy.

A further sign of ineffectiveness was that the prosecutor, on rebuttal, apparently aware of lack of competent defense, sought to inject his opinion of effective assistance by using the very word. "I have to get up because [counsel] has attempted to effectively have you people consider some mercy." TT. 316. Counsel "alluded to it skillfully to try to get you to get his client off with mercy." TT. 318.

D. BECAUSE OF THESE STATEMENTS BREACHED THE DUTY OF LOYALTY, SHELTON NEED NOT SHOW PREJUDICE

Expert Wood is correct. Habeas, p. 231: Counsel abandoned the client's interest.

Thus a denial of effective assistance is shown.⁴ This Court need not consider actual

⁴ A case that Shelton relied upon, *Nixon v State*, 857 SE 2d 172 (Fla 2003) reversed, 543 US 178 (2004), was reversed by the Florida Supreme Court.

That reversal does nothing to the force of Shelton's argument. There guilt was admitted in the opening statement. See Note, Prejudice Presumed: The Decision to concede Guilt to Lesser Offenses During Opening Statements, 55 HASTINGS L. J. 965 (2004), arguing that conceding guilt in opening differs from a concession in closing (at least when the admission is to a lesser-included offense). Unlike the cases cited in this Note, the counsel (among other things) doubted that mercy was appropriate, rather than a strategic concession to a lesser-included offense. See generally *Rompilla*, noting the absence of strategic reason articulated by the state for the action taken.

prejudice. The argument abandoned Shelton, breaching the duty of loyalty. See Strickland, recognizing counsel's duty of loyalty, *Id.*, at 688, as characterized by *Nix v. Whiteside*, 475 U.S. 157, 165 (1986). Counsel "entirely failed to subject the prosecution's case to meaningful adversarial testing. *Bell* at 696, quoting *Chronic*, at 659. *Bell* focused on the meaning of the word "entirely," at 697, indicating that counsel "failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that counsel failed to do so at specific points," calling this a difference in kind that called for applying *Strickland*, and the need for prejudice rather than *Chronic* and its presumption. *Bell*, at *Id.* Because of the effect of failing to move to bifurcate, the sentencing proceeding as a whole consisted entirely of the closing argument.

Thus *Rickman v Bell*, 131 F.3d 1150, 1156-60 (6th Cir. 1997), held that counsel's failure to advocate petitioner's cause and counsel's repeated expressions of hostility toward petitioner amounted to constructive denial of petitioner's right to assistance of counsel. Although counsel was present, "the performance of counsel [is] so inadequate that, in effect, no assistance of counsel is provided." Citing Strickland, *Id.* at 654, n. 11. The Sixth Circuit characterized counsel's conduct as "abandonment." At 157. A similar characterization led to presumed prejudice in *Griffin v U.S.*, 109 F.3d 1217, 1219 (7th Cir. 1997).

The closing here was similarly ineffective under *Swanson*, 943 F.2d, at 1074, where the court found ineffective assistance (and prejudice *per se*) where defense counsel conceded in his closing argument that there was no reasonable doubt as to his client's guilt regarding the only factual issues in dispute. The attorney's conduct had tainted the integrity of the trial. *Id.*

While some cases have disagreed with *Swanson's* reliance upon abandonment, the crucial aspect remains not the presence of counsel but whether counsel performed an adversarial function. See Childress v Johnson 103 F.3d, 1221, 1229 (5th Cir. 1997). Thus another case

disagreeing with *Swanson*, *Scarpa* relied in part upon a distinction between trial errors and structural errors and it nonetheless found that an argument was objectively unreasonable. The summation effectively conceded the only disputed elements of the charged crimes and relied the prosecution of its burden of proof. At 10. Indeed *Scarpa* relied heavily, in not finding prejudicial ineffective assistance, upon the hesitancy a federal court has in approaching a state court conviction, a hesitancy absent here.

Similarly, the rationale for the conflict of interest exception (often known as a *Chronic* exception to a requirement of prejudice) is “[i]n those cases, counsel breaches the duty of loyalty, perhaps the most basic of counsel’s duties.” *Strickland* at 691, citing *Cuyler* at 350.

In distinction to this case, counsel in *Bell* stressed mitigation in opening the penalty phase “just a few hours before,” *id.* at 701; had given a closing in the guilt phase; and **only then** waived closing in the penalty phase, and did so strategically.

The inference is that counsel failed to secure the client’s permission for the closing argument. See *People v Washington*, *supra* at 3 (concession of guilt in opening provided ineffective assistance where defendant did not concede to concession of attorney). *Florida v Nixon*, *id.* at 75, indicated that “an attorney undoubtedly has a duty to consult with the client regarding ‘important decisions’ including questions of overarching defense strategy.’ Counsel in *Nixon* discussed with the client the method he planned to take in closing, for the Court repeatedly indicated that the client neither consented nor objected, *id.*, at 178.

Nixon distinguished cases where defense counsel fails to function as the government’s adversary. This argument, e.g. “[i]f ever there was ever a time for vengeance, this could be it.” TT. 315 and “I don’t know if defendant deserves mercy, TT. 312,” is failing to function as an adversary when mercy is the only issue. See *Chronic*, *id.* at 656-7, n. 19, stating that “even when

no theory of defense is available...., counsel must hold the prosecution to its heavy burden of proof beyond a reasonable doubt.”

Counsel’s statements abdicated the role of advocate. See: *People v Washington, supra, and Daniel, supra, citing Swanson*, 943 F.2d, at 1075-1076, for the proposition that “prejudice [is] presumed when counsel effectively conceded defendant’s guilt during closing argument.” The court held that the attorney abandoned his duty of loyalty to his client and failed to subject the government’s case to meaningful adversarial testing. *Id.* at 1074-75. The “statements lessened the Government’s burden of persuading the jury that *Swanson* was the perpetrator of the bank robbery.” It bears repeating that *Strickland* indicates that “loyalty [is] the most basic of counsel’s duties.” At 691. See *supra* re admission of first degree murder.

The statements at closing were magnified by lack of mitigation evidence. As the expert testified, they rise to the level of ineffective assistance even though Shelton admitted shooting at decedent Lawson. Habeas p. 232.

In *Miller*, Justice Cleckley addressed a situation where trial counsel

develop[ed] and rel[ied] upon self-defense at trial and then offer no instructions on the defense. Such a maneuver is indicative of the lack of a trial strategy and “[n]o competent defense attorney would go to trial without first formulating an overall strategy.” Welsh S. White, *Effective Assistance of Counsel Habeas in Capital Cases: The Evolving Standard of Care*, 1993 U.Ill.L.Rev. 323, 356. Effective trial counsel typically prepares for a criminal defense by asking questions such as: (1) What is the objective of the defense? (2) What is the trial strategy to reach that objective? (3) How does one implement that strategy?

194 W.Va. at 15-16, 459 S.E. 2d, at 126-127

E. PETITIONER WAS PREJUDICED

Assuming *arguendo* that Shelton must show prejudice, Shelton need NOT show that counsel’s conduct more likely than not altered the outcome in the case. *Strickland* at 693.

“Defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”

Strickland, at 694.

He can show that the impact “is ‘sufficient to undermine confidence in the outcome ‘actually reached at sentencing.’” *Rompilla*, 125 S.Ct., at 2469, quoting *Strickland*, 466 U.S., at 694. See *Fisher v Gibson*, 282 F.3d 1283, 1307 (10th Cir. 2002) (closing argument ineffective; it included attack on defendant’s credibility and bolstered the state’s case). Cf *Hill v Lockhart*, 474 U.S. 52 (1985)(while guilty plea can be subject of ineffective assistance claim, claimant failed to show adequate prejudice where he failed to allege that the plea was involuntary).

1. By itself

Though the standard is not the effect of closing by itself, a closing argument can be crucial. *Herring v New York*, 422 U.S. 853 (1975)(defendant has right to make closing argument, even in a bench trial), and *State v Webster* 218 W.Va. 173, 624 S.E.2d 520 (2005), reversing for violation of the right to close. Thus *Glover* found prejudicial actions by “counsel’s performance in failing to argue the point.” 531 U.S., at 204. “The right to effective assistance extends to closing arguments.” *Yarborough*, 540 U.S., at 5, citing *Bell*, 531 U.S., at 701-2, and *Herring*. By contrast, the most “extreme,” in the parlance of counsel, statement made in the *Yarborough* closing was “‘I don’t’ know who’s lying,” at 4, and “the jury had to acquit if it believed [defendant’s] version of events.” At 6. By analogy, *Rompilla* indicated that the deviation (there a failure to investigate) was prejudicial “regardless of the accused admissions,” 125 S.Ct., at 2465, citations omitted, and despite defendant’s “minimal” contribution to his defense. *Id* at 2462.

Glover found prejudice from an increase in a prison sentence from 6 to 21 months. 531 U.S., at 203. *Strickland* focuses upon the dangers to the “art of criminal defense” in too rigid an approach to the conduct as compared with the dangers of an unreliable verdict. In West Virginia, the dangers of the latter are here as great as can be. The difference is between approaching the parole board in 15 years and dying in prison. For a person the age of Shelton, 26 at time of trial, with a life expectancy of another fifty years, an unreliable result yields decades of imprisonment.

2. In connection with other ineffective assistance

With respect, though the Court granted the petition only as to the argument issue, *Strickland* requires that a court must consider the totality of the circumstances. 466 U.S., at 697. It must consider “the circumstances of the case.” *Id.*, at 704, Brennan, J., concurring and dissenting, See *Pavel v Hollins*, 261 F.3d 210, 216 (2nd Cir. 2001), focusing on whether the “**cumulative** weight of the flaws deprived [defendant] of his Sixth Amendment rights” (emphasis in original). Here as in *Rompilla*, the evidence, taken as a whole, ‘might well have influenced the jury’s appraisal of [Rompilla’s] culpability.’” 125 S.Ct. at 2460, quoting *Wiggins*, *supra*, 539 U.S., at 538, quoting *Williams v Taylor*, 529 U.S. at 398. See also *Bell*, emphasizing that *Chronic* requires a consideration of counsel’s action in its entirety.

These other factors contribute to the weight on Shelton’s side of the equation, for they too contribute to show a proceeding unreliable and unfair (though Shelton must show only that it was unreliable OR unfair).

As Wood indicated, even if this conduct by itself did not rise to the level of ineffective assistance, it did, with other failures, affected the jury verdict. For this reason Shelton sets forth the totality of the circumstances regarding mercy presented at the trial.

Had the jury had “mercy” information about Shelton, Wood concluded, it was likely that they would have found mercy, Habeas p. 231-2. The jury was out three hours and asked a question. TT. 321-2. Their inquiry reflected the jury’s interest in the **effect** of a finding of mercy, should it grant mercy. TT. 322. (“Will he serve the fifteen years or could it be less”). See Rompilla, supra at 6, finding ineffective assistance in failing to discover mitigation evidence. The state ADMITTED that the this Court “has stated that criminal defense counsel has a duty to present evidence in support of mitigation of mercy” State’s Response, p. 6, Habeas, p. 116, citing Schofield, supra at 6, and State v Triplett, 187 W.Va. 760, 421 S.E.2d 511 (1992), citing Thomas, supra.

The actions here also parallel the activity in *Bell*. Three actions were alleged in *Bell*. One clearly occurred here (the lack of mercy evidence). One arguably occurred here (closing argument, waived there, virtually waived here). The third action was failure to interview witnesses who could have provided mitigating evidence. Though the testimony from counsel suggested that investigation occurred, the record clearly showed enormous impeachment evidence unused, some of which would have provided mitigating evidence. See: infra at 19.

a. Mercy evidence from the family

“Mercy evidence” would have included Shelton’s “history of social and emotional problems...and family background,” *Schofield*, 185 W. Va., at 203-204, 406 S.E.2d, at 429-430; or that defendant was a “good man.” *Rompilla*, 125 S.Ct., at 2460 (reversing for ineffective assistance in failure to investigate material that would have been apparent in previous convictions, which the state pointed out to defense counsel); or in its broadest terms, “the diverse frailties of humankind.” *Woodson v North Carolina* 428 U.S. 280 (1976). See LaRock, emphasizing “the important role a finding of mercy has in the administration of justice,” 196 W.Va. at 315, and Williams v Taylor,

529 U.S. 362 (2000), rejecting “strategic decisions” based on hunches and assumptions. Cf. *Daniel*, 195 W.Va., at 320, 465 S.E.2d, at 422 (counsel's failure to call material witness did not constitute ineffective assistance of counsel because of lack of prejudice, though “a criminal defense attorney might be ineffective if he or she failed to present advantageous evidence the could affect a jury’s verdict,” 195 W.Va. at 329, 465 S.E.2d, at 431), *Darden v Wainwright*, 477 U.S. 168 (1986)(lack of mitigation evidence) and *Burger v Kemp* 483 U.S. 776 (1987)(finding lack of any evidence of mitigation at sentencing phase was “sound trial strategy.”).

This string of cases shows that the West Virginia law has evolved beyond the minimum of *Burger* in the years since *Darden* and *Burger*. **“Unlike the performance prong of the *Strickland* test, which is analyzed at the time of trial, the prejudice prong of the *Strickland* test is examined under the law at the time the ineffective assistance claim is evaluated,”** 35 *Geo L.J. Ann Rev. Crim Proc* (2006), n. 1579, citing *Fretwell*, 506 U.S., at 367-8. “Both the West Virginia Supreme Court of Appeals and the Fourth Circuit have repeatedly held that the failure to present critical evidence could be ineffective assistance of counsel.” Handbook on Criminal Procedure, I. 53, citing *inter alia State ex rel Leach v Hamolton*, 280 S.E.2d 62 (W.Va. 1982).

Potential witnesses for petitioner included his brother, Tim Shelton (“Tim”) and Erica Shepherd, mother of his children, who could have confirmed to what Shane testified at hearing, his involvement in the lives of his children, to which he alluded in cross-examination but which was not explored at all at trial. Habeas p. 21. TT. 261 (proffer).

When Tim came to his brother’s trial, Habeas p.221, counsel told Tim “to go back to the motel” but testified that the defense could have got Tim back to the trial, Habeas p. 254.

Counsel knew about Tim well prior to trial. Habeas p. 253, 261-2. Habeas Counsel, who

proffered the testimony of Tim and explained his absence at the second day of habeas hearing.

Habeas p. 240-1. Had Tim been called, he could have testified that

--Shane worked as a dishwasher in a restaurant (this testimony would have confirmed the hearing testimony of Shane of working for "a couple years" at a Days Inn. Habeas p. 216);

--Shane had never really been locked up, and that Shane had so little been locked up shows that he was not a bad kid, given his environment;

--Wheeling was his first home away from home.

--the youngest of 6, Shane was still the baby in Tim's eyes. Habeas p. 240-1.

--Shane smoked pot and drank alcohol every day before school but everybody in the projects where Shane lived did that; this too was confirmed by Himmelhoch's notes, Resp Ex. 4, p. 3, Habeas, p. 302.

The State argued that if evidence was introduced about Shelton smoking pot and drinking before school, it could have introduced evidence that he had been selling dope since age 15. Yet Shelton freely admitted that his occupation while in Wheeling was selling drugs. TT. 252. The closing explained it. TT. 309-10. Additional evidence about how **early** he began to sell drugs could hardly have hurt Shelton and more likely would have aided him.

--Shane came back to Wheeling after he got hit in the head because he was involved with a woman from Wheeling, Alberta Banks Palmer, Habeas, p. 241, which could have offset the prosecution argument, TT. 317, that Shelton's return to Wheeling showed that he was not afraid of Lawson, Davis, Mitchell, and Robinson.

The only rationale given by counsel for not calling Tim was that lead counsel was not sure what Tim was going to say. Habeas, p. 261-2. **Counsel testified that by the time that Tim Shelton was available, anything that they "could have used would have been helpful."**

Habeas, p. 254. See Silva v Woodford 279 F.3d 825 (9th Cir. 2002), where counsel's ineffective in failing to investigate and present potentially compelling mitigating evidence to the jury during the penalty phase was sufficiently prejudicial to undermine confidence in the outcome of the penalty phase of defendant's trial).

Shelton also provided mitigation evidence at the habeas hearing, but not at trial, that he sent money to Erica; and that prior to 1995 been shot in the back, and hit over the head three times. Habeas, pp. 216, 221.

This was the kind of mitigation testimony about which Wood testified, Habeas, p. 229, that would have put Shane in context for the jury.

Other signs of un-introduced mitigation evidence came from Himmelhoch's notes of his interview with Shane: "Kenny Lawson a drug pusher (his relatives will say he's an honorable citizen)." Resp. Hear. Ex. 4. This characterization is directly contrary to the closing argument, *supra*, p. 15, citing TT. 312, where counsel stated that Lawson was completely innocent.

Instead of a person who had little been in trouble, who had worked for years and who had changed his children's diapers, the jury got a description of Shelton as "**this ASSASSIN, Shane Shelton, Shane Armistead, 'Big Boy,' 'the drug dealer from New Jersey,'**" as the State argued, TT. 297, a person who sold drugs to young people on the street, TT. 304, a person who crossed state lines to sell drugs, TT. 305.

In contrast, the topic of Shelton's children got three questions from his own counsel in Shelton's testimony. TT. 261.

Instead of a person who returned to Wheeling, as Tim Shelton would have confirmed, because of attachment to his Wheeling girlfriend, Shelton was pictured as a brazen, unafraid corruptor of youth whose only ties to Wheeling were the drugs he peddled. TT. 304.

Instead of an action that was the product of singular events and monumental stress, unlikely to ever be repeated, the shooting came across to the jury as actions consistent with Shelton's life. See Hart v Gomez, 174 F.3d 1067, 1073 (9th Cir. 1999)(failure to introduce exculpatory evidence was ineffective where it would have created reasonable possibility of different verdict. Here "[t]he record reflects [trial counsel's] failure to present additional available character evidence as mitigating evidence was not a strategic decision taken after reasonable investigation," as in *King*, 748 F.2d, at 1464.

Note that in *King* occurred both errors occurring here. Counsel failed to present mitigation evidence AND breached the duty of loyalty in closing argument. The lack of mitigation evidence is worsened by a lack of consistent trial theme, as Wood testified, as in contrast to *Yarborough*, where a "unifying theme" was "[w]oven through" the arguments raised. *Id.*, at 6, in finding that counsel made a "calculated risk."

b. WHEN COUNSEL FAILED TO SEEK BIFURCATION,
SHELTON SUFFERED PREJUDICE

After drug usage by the defendant was restricted by the court in a pretrial order, suggesting that defendant could not use a key means to show that the identification of Shelton by the victim's companions was faulty, see supra at III, defendant might expect to be convicted. Since Shelton would need to testify about his fear, see infra at 39, trial counsel needed to seek bifurcation.

Yet counsel did not seek to bifurcate the trial, Habeas p. 255, 261, despite their duty to seek bifurcation. See generally LaRock, 196 W.Va, at 313-315, 470 S.E.2d 632 (1996)(review of court decision to refuse to bifurcate implicates a standard of review of an abuse of discretion such that compelling prejudice need be shown), citing State v Bragg, 160 W.Va. 455, 255 S.E.2d

466 (1977), and *State v McCraine* 214 W.Va 188, 588 S.E.2d 177 (2005), court erred in failing to bifurcate two charges. Here compelling prejudice is evident. See: Wood testimony, Habeas pp 229, 232, 234.

The State's Response was, first, that the trial court might not have granted the motion to bifurcate; and two, that, if the case were bifurcated, then it could have introduced the fact that defendant began selling drugs at age 15 or 16. Petitioner's logical response to the second argument is that defendant could have responded that several years before he was smoking pot and drinking alcohol before going to school, evidence that, under most cases, has to be considered mitigation. See Schofield, 185 W. Va., at 203-204, 406 S.E. 2d, at 429-430.

Additionally, irrelevant bad acts by petitioner were introduced in this unitary trial, without objection. Habeas p. 239, referring to TT. 262. Wood stated that the trial strategy as a whole did not make sense. Habeas p. 229. See Rompilla, indicating importance of theme. Assuming he was going to admit guilt, trial counsel should have stressed mitigation. Yet there was very little delving into background and no introduction of Shelton to the jury. If they were contesting guilt, Wood testified, he would not testify. Counsel should have sought bifurcation. *LaRock*, Syl Pt. 6, indicates that one factor is whether bifurcation would excessively lengthen the trial. Since trial lasted but three days, Habeas p. 239, lengthening would pose little inconvenience.

c. LACK OF PURSUIT OF TRIAL THEME FURTHER
PREJUDICED SHELTON

Police officers testifying could have been asked if he or she was the "Wheeling police" officer who said to the AP reporter, see generally Cleckley, *Handbook* (4th ed.), Section 6-9B, pp. 6-154 - 6-188, that there had been an "ongoing conflict between Shelton and the decedent."

See Dietz, 188 W.Va., at 533, 425 S.E.2d, at 209 (defendant was deprived of ineffective assistance for failure to vouch the record with reports on issue of victim's propensity for violence, which would have supported self-defense), citing Thomas and State ex rel Bess (ineffective assistance can be shown by failure to investigate the factual basis to suppress a tape recording). See State v Louk, 171 W.Va. 639, 301 S.E.2d 596 (1983), noting the relevance, in certain situations, of "threats made to other parties against them."

As counsel admitted, only two questions were asked of petitioner by his own counsel about threats, though they were essential to the defense, Habeas p. 249, despite the coming together of a perfect storm of causation:

--shots were fired at Shelton the night of the shooting from a car containing the decedent and a trial witness (Robinson). Habeas pp 214, 215. Shelton told his lawyers about this. Habeas p. 222-3. See Habeas p. 213-4; TT. 153; 2/19/98 hearing, p. 7.

--the planned theme that "everyone out there [in the housing project] had a gun" Habeas p. 250. Yet no such evidence was presented.

--the decedent had threatened to rob Shelton. Habeas, p. 213-4. This implicated Shelton's girlfriend and her son, since she and Shelton lived together. Habeas, p. 213. Shelton testified that he told his lawyers about it. Habeas, p. 222, 226.

-- a woman that night got Shelton out of the car near the Rideout apartment. With her Shelton smoked marijuana while next to the apartment, Habeas, p. 212, 223, after other witnesses saw him – and well after drug transaction upon whom the trial court relied to refuse an intoxication instruction. This would help defeat the "lying-in-wait" theory of the state. TT. 301, 1. 6. ***

--some shell casings came from a "war" at the project, which would have left shell casings throughout the area. Habeas, p. 212-3. Instead the jury got an argument based upon "five empty [shell] casings ...recovered from where Defendant was standing" and "that there were as many as seven, six or seven seems to be what everybody says." TT. 302. Later the State jacked the number up to "I counted eight casings." TT. 318. The number of shell casings were argued as evidence of malice, TT. 302, and the trial court relied upon the number of holes in Lawson in its Findings of Fact and Conclusions of Law.

Thus this case further diverges from *Bell* in that there no absent mitigation evidence was presented at the habeas hearing. *Id.*, at 697, n. 4.

Here some evidence was presented – and much more was available See infra, citing petition exhibits A-S, largely impeachment, Habeas p. 150-207.

As well, in *Bell*, concerns of federalism appear and they are absent here. The Supreme Court rejected the Sixth Circuit, which had rejected the state court of appeals, finding that the state court was not clearly contrary to federal law, a higher standard than obtains here.

- d. Trial Counsel generally failed to impeach the state's witnesses, e.g. by their important prior inconsistent statements

Here much more impeachment did not occur than did occur. See *Berryman v Morton*, 100 F.3d 1089, 1098 (3rd Cir. 1996)(failure to cross examine rape victim was ineffective assistance where description of assailant was inconsistent with prior statements.) Cf. *Gray v State* 139 S.W.3d 617, 622 (Mo.App.. 2004), where the court indicated, with significant and repeated qualification that "counsel's failure to impeach a **witness** does not, **on its own**, warrant post-conviction relief."

Key is the impact of the matter, which could have been explored, on the parties' theories of the case. The impeachment would have helped provide Shelton with a defense and would have changed the outcome of the trial. This can discharge the petitioner's burden.

No strategic reasons appeared for failure to impeach; a strategic decision would require an articulation of how cross-examination of a witness would be harmful to the petitioner. One counsel did not recall why he had not used potential impeachment. Habeas p. 261. (Javita Wade statement, see Habeas p. 174). This prevents a finding of strategy. "A particular decision could not be labeled 'strategic' where, *inter alia*, the attorney had no idea why the decision had been taken" *Pavel*, 261 F.3d, at 218, n. 11 (citations omitted). See Com. v Corley 816 A.2d 1109, 11143-1115 (Pa. Super 2003)(trial counsel ineffective for failure to impeach witness facing criminal charges stemming from same incident regarding his expectation of leniency in exchange for his testimony against defendant; attacking witness's credibility would only have been beneficial to defendant in light of the inculpatory nature of witness's testimony). Unlike *Daniel*, 195 W.Va. at 32-328, 465 S.E.2d 429-30, where trial counsel's cross-examination of a non-damaging witness was not inadequate, the witnesses here were foundation of the state's case. Cf State v Frye --- S.E.2d ----, 2006 WL 386363 (W.Va., 2/17/06)(trial counsel's failure to cross-examine witnesses was "calculated towards advancing a particular theory of the case." A footnote indicated that it did "not pass on whether advancement of the particular theory adopted by trial counsel meets the objectively reasonable standard established by *Miller*," citing 194 W.Va. at 6-7, 459 S.E. 2d at 177-18, syl. pts. 5, 6.

A wealth of readily-available impeachment was contained in the prosecution file. See Bell, rejecting ineffective assistance in large part because counsel, though he waived closing argument and called no witnesses, did cross examine state witnesses. 535 U.S. at 585.

For example, upon Drake the State relied **heavily** for evidence of premeditation, TT. 299-300. The State gave the mistaken impression that Drake's testimony was all "that's what he told Anton then." Drake's pre-trial statement said that Shelton said his gun was "for protection." Counsel who cross-examined Drake, T. 133-137, opined that this statement would have added to the basis for the self-defense instruction that defendant had sought at trial but which had been refused by the Court TT. 280-281. Counsel testified it was likely that he saw this statement. Habeas p. 260.) See Com. v Hudson, 846 N.E.2d 1149 (Mass., 2006)(counsel's failure to use eyewitness' recantation affidavit to impeach eyewitness' testimony from first trial that was admitted when eyewitness pleaded Fifth Amendment constituted ineffective assistance); State v Jeannie M.P., 703 N.W.2d 694 (Wis. App. 2005)(counsel's failure to impeach testimony constituted deficient performance where witness had adverse relationship with defendant.); and Lewis v Mayle 391 F.3d 989 (9th Cir. 2004)(defense counsel's failure to impeach state's key witness on witness' prior felony DUI conviction constituted ineffective assistance of counsel; admittedly, Lewis presents a conflict of interest not present here). Drake's statement also dates the "bottle incident" about a week before the shooting. See infra regarding self-defense.

Rideoutt's apartment, near where the shooting occurred, "was a place you went to, to get high" Habeas p. 217. This statement was consistent with her **unused** statement that those in the apartment were having a good time, Pet Ex M. While the Court limited impeachment of her regarding drug usage, wrongly, we showed below, counsel eschewed such impeachment of any **other** state witness. This should have been set up pretrial for several of the witnesses.

Chris Parks, present for the bottle incident and drove Shelton to the hospital, was not called, and therefore not impeached (though a WPD officer could have been asked about his statement, since the State relied upon the "bottle incident." Parks told WPD that Shelton told

Parks essentially that Shelton was going to leave the dispute with Lawson *et al* alone, Habeas, p. 157-8, see Habeas p. 215, to let it go. Pet Ex O. The State argued that Shelton told several people that he was not letting it go. 2/19/98 hearing, p. 9. Counsel testified it was likely that he saw this statement. Habeas p. 260. Parks was identified as a witness the state was going to call, so counsel knew about him. See Pet.'s Ex C, memo from Det. Brown to the prosecutor attorney. Habeas, p. 200. See Pavel, 261 F.3d, at 217-8 (failure to call important fact witness (and medical expert) was ineffective assistance because prosecution's case was weak).

Speaking of premeditation, the state's closing said, "[H]ow does the State establish this? Edward Robinson." TT. 299. Yet easily-used impeachment was not used for this important witness. The result was that the premeditation evidence went unchallenged. Robinson's testimony related to the "bottle incident," when Lawson struck Shelton a few days to a few weeks prior to the shooting. The state's file folder for Robinson contains a typewritten sheet, Pet Ex F1, and writing on the inside folder, Pet Ex F2. One statement does not mention the girls whose presence led to the Robinson's claim that if he disclosed the names of the girls present when Shelton made a "damning statement," they would be in jeopardy. See Ex G. The APA told the Court "this witness has not told the State their identity." The pre-trial statement was more deficient than that. Robinson had not even told him of their existence. Robinson could have been impeached for failure to mention "the girls" in a pretrial statement. See Dixon v Snyder, 266 F.3d 693, 7-3-5 (7th Cir. 2001)(failure to cross examine sole eyewitness was ineffective).

Supporting both a unmade diminished capacity argument and an intoxication instruction are two similar statements in the prosecution's Robinson folder: "Shane acting very strange on day of shooting," Ex F1, and "saw Shane the day of shooting acting strangely." Ex F2.

Upon Wade the State also relied to show malice. TT. 3. Counsel did not know why Javita Wade's inconsistent pretrial statements, Pets. Ex H, Habeas, p. 174, and L, Habeas, p. 185 was not used and counsel did not know why. Habeas, p. 261 TT. 261 (Court did not know if self-defense was appropriate and ultimately refused the instruction).

Officer Petri's failure to answer fully the question about Wade's pretrial could have been used also to impeach Petri's testimony at trial. Petri provided the "basis" for the "flight route exhibit," TT. 233-239, so the foundation for that exhibit, St. Ex 50, would have been undermined. See: TT.232-236. Petri admitted pre-trial what another state witness (Brown) refused to admit on cross-examination at trial. Before the grand jury, Petri speculated that the bottle incident was **drug-related**. Ex I. Petri was never cross-examined at trial, Habeas, p. 183, TT. 237.

His grand jury testimony contrasted with Brown's testimony at trial, Habeas, p. 183, TT. 122. Brown indicated that he had never heard that the "bottle incident" related to drugs. Petri could have been asked the question that Brown refused to admit and Petri impeached if he said what Brown said. At the grand jury, then Police Chief Petri related one but not the other of Wade's pretrial statements, Ex H, to the grand jury, in answer to the question, "what was the substance of her statement regarding this incident." Pet Ex. I, Habeas, p. 175-6.

Petri said that Wade identified Shelton. *Id.* Yet her first statement indicated that "**it was too dark to see his face.**" Ex H (fifth handwritten line). Trial saw no cross examination of Wade's lengthy identification. Pet Ex J, Habeas, 178-183. The crucial discrepancy could have been used to impeach Wade. This would have outweighed the potential rehabilitation evidence for the State: transcript, in the prosecutor's file, with many blanks, apparently a taped statement, conducted an hour or so later on the same day as her signed statement.

Nesbitt was suggested at the Habeas hearing to be a very important witness. Habeas, p. 243 (“the main witness for the state ... wasn’t around here.”) He was described as unavailable, State’s 2nd Supp. Resp. to Def.’s Dis. Mot., and the subject of a letter from the prosecutor. His trial testimony seemed to indicate but a few moments between seeing Shelton, TT. 212-213, and the shooting where notes from 1/98, indicate it was 25 minutes later. That same conversation also refers to Danielle Garrison (or someone else) changing a shirt, at Rideout’s apartment, Pet Ex Q, Habeas, 201-2, something to which no one else seems to have alluded. This topic suggests a lack of investigation of what the people in Rideout’s apartment were doing. Rideout’s statement indicated that the people at her apartment were “laughing and having a good time.” Pet. Ex M, Habeas, 186, handwritten line 7.

Rideout’s unsigned statement said that “she heard gunshots **but did not see anyone doing the shooting**,” Pet. Ex L, Habeas, p. 185. Her signed statement did not make any specific connection between Shelton and the shooting. Pet. Ex M, Habeas, 186.

Both of these statements were more favorable than her trial testimony, Pet. Ex N, where she said she saw him running down the hill, TT. 169, after the shooting.

Apart from Rideout, counsel did not impeach by conviction.

e. Failure to repeat the bottle incident

State witnesses could have been asked if they saw Lawson hit Shelton in the back of the head with a bottle. Habeas p. 157-8. When Tracey Wade was led to say that Lawson was his usual peaceful self, TT. 203, she could have been asked, “you can’t be sure of the things you attribute to Mr. Lawson, when you say he was peaceful, since he hit Mr. Shelton over the head with a bottle?” If repeated, this cross-examination would have supported a consistent defense theme.

F. PETITIONER WAS NOT READY TO TESTIFY

Stating, "I'm beaten." TT. 264. And quite inexperienced at testifying, Habeas, p. 211, 232, Shelton so damaged his case that the prosecutor said that Shelton had admitted things that the State could not have proven. TT. 301 ("this comes out of his own mouth. The State did not have a single witness to tell you this.") The State said that "[a]t trial, the Petitioner confessed to the murder in front of the jury." Habeas p. 119. His "nonchalant" demeanor, TT. 304, and failure to cry, TT. 305, was attacked at closing.

While Shelton stated some facts in his favor, they were not developed in testimony OR stressed at argument. For example, the State (and later the Court, Order, ¶ 2) relied upon 13 bullet holes in Lawson, TT. 88, and argued that it was "anywhere up to eight or nine shots," TT. 266, the defense noting that some were entry and some exit and that defendant had not shot thirteen times. This was approximate to defendant's testimony, e.g. Habeas p. 213, and to Nesbitt's that he heard 5 or 6 shots, TT. 214, and to the police statement pretrial, newspaper article, Habeas p. 270 (5 or 6 times). For a jury mulling over mercy, that difference was significant.

Another example is the threats, allegedly the defense strategy, that got only two questions, TT. 254, ll. 8-12. Shelton did not testify at trial to his intent, as reflected in his habeas hearing, which was to scare Lawson *et al*,

that he did not know if he hit Lawson. Habeas pp 223, 219.

G. FAILURE TO OBJECT TO PROSECUTION STATEMENTS, WHERE PREJUDICE RESULTED

While they were mentioned in the new trial motion, Felony ¶ 191-193, counsel did not object to the prosecutor statement, "[t]his is the strongest case I've ever seen....I've been in this

work since 1973” T. 320 (rebuttal). See State v Moore, 1867 W.Va. 23, 409 S.E.2d (1990), reversing for expression of personal opinion, and Burns v Gammon, 260 F.3d 892, 897 (8th Cir. 2001)(counsel’s failure to object to prosecution’s statement in closing argument constituted ineffective assistance). The State called Shelton an “assassin,” TT. 297, and emphasized that he was from New Jersey. In denying the new trial motion, the trial court found that “the Prosecuting Attorney’s statement was NOT PROPER.” Habeas, p. 210.

Counsel did not object to prosecutor questions, though he said “[t]hat would have made you 24, something like that, **when you murdered** Kenny Lawson; is that correct?” TT. 260, and referring to “the death of a person by someone that’s accused of **murder**.” TT. 227

Counsel did not object though the State asked witnesses to speculate what Lawson meant by his statements, TT. 191, 201. Counsel did not object to compound questions, e.g. TT. 264; 265, 19-20; 266. See generally U. S. v Rendon-Marquez, 79 F.Supp.2d 1361 (N.D. Ga. 1999), aff’d, 228 F.3d 416 (11th Cir. 2000)(confusing compound questions could not be the basis for a perjury conviction); to asking defendant about uncharged criminal conduct without any notice (pirating CDs). TT. 261-3. See LaRock, supra and State v McGinness, 193 W.Va. 147, 455 S.E.2d 516 (1994). Counsel did not object to a single question that the State asked of the Petitioner. TT. 260-273, 274-275. See: State v Atalla, 157 OhioApp.3d 698 (Ohio App. 2004) (finding ineffective assistance in failure to object). Supporting the state theory that it would be “hard for someone to see Shelton standing in the dark,” TT. 121, the State got police officers to testify where WPD believed that Shelton stood when the shots were fired, TT. 118, contrary to *WVRE 702, 701(a), and 701(b)*.

Contrary to frequent usage, an officer should **not** be able to explain why or how an investigation was begun. See U.S. v Blake, 107 F. 3d 651, 653 (8th Cir. 1997)(citation omitted);

U.S. v Reyes, 18 F. 3d 65-71 (2nd Cir. 1994)(testimony by officer indicating he was responding to a police call, can become hearsay, to the extent that the officer relates the contents of the call); *U.S. v Martin*, 897 F.21368, 1372 (6th Cir. 1990)(“the relevance and probative value of ‘investigative background’ is often low, but the potential for abuse is high.”).

The prosecution error adds weight to the prejudice arising from ineffective assistance. *Strickland* and later cases rely on the inability of the prosecution to prevent counsel errors as a *reason* in favor of requiring prejudice. “The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence.” 466 U.S., at 693, cited in *Hill*, *id.*, at 58. The presence of State errors here inclines to a prejudice finding, for the experienced state prosecutor should have known much better. The State was able to prevent his words and thus is responsible for their effect.

H. PREJUDICE RESULTED WHEN THE COUNSEL FAILED TO HIRE EXPERTS WHO WOULD EXPLAIN THE ISOLATION TO THE JURY INHERENT IN SHELTON BEING AN OUT-OF-TOWNER

One such expert could have explained the effect of PCP. See also *infra* regarding refused intoxication instruction. The urine drug screen of Lawson, who had been at Rideoutt’s apartment, showed cocaine, PCP, and cannabis. Habeas p. 60-1. This drug use was relevant to the question of self-defense. PCP particularly relates to violence. See *U.S. v Foster* 376 F.3d 577 (6th Cir. 2004)(officer’s previous experience with PCP legitimized pat down for weapons). See generally *Dietz*, 188 W.Va., at 531-533, 425 S.E.2d, at 207-209, noting the relevance of drug addiction and propensity for violence. But see *State ex rel. Wensell v. Trent* 218 W.Va. 529, 625 S.E.2d 291 (2005)(per curiam)(no ineffective assistance in failure to hire psychological expert). Consumption of PCP would bolster the self-defense theory, by its link to aggressiveness. The

DVM IV states: "aggressive behavior involving fighting has been identified as an especially problematic adverse effect of phencyclidine." p. 256

Such an expert could also testify on the effects of the drugs consumed by the witnesses that identified Shelton as the shooter, such as Rideoutt, and on perception generally. Such a witness could ALSO testify to the effects of alcohol and marijuana, particularly long-term consumption, by Shelton., who said "I was high I was drunk. But I drink so much, I really can't tell if I'm drunk or not because so much be in me." TT. 256. She could have described the studies indicating that the earlier a person begins drinking the more likely he or she is to have a substance abuse problem. See: www.psesd.org/www.psesd.org/prevention/doc, accessed 7-28-06., providing additional basis for the not-given intoxication instruction. The expert could have explained the isolation that might have additionally supported a self-defense instruction.

I. PREJUDICE RESULTED WHEN COUNSEL FAILED TO SET UP DRUG USAGE TESTIMONY

Trial counsel failed to ask the eyewitnesses about their drug usage at the pre-trial hearing, 2/19/98, Mitchell, Beegle, Javita Wade, and Miller testifying, so that they could be questioned effectively at trial. See generally Habeas p. 263. As Professor Cleckley indicates, pretrial questions are very useful to set up the cross examination of state witnesses at trial. 1 *Handbook on W.Va. Criminal Procedure* (2nd ed.); I. 598 – 599. Woods states that counsel should have proffered cross-examination questions Habeas pp 233-4; and that restriction of the defense' examination into victim's drug use played into, and magnified, the failure to present mitigation evidence. See Habeas p. 234, "Shane acting very strange day of shooting," F-1, Habeas, p. 167, and F-2, Habeas, p. 168, "saw Shane day of shooting – acting strangely."

J. PROSECUTION MISCONDUCT HELPED PREJUDICE DEFENDANT

No novice, the prosecutor also said, at the end of the rebuttal portion of the closing:

“This is the strongest case I’ve ever seen....I’ve been in this work since 1973...It’s the strongest case I’ve ever seen.” TT. p. 320. This is a forbidden expression of personal belief in the quantity of the evidence. Calling Shelton an assassin, as indicated *supra*, is inflammatory. *Edwards v State*, 428 So. 2d 357 (Fla.App.1983) (reversing for an inflammatory argument containing this name). As well, it is improper argument since un-supported by the record *People v Gutierrez*, 564 N.E.2d 850, 871 (Ill.App.1990)(calling defendant an assassin, which indicates that he is a professional murderer, “played upon the fears and prejudices of the jurors.”) While Shelton admitted that he was a drug dealer the record contained absolutely no evidence that this or he was a murderer for hire.

K. THE COURT ERRED AND PREJUDICE RESULTED WHEN THE COURT EXCLUDED EVIDENCE OF DRUG USE BY THE VICTIM AND BY INFERENCE BY THE EYEWITNESSES IN ADDITION TO RIDEOUT

Drug use by a group including the victim, was relevant to the question of self-defense.

See e.g. HUD v Rucker, 535 U.S. 125, 134 (2002)(linking drugs and violence, such that housing authorities can enforce no-fault evictions). Limited was cross-examination, though it is in the terms of the Wigmore treatise, is virtually the greatest engine ever invented for the discovery of truth. 5 Wigmore on Evidence 1367 (Chadbourn rev. 1976). Accord: State v Thomas. See Davis v Alaska, 425 U.S. 308, 316 (1974).

The government cited *State v Johnson*, 213 W.Va. 612, 584 S.E.2d 468 (2003)(per curiam). State’s Response, Habeas, 119 as “affirming this Court’s pretrial ruling that evidence of the victim’s drug use was inadmissible.” *Johnson* upheld exclusion of the victim’s crack

cocaine drug use eight hours before an identification of defendant under an abuse of discretion where two witnesses testified at hearing. One testified that the effect of crack cocaine lasts about one half hour. The other, a police officer, testified that the victim did not seem to be under the influence of drug use. 213 W.Va. at 614-15, 584 S.E.2d at 470-1. HERE THERE WAS NO SUCH TESTIMONY ABOUT THE EFFECT OF ANY OF THE DRUGS FOUND IN LAWSON'S SYSTEM.

Though the scope of cross examination is subject to abuse of discretion standard, that standard is narrowed by the floor of the *Sixth Amendment*. Professor Cleckley phrases this as whether a "minimum threshold of inquiry was afforded a defendant in the cross examination of an adverse witness." 2 *Handbook on Evidence for West Virginia Lawyers*, 6-11(F)(2), at 6-224. It only becomes discretionary "after the right of cross examination has been substantially and thoroughly exercised." At 6-235 (citation omitted).

The drug screen of Lawson, who had been at Rideoutt's apartment, showed cocaine, PCP, and cannabis. Felony p. 60-1. Wood proffered that the Court's restriction of the defense' examination into victim's drug use played into, and magnified, the failure to present mitigation evidence. Habeas p. 234. PCP particularly relates to violence. See supra, e.g. *Foster and Dietz*, 188 W.Va., at 531-533, 425 S.E.2d, at 207-209, noting the relevance of drug addiction and propensity for violence. Yet this evidence was excluded pre-trial.

After the exclusion of drug use by the court, the prosecutor stated that the people in the apartment were "high," TT. 57, which should have "opened the door" to evidence about Lawson – and all other persons who had been in Rideoutt's apartment. See Cleckley, Handbook, 1-7(1). Amid a split of authority, 33 POF2d pp. 211, 254, the majority rule is that the victim's

intoxication may be a circumstance to be considered in determining if there is any pressing need for self defense. N. 36, citing *Nuss v State*, 328 N.E.2d 747 (Ind. App. 1975).

Wade, who the State said was high, testified that when Shelton looked in the window he **could have seen Kenny**. TT. 198. She testified that she remembered him saying "I don't have nothing, and allowed to explain that **what he meant** was "I'm unarmed," TT. 201-2, though not an expert under WVRE 702, nor a lay witness offering an opinion under *WVRE 701*. It was not rationally based upon direct perception under *WVRE 701(a)*, nor helpful under *WVRE 701(b)*. She was allowed to testify she knew Lawson didn't have a weapon on him, TT. 202.

Regarding another identifying witness, Rideoutt, defense counsel asked, in response to redirect question about her the date of her conviction in relation to the shooting, "You just decided to run a crack house one day and got arrested for it." The court sustained an objection, saying, "that area has been probed and its bee[n] probed properly and the jury will be instructed to disregard the question that was last propounded," TT. 174, though no trial probing occurred. Wood proffered that trial counsel should have proffered cross-examination questions *Habeas p.* 233-4.

- L. PREJUDICE ALSO OCCURRED IN THAT THE COURT ERRED IN RESTRICTING CROSS EXAMINATION OF RIDEOUTT, ONE OF ONLY THREE WITNESSES TO THE SHOOTING, AND WHOSE APARTMENT LAWSON WAS EXITING, ABOUT THE LENGTH OF TIME SHE HAD BEEN RUNNING A CRACK HOUSE

Prof. Cleckley states

While trial courts have wide discretion in controlling the form and manner of cross examination, their discretion is considerably more limited when it comes to the scope of cross examination, particularly in criminal cases. As previously stated, cross examination is frequently extolled as the single best mechanism for discovering the truth, thus, any limitation upon its legitimate scope are strictly reviewed.

Handbook on W. Va. Evidence, 6-11(F)(4) at 6-228.

Rideoutt was one of the few putting defendant at the scene of the shooting. TT. 169. Robinson, Anton, Garrison did not identify him. See TT. 190. That placement had to incline defendant to decide to testify.

Cross examination of this witness was also crucial in that she testified that Shelton did not seem intoxicated. TT. 167. See *Cleckley*, 6-11(F)(1) (“the *right* to cross examine an adverse witness is *almost* absolute.” At 6-219, citing *Pointer v Texas*, 380 U.S. 400, 405 (1965).

She - and others - might have been consuming crack that night. Virtually all the witnesses putting Shelton at the scene were at Rideoutt’s apartment. At least “a couple” of them were high, as the State admitted, Felony, p. 27, 57. Yet Shelton was not permitted to challenge the prosecution’s description of the level of intoxication. He did not receive an adequate opportunity to cross examine. The identification, unchallenged, he was virtually forced to testify, though not prepared to do so.

M. PREJUDICE ALSO OCCURRED WHEN SHELTON, SHACKLED ON THE BUS WHEN THE JURY EXITED AND VIEWED THE SCENE AND UNABLED TO PARTICIPATE IN THEN JURY VIEW, DID NOT PERSONALLY WAIVE HIS RIGHT TO BE PRESENT, AND WAS LIKELY SEEN BY JURORS IN FOOT SHACKLES WHEN THE RE-BOARDED THE BUS

At voir dire, Shelton stayed on the bus, TT. 49, 51 Habeas p. 23. He missed what was said about the locations, which locations the jury should “regard.” The court stated:

“Mr. Shelton is present, but by agreement of all the parties, including obviously the defendant, Mr. Shelton will remain on the bus mainly because he is – for security purposes, he has leg shackles. At the request of defendant, he will remain on the bus.”
T. 49.

The State relied upon the jury view in its closing argument. TT. 299. At this view, Shelton had a personal statutory right to be present. *W.Va. Code 56-6-17*, stating that “the

accused shall likewise be taken with the jury.” Thus this statutory aspect would suffice, even if this case were put into the category of cases where defendant might have to show the additional prejudice element, that the action “deprive[d] the defendant of a substantial or procedural right to which the law entitles him,” 35 Geo L.J. Ann Rev Crim Proc (2006), citing Williams, 529 U.S. at 391-3, (further citations omitted).

The State said “[a]t the Petitioner’s request, he was not permitted to leave the bus.” State’s Resp.I, 123-4. Though the record reflects an agreement by counsel, it reflects no agreement by defendant himself. Cf. People v Maynard, 928 P.2d 485 (Cal. 1997), suggesting that defendant must personally waive his presence at the jury view.

This issue is linked to the “shackling” issue under Deck v Missouri, 125 S.Ct. 2007 (2005), which overturned a sentence due to unjustified shackling visible to the jury. Absent “special circumstances” and specific findings by the trial court, the practice is inherently prejudicial. Once unjustifiable shackling has been shown, the State bears the burden of proving beyond a reasonable doubt did not contribute to the death penalty.

Evidence from the habeas hearing showed that petitioner sat in the middle of the last seat, sitting between two deputies, and at least his leg shackles were visible to each juror as they re-boarded the bus after the jury view. The impression on the jury had to be that Shelton was dangerous, that he was a danger even to the jurors in his trial. Habeas, p. 210-1.

Applying Deck v Missouri, the shackling was visible, unjustifiable, and unaccompanied at any point by personal waiver. See State v Youngblood 217 W.Va. 535, 618 S.E.2d 544 (2005), Davis, J., dissenting, faulting the failure to mention Deck.) Such shackling requires an evidentiary hearing, State v Holliday, 188 W.Va. 321, 424 S.E.2d 248 (1992). See State v Brewser, 164 W.Va. at 178, 261, S.E.2d at 81 (rule against physical restraints) and State v Allah

Jamaal W. 209 W.Va. 1, 543 S.E.2d 282 (it is generally improper to require even defendant's incarcerated witnesses to appear in jail attire.).

Petitioner's claim here is aided by the ease with which the sight of shackling could have been blocked. Lead trial counsel testified that merely crossing his own ankles might have shielded the shackled ankles from view of the jury. Habeas p. 260.

Wood found that viewing shackling of Shelton could have the effect on deliberations, Habeas p. 233. The State did not prove beyond a reasonable doubt that the shackling did not impact the jury. As Shelton testified, attending the jury view could well have been helpful to preparing to testify and testifying, and he wanted to hear what was being said by – or to – the jury, Habeas p. 213, particularly since Shelton, as measured by his testimony, was not ready to testify.

N. PREJUDICE ALSO OCCURRED WHEN COURT ERRED IN FAILING TO GIVE AN INTOXICATION INSTRUCTION

Despite the court's rationale, that a person sober enough to conduct a drug deal some hours earlier forfeits his right to an intoxication instruction, the testimony by defendant offered sufficient basis to require an instruction. See LaRock, 196 W.Va., at 308. "Appreciable evidence is all that is needed to justify the granting of an instruction. *State v Spicer* [162 W.Va. 127, 135] 245 S.E.2d 922 [927] (1978)," citing *State v Hackle*, 110 W.Va. 485, 158 S.E. 708, (1931) and *State v Allen*, 131 W.Va. 667, 49 S.E.2d 847 (1948), *Cleckley*, *West Virginia Criminal Procedure*, II-220 (2nd ed.).

The record evidence showed three shots of cognac, more than one beer at a bar, perhaps other beer while driving (and thus perhaps after the drug transaction, which apparently happened in a bar), then "more weed." TT. 256, 270. This came amid chronic alcohol consumption, T.

278, describing it as a way of life, and with no testimony about food consumed that day. This consumption, particularly on a chronic basis, requires an instruction.

O. THE COURT ERRED IN ADMITTING THE FLIGHT ROUTE EXHIBIT

The Court's Order erroneously stated that "phone records linked to the defendant and the automobile in which he was traveling represents sufficient circumstantial evidence of further flight..." Order dated 2/24/98. No such cell phone records were introduced in this trial and this "foundation" witness not cross-examined. Trial counsel objected at trial, TT. 232, 236, as they had pretrial, 2/19, pp. 37-44, and raised the issue on appeal (Issue IV, Felony 227-8). The trial court indicated, "that ruling will continue, your exception is saved." TT. 236, the precise objection cut off by the Court. TT. 236.

The flight route exhibit, Felony, p. 62, lacked any basis in prosecution testimony from Alberta Banks that the phone was in the car, T. 46-47, or when the calls were made. Though the State admitted that it had had some contact with her. The State did not call Banks to the pretrial hearing because, it said, she had not been **fully debriefed** at the time of hearing, TT. 45-46, suggesting that the State had at least some contact with her. Chief Petri stated that "as far as having a witness saying, 'yes I saw Mr. Shelton in that car, using that phone and stop in Rochester, New York,' I don't have that." TT. 44, 67.

Thus Petri's testimony, the only foundation for the exhibit, violated *Crawford v Washington*, 541 U.S. 36 (2004)(predicate to present out-of-court testimonial evidence requires unavailability of the witness and prior opportunity for cross examination) in both its hearsay and Sixth Amendment aspects. See Davis v Washington, 126 S.Ct. 2266 (2006), where the Court, by Justice Scalia, reversed a conviction for domestic violence on the basis of *Crawford*.

CONCLUSION

The conviction of Petitioner should be reversed and vacated.

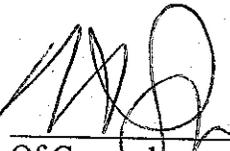
In the alternative, this Court should vacate the sentence, and order that a new penalty phase hearing be conducted. See: State v Domain 204 W.Va. 289, 294, 512 S.E. 2d 211 (1998).

This matter should be remanded to a different court.⁵

Respectfully submitted,

SHANE SHELTON, Petitioner:

By:



Of Counsel

⁵ The same judge who ruled on issues should not reconsider issues that arose during the trial. See generally Tyler v Swenson, 427 F.2d 412 (8th Cir. 1970)(a federal court might have given the state court an opportunity to entertain petitioner's claim before another judge)
The Court stated:

“Insofar as this Court is concerned, based upon the facts as I have seen them in this case, if ever there is a recommendation by a governor of the state of West Virginia to pardon or issue clemency, as long as this Court is alive, I will reject any such attempt.”

TT. 325

The Court also stated:

“It would be a perversion of justice to let this jury consider a verdict other than a verdict other than first degree murder.”

TT. 279

The Court also stated:

“[W]e are scheduled to being this trial on Monday and I have, I think you all know, as long as I'm alive, this case is going to trial, I mean going to start that day.”

T. 17

Having indicated animosity toward Petitioner, the Court should not hear this case on remand, even if the procedure were generally not infirm. The State indicates that “[t]his Court has on two separate occasions found that the Petitioner’s Motions to Recuse this Court are unfounded and without any basis.” State’s Response, p. 14; Order, Habeas, 70. Shelton objected to a question proposed by the Court, which responded to an objected-to question by the State with “a better question.” Habeas, p. 225. The Court should not assist the state in framing its questions, even without a jury present and though the Court has the right to ask questions of its own at the proper time, pursuant to WVRE 614. See Habeas, p. 227 for Court’s response.

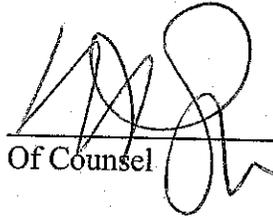
Timothy F. Cogan, Esq.
W.Va. State Bar No. 764
CASSIDY, MYERS,
COGAN & VOEGELIN, L.C.
The First State Capitol
1413 Eoff Street
Wheeling, WV 26003
(304) 232-8100; (304) 232-8200 Fax

CERTIFICATE OF SERVICE

Service of the foregoing was had upon the following by United States mail, postage prepaid, at their last known address, this 13th day of April, 2007, as follows:

SCOTT SMITH ESQ
OHIO CO PROSECUTING ATTY
OHIO COUNTY COURTHOUSE
1500 CHAPLINE STREET
WHEELING WV 26003

DARRELL V McGRAW JR
ATTORNEY GENERAL
1900 KANAWHA BLVD EAST
ROOM 26 E
CHARLESTON WV 25305-9924



Of Counsel

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