

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

SHANE SHELTON,

Petitioner/Appellant,

vs.

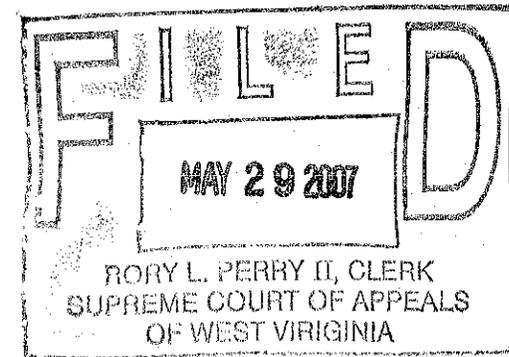
HOWARD PAINTER, WARDEN
MOUNT OLIVE CORRECTIONAL CENTER

Respondent/Appellee.

APPEAL NO. 33322

CASE NO. 00-C-23

CIRCUIT COURT OF
OHIO COUNTY,
WEST VIRGINIA



**REPLY BRIEF OF APPELLANT CONTRA APPELLEE'S BRIEF AND IN SUPPORT
OF PETITION FOR APPEAL OF DENIAL OF HABEAS CORPUS PETITION,
INCLUDING MOTION TO STRIKE APPELLEE'S BRIEF**

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TO: THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF APPEALS OF
THE STATE OF WEST VIRGINIA

HON. JOSEPH P. ALBRIGHT, CHIEF JUSTICE
HON. ROBIN JEAN DAVIS, JUSTICE
HON. LARRY V. STARCHER, JUSTICE
HON. BRENT D. BENJAMIN, JUSTICE
HON. ELLIOTT E. MAYNARD, JUSTICE

RORY L. PERRY, II, CLERK

TABLE OF CONTENTS

Title Page	ii
Table of Contents	iii
Table of Authorities	iv
Reply Brief of Appellant Contra Appellee’s Brief and in Support of Petition for Appeal of Denial of Habeas Corpus Petition Including Motion to Strike Appellee’s Brief	1
Petitioner was Entitled to Effective Assistance of Counsel	2
Because these Statements Breached the Duty of Loyalty, Shelton Need not Show Prejudice	10
The State has not Indicated in Any Specific Way a Lack of Prejudice	11
1. By itself	12
2. In connection with other ineffective assistance	12
Absent Mercy Evidence from the Family was Detrimental for Shelton	14
Shelton Suffered Prejudice when Counsel Failed to Impeach the State’s Witnesses by Their Important Prior Inconsistent Statements	18
When Counsel Failed to Seek Bifurcation, Shelton Suffered Prejudice	22
The Effect of Improper Prosecution Argument was Prejudicial	23
Prejudice also occurred when Shelton, shackled and remaining on the bus when the jury exited and viewed the scene, did not personally waive his right to be present, and was likely seen by jurors in foot shackles when they re-boarded the bus	23
Prejudice from the Flight Route Admission	24
Failure to Object	25
Other Factors	25
Conclusion	25
Certificate of Service	26

TABLE OF AUTHORITIES

CASES

Bell v Cone, 535 U.S. 685 (2002)3, 4, 9, 12, 13, 19

Burger v Kemp 483 U.S. 776 (1987)14

U.S. v Chronic, 466 U.S. 648 (1984)3, 4, 5, 11, 13

Crawford v Washington, 541 U.S. 36 (2004)25

Cuyler v Sullivan, 446 U.S. 335 (1980)11

Daniel, 195 W.Va., at 320, 465 S.E.2d, at 4223, 11, 14, 19

Darden v Wainwright, 477 U.S. 168 (1986)14

Deck v Missouri, 125 S.Ct. 2007 (2005)24

State ex rel Dietz v Legursky, 188 W.Va. 526, 425 S.E.2d 202 (1992)17

Dixon v Snyder, 266 F.3d 693 (7th Cir. 2001)20

Dorsey v Missouri, 156 S.W.2d 825 (Mo.App. 2005)3, 4, 9

Fisher v Gibson, 282 F.3d 1283 (10th Cir. 2002)6

Francis v Spraggins, 720 F.2d 1193 (11th Cir. 1983)3, 8, 9

Lockhart v Fretwell, 506 U.S.364 (1993)14

Glover v U. S., 531 U.S. 198 (2001)3, 12

Haynes v Cain, 272 F.3d 757 (5th Cir. 2001)3

Herring v New York, 422 U.S. 853 (1975)3, 12

Kimmelman v Morrison, 477 U.S. 365 (1986)3

King v Strickland, 748 F.2d 1464 (11th Cir 1984)17

Mathena v. Haines, 219 W.Va. 417, 633 S.E.2d 771 (2006)1, 2, 19

Nix v. Whiteside, 475 U.S. 157 (1986)10

Pavel v Hollins, 261 F.3d 210 (2nd Cir. 2001)13, 19, 20

People v Kryzstopaniec, 429 NW2d 828 (Mich App. 1988)5

People v Maynard, 928 P.2d 485 (Cal. 1997).....24

People v Washington, 5 Misc.3d 957, 785 N.Y.S.2d 885 (Co. Ct. 2004)3, 9, 11

Rickman v Bell, 131 F.3d 1150 (6th Cir. 1997)9

Rompilla v Beard, 125 S.Ct. 2456 (2005)2, 12, 13, 14, 23

Schofield v W.Va. Dept. of Corrections, 185 W. Va. 199, 406 S.E.2d 425 (1991)6, 13, 14, 22

State v Domain 204 W.Va. 289, 294, 512 S.E. 2d 211 (1998)25

State v Frye --- S.E.2d ----, 2006 WL 386363 (W.Va., 2/17/06).....18

State v LaRock, 196 W.Va, 294, 470 S.E.2d 632 (1996).....14

State v Miller, 194 W.Va. 3, 14-17, 459 S.E. 2d 114 (1995).....6, 7, 23

State v Smith, 186 W.Va. 33, 410 S.E. 2d 269 (1991).....3

State v Webster 218 W.Va. 173, 624 S.E.2d 520 (2005).....12

State ex rel Leach v Hamilton, 280 S.E.2d 62 (W.Va. 1982).14

State ex rel. Humphries v. McBride, __ W.Va. __, 2007 WL 1201056 (W.Va. 2007)(per curiam)1, 22

State ex rel. Quinones v Rubenstein, 218 W.Va. 388, 624 S.E.2d 825 (2005).....2

State ex rel Wheeling Pittsburgh Steel v Eno, 135 W.Va. 437, 63 S.E.2d 845 (1951).....3

Strickland v Washington, 466 U.S. 668 (1984).....7, 9, 10, 11, 12, 14

U.S. v Swanson, 943 F.2d 1070 (9th Cir. 1991)10

Wickline v House, 188 W.Va. 344, 424 S.E. 2d 579 (1992).....3

Wiggins v Smith 539 U.S. 510 (2003)3, 13

Wiley v Sowders, 547 F.2d 642, 650 (6th Cir. 1981).....3, 9

Williams v Taylor, 529 U.S. 362 (2000).....13, 19, 24

Woodson v North Carolina 428 U.S. 280 (1976).....14

Yarborough v. Gentry, 540 U.S. 1 (2003) (per curiam).....12

OTHER AUTHORITIES

Cleckley, Handbook on W.Va. Criminal Procedure, “Right to Counsel,”3, 14, 17

35 Geo L.J. Ann Rev. Crim Proc (2006), n. 1579.....14, 24

Sixth Amendment, U.S. Constitution.....2

W.Va. Code 56-6-17.....27

W.Va. Constitution, Article 3, Section 142

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

~~Shelton moves to strike this brief of appellee as not timely filed. The order of 2/15/07 indicated that it was to be filed 30 days after receipt of the order. Appellee's brief was due on or before 5/2/07. Ironically, appellee claimed before the circuit court that many issues were procedurally defaulted.~~

Order
6/27/07

This court recently indicated the standard or scope of review in such a case in *State ex rel. Humphries v. McBride*, ___ W.Va. ___, 2007 WL 1201056 (W.Va. 2007)(per curiam).

In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review." Syl. Pt. 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006). It bears repeating:

THIS PROCEEDING MARKS THE FIRST TIME THAT THE MERITS OF THIS CASE HAVE BEEN CONSIDERED BY ANY COURT OTHER THAN THE TRIAL COURT.

While *Mathena* indicates the denial by the trial court would ordinarily be accompanied by some presumption of correctness, that trial court here indicated its prejudice to Shelton by its statements at time of trial.

“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 (trial transcript). 325.

The Court further stated that “[i]t 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 state argues that mercy was the only issue at the time of closing. It states that “Counsel felt they had no other option than to simply obtain a mercy recommendation and that comes within trial strategy.” State Brf., p. 8.

This is **directly contrary** to the finding of the circuit court, which found that counsel made these statements to gain credibility for a second degree murder verdict, FOF, ¶ 25. This amounts to an admission that this finding was clearly erroneous under *Mathena* and *McBride*, *supra*.

PETITIONER WAS ENTITLED TO EFFECTIVE ASSISTANCE OF COUNSEL

Appellee does not contest that Shelton has rights to effective assistance, 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) (failure to examine defendant’s file below level of reasonable performance and prejudiced defendant); *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); *Kimmelman v Morrison*, 477 U.S. 365 (1986)(ineffective assistance in lack of timely motion to suppress); *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 failure to move to suppress); *Wickline v House*, 188 W.Va. 344, 424 S.E. 2d 579, 583-584 (1992)(*per curiam*); *People v Washington*, 5 Misc.3d 957, 785 N.Y.S.2d 885 (Co.Ct. 2004); *Dorsey v Missouri*, 156 S.W.2d 825 (MoApp. 2005). See generally 1 Cleckley, W.Va. Criminal Procedure (2nd ed), "Right to Counsel," I- 17-88, citing cases.

Appellee does not seem to dispute that prejudice is not always necessary, as argued in § 3 of Shelton's principal brief. In certain situations, prejudice is dispensed with as a requirement, or presumed, or both. See *U.S. Chronic v*, 466 U.S. 648 (1984), a source for these situations, and Daniel, emphasizing the *Chronic* exceptions.

Appellee does not distinguish any of the cases relied upon by Shelton. Nor does the State dispute the applicability of *Bell v Cone*, 535 U.S.685, 696 (2002), and *id n. 3*, giving example of a *Chronic* situation as denying opportunity for CLOSING argument.

Nor is *Francis v Spraggins*, 720 F.2d 1193 (11th Cir. 1983) distinguished. There counsel, at the guilt phase of a capital penalty trial, effectively conceded guilt and admitted that he "committed the crime of murder." 720 F.2d, at 1193, n. 7, and, at 1194, citing *Wiley v Sowders*, 547 F.2d 642, 650 (6th Cir. 1981)

Nor did Appellee distinguish *Haynes v Cain*, 272 F.3d 757 (5th Cir. 2001), holding that counsel's strategy of explicitly conceding defendant's guilt on underlying felonies, in a first degree murder prosecution, was ineffective *per se*.

Nor *Dorsey, supra*, where counsel's admission in closing went beyond the testimony of defendant. At 834. Appellee states that the entire closing should be read in context and a single portion not pulled out of context. State Brf, p. 8. Shelton did not rely upon a single sentence. As he stated earlier, while the admission that counsel did not know if Shelton deserved mercy was harmful, even more fatal was the context.

The buildup was the sentiment that defense trial 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.

Counsel here, as in *Dorsey*, undermined the credibility of defendant. Here counsel termed the testimony of Shelton “a story,” once as in his “story about the bottle,” and then as in “he had a different story for that,” TT. 309. This referred to an assault when the decedent hit Shelton over the head with a bottle. Calling a crucial part of his testimony a “story” made it sound made-up, particularly when repeated twice. Counsel then distanced himself from Shelton: “I'm not going to justify what Mr. Shelton said.” If the “strategy” was to curry favor with the jury (see *supra* at 2 and *infra* at 6-7), that strategy makes no sense when the argument distances counsel (the strategy's recipient of the jury's favor) from Shelton.

Counsel's most damaging line might have been, amid 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 “entirely failed to subject the prosecution's case to meaningful adversarial testing. *Bell* at 696, quoting *Chronic*, at 659. Counsel “failed to oppose the prosecution throughout the sentencing proceeding as a whole.” *Bell* at 696.

Abandonment went far beyond the single sentence, "I don't know if my client deserves mercy." I, p. 151, TT. 312. Counsel who made the closing argument testified that one statement, see ¶ 39, might seem "a bit extreme," Habeas, 258-9. The expert, Ms. Wood, testified that such "closing statements" violate the duty of loyalty owed by trial counsel to Shelton. She testified 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.

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

Despite saying he was going to seek mercy, counsel RARELY IF EVER ASKED FOR MERCY. He repeatedly referred to this "murder." Looking at the time prior to Shelton's testimony, he said that he would not have stopped Shelton from "going to take the stand and tell 13 people on this jury that he basically **murdered** somebody." TT. 311. He said: "You can assume **he was premeditating for a month** and let the State presume it. TT. 313.

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 N.W.2d 828 (Mich App. 1988)(complete concession of guilt constitutes ineffective assistance of counsel). Counsel's statement here suggests that the trial was a waste of time. It also suggested the defendant bore some burden of proof. This violates *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."

What the closing emphasized by repetition was that “Mr. Shane Shelton took the stand and stated that he killed Kenny Lawson. Mr. Shane Shelton killed Kenny Lawson.” TT. 307.

Again, counsel did not ever quite get to asking for mercy. 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 bona 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 argument against a not guilty verdict that was wrong on the law.** “Mr. Shelton didn’t say that and the judge probably won’t allow it, based upon the instructions.” TT. 307. *See Schofield v W.Va. Dept. of Corrections*, 185 W. Va. 199, 203-204, 406 S.E.2d 425, 429-430 (1991)(technically ineffective in failing to present substantial evidence or argument on mercy).

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. *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).

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. Cf State v Miller*, 194 W.Va. 3, 14-17, 459 S.E. 2d 114 (1995), adopting

Strickland v Washington, 466 U.S. 668 (1984), and stating that lack of strategy would amount to ineffective assistance. *Miller* asked “(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.

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 was the endearment used**. As in *State ex rel McBride*, there is “no strategic value in [counsel’s] choices at trial.”

The state argues that mercy was the only issue at the time of closing, p. 8. If it was the only issue, then giving up the mercy argument to endear counsel to the jury is abandonment. On the other hand, the trial court, in direct contrast, made finding of facts stating that counsel made these statements to gain credibility for a second degree murder verdict, FOF, ¶ 25.

Thus the finding of fact cannot be sustained as the state concedes by its divergence from it.

Moreover, the trial court had barred a second degree instruction at the time of closing, indicating that there was no evidence to support it. Trial counsel agreed, and **conceded guilt to first degree murder**: “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.

He specifically agreed with the State’s closing, naming the state prosecutor and endorsing his argument, abandoning the client. “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.” TT. 307. See Francis, where a similar admission was ineffective. 720 F.2d, at 1193, n. 7.

Counsel also specifically abandoned the self-defense argument and then linked that abandoned argument to the jury’s decision on mercy:

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

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 that asking for mercy would be 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 (“to me it’s been a very difficult case”), 308, l. 4. He participated in – and emphasized – Shelton’s role as a drug dealer. Indeed, he went beyond it, introducing the idea that Shelton had not changed his life after the shooting but likely was still dealing drugs. “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. This amounted to an anti-mercy argument, for it raised the possibility that he was not a changed person, a key mercy element. See Rickman v Bell, 131 F.3d 1150, 1156-60 (6th Cir. 1997), which 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.

Even this approach to the "mercy argument" slammed Shelton: "[j]ust because you **sell drugs** to use doesn't mean he doesn't deserve mercy." TT. 309.

While the lack of tactic and strategy needs no further support, they are 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.

Wood also opined that these statements, alone and in combination with other failings, materially affected the jury verdict. She supplied a rationale, including 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.

Beyond *Wiley*, *Francis*, and *Dorsey*, *supra*, and *Sawson*, *infra*, this closing statement was ineffective under *People v Washington*, holding that a 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.

Statements of lesser harm included dating the bottle incident happened "a month before," the shooting, TT. 312, when some witnesses put it as little as a few days before. Omissions included failing to highlight Shelton's side about the number of shots fired, that fewer were fired than the prosecution claimed 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.

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

This Court need not consider actual prejudice. The argument AS A WHOLE 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). Because of the effect of failing to move to bifurcate, the sentencing proceeding as a whole consisted entirely of the closing argument.

The closing here was similar to that in *U.S. v Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991), 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.*

Similarly, the rationale for the conflict of interest exception (often known as a *Chronic* exception) 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.

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.

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 STATE HAS NOT INDICATED IN ANY SPECIFIC WAY A LACK OF PREJUDICE

Assuming *arguendo* that Shelton has to show prejudice, the standard “

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.

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) and *State v Webster* 218 W.Va. 173, 624 S.E.2d 520 (2005), reversing for violation of the right to close. *Glover v U.S.* 531 U.S. 198, 203 (2001) found prejudice from an increase in a prison sentence from 6 to 21 months; its prejudicial actions arose from “counsel’s performance in failing to argue the point.” 531 U.S., at 204. “The right to effective assistance extends to closing arguments.” *Yarborough v. Gentry*, 540 U.S. 1 (2003) (per curiam), at 5, citing *Bell*, 531 U.S., at 701-2. The closing here was “extreme,” in the parlance of counsel. In contrast, the most “extreme” 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. *Rompilla* indicated that its deviation was prejudicial “regardless of the accused admissions,” 125 S.Ct., at 2465, citations omitted, despite defendant’s “minimal” contribution to his defense. *Id* at 2462.

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 and dying in prison.

2. IN CONNECTION WITH OTHER INEFFECTIVE ASSISTANCE

Strickland requires that a court must consider the totality of the circumstances. 466 U.S., at 697, “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). As in *Rompilla*, the evidence here, “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. 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 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)(citations omitted).

ABSENT MERCY EVIDENCE FROM THE FAMILY WAS DETRIMENTAL FOR
SHELTON

“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 in previous convictions). It included, in its broadest terms, “the diverse frailties of humankind.” *Woodson v North Carolina* 428 U.S. 280 (1976). Thus *LaRock*, 196 W.Va, at 313-315, 470 S.E.2d 632 (1996), emphasized “the important role a finding of mercy has in the administration of justice,” 196 W.Va. at 315. See *Daniel*, 195 W.Va., at 320, 465 S.E.2d, at 422 (“a criminal defense attorney might be ineffective if he or she failed to present advantageous evidence that could affect a jury’s verdict,” 195 W.Va. at 329, 465 S.E.2d, at 431). Cf. *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.”).

West Virginia law has evolved 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

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

--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);

--Wheeling was his first home away from home;

--That Shane had spent so little time in confinement jail showed that he was not a bad kid, given his environment; Habeas p. 240-1.

--Shane smoked pot and drank alcohol every day before school; everybody in the projects where Shane lived did that; 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 drugs 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. It more likely would have aided him.

--Shane returned to Wheeling after he got hit in the head with a bottle because he was involved with a woman from Wheeling, Alberta Banks Palmer, Habeas, p. 241. This motivation would have offset the prosecution argument, TT. 317, that Shelton's return to Wheeling showed that he was not afraid of Lawson, Davis, Mitchell, or 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.

Shelton also provided mitigation evidence at the habeas hearing, but not at trial: he sent money to Erica; and prior to 1995 been shot in the back, and hit over the head three other times. Habeas, pp. 216, 221. This kind of mitigation testimony, about which Wood testified, Habeas, p. 229, would have put Shane in context for the jury.

Other un-introduced mitigation evidence came from the psychiatrist's notes, that "Kenny Lawson [was] a drug pusher. Resp. Hear. Ex. 4. This characterization is directly contrary to the closing argument, citing TT. 312, where Shelton's own counsel stated that Lawson was completely innocent.

Instead of a person who had little been in trouble, who had years of employment, who had changed his children's diapers, the jury got a description of Shelton as "**this ASSASSIN,...**" "**the drug dealer from New Jersey,**" as the State argued, TT. 297, a person who crossed state lines to sell drugs to young people on the street, TT. 304-5.

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 corruptor of youth whose only ties to Wheeling was that Wheeling was where he peddled his drugs.. TT. 304. See Shelton Prin Brf, pp. 24-8.

Instead of an action that was the product of singular events and the monumental stress they caused, and was thus unlikely to ever be repeated, the shooting came across to the jury as actions consistent with Shelton's life. "The record reflects [trial counsel's] failure to present additional available character evidence as mitigating evidence was not a strategic decision taken after reasonable investigation," *King v Strickland*, 748 F.2d 1462, 1464 (11th Cir. 1984).

King contains 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. Police officers testifying could have been asked about the statement the Associated Press attributed to the "Wheeling police," 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), citations omitted. As counsel admitted, only two questions were asked of petitioner by his counsel about the threats that were essential to the defense, Habeas p. 249, even though

--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 tactical theme was that "everyone out there [in the housing project] had a gun" Habeas p. 250. Yet no such evidence was presented. See infra at d regarding lack of impeachment.

--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.

--some of the shell casings found came from a previous "war" at the housing project, which would have left shell casings throughout the area. Habeas, p. 212-3. Instead the jury got an argument that the prosecutor "counted eight casings." TT. 318, argued as evidence of malice, TT. 302, and

-- a woman that night got Shelton out of the car near the Rideout apartment. With her Shelton smoked marijuana while standing next to the apartment, Habeas, p. 212, 223, after other witnesses saw him -- and well after a 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 as it gives Shelton another reason to be where he was. TT. 301, 1. 6.

SHELTON SUFFERED PREJUDICE WHEN COUNSEL FAILED TO IMPEACH THE STATE'S WITNESSES BY THEIR IMPORTANT PRIOR INCONSISTENT STATEMENTS

Much more impeachment did not occur than did occur. The impeachment would have helped provide Shelton a defense and would have changed the outcome of the trial.

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. Cf State v Frye ___W.Va. ___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.") Thus the findings of fact cannot be sustained, even under a clearly erroneous standard of *Mathena* and *McBride*. "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 Shelton Prin Brf, pp. 31-6. *Williams v Taylor*, 529 U.S. 362 (2000), rejected "strategic decisions" based on hunches and assumptions. Unlike *Daniel*, 195 W.Va. at 32-328, 465 S.E.2d, at 429-30, the witnesses who were not cross examined provided the foundation of the state's case. This case differs from *Bell*, which rejected an ineffective assistance claim largely because counsel, did cross examine state witnesses. 535 U.S. at 585.

Upon witness 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 [Shelton] 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 which had been refused by the Court TT. 280-281. Counsel likely saw this statement. Habeas p. 260. Drake's statement also dates the "bottle incident" about a week before the shooting. See Shelton Prin Brf, pp. 30 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, Habeas, line 7. That not questioning about this

topic occurred suggests a lack of investigation of exactly what the people in Rideoutt's apartment were doing. While the Court limited impeachment of her regarding drug usage of Rideoutt, wrongly, we showed *infra* and in the Prin Brf, p. 43-44, counsel eschewed such impeachment of any other state witness.

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, was going to let it go. Pet Ex O. The State argued that Shelton said he was not letting it go. 2/19/98 hearing, p. 9. Since counsel likely saw this statement, Habeas p. 260, and Parks was identified as a witness the state was going to call, trial counsel knew about him. See Pet.'s Ex C; Habeas, p. 200. See also Pavel, 261 F.3d, at 217-8 (failure to call important fact witness constituted ineffective assistance).

The state said at closing, "[H]ow does the State establish [premeditation]? Edward ROBINSON." TT. 299. Yet easily-used impeachment was not used and in result 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 two statements. One 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 what the Court called 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 an 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, ultimately refusing the instruction). At the grand jury, then Chief Petri related only one of Wade's pretrial statements, Ex H, though asked, "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 identification. Pet Ex J, Habeas, 178-183. The crucial discrepancy should have been used to impeach Wade.

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, that the bottle incident was **drug-related**. Ex I. Petri was never cross-examined at trial, Habeas, p. 183, TT. 237. Petri could have been asked the question that Brown refused to admit and Petri impeached if he said what Brown said.

NESBITT, suggested at the Habeas hearing to be a very important witness, Habeas, p. 243 (“the main witness for the state ... wasn’t around here.”), offered trial testimony indicating but a few moments between seeing Shelton, TT. 212-213, and the shooting. Yet earlier notes from Nesbitt indicate it was 25 minutes later.

RIDEOUTT’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.

Apart from Rideout, counsel did not impeach by conviction.

WHEN COUNSEL FAILED TO SEEK BIFURCATION, SHELTON SUFFERED PREJUDICE

Drug usage by the defendant was restricted by the court in a pretrial order, suggesting that defendant could not use state witness’ drug use to test the identification of Shelton by the victim’s companions. Prin Brf, III. Defendant might expect to be convicted. Since Shelton would need to testify about his fear, see Prin Brf 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 State ex rel McBride v Humphries, supra (ineffective assistance in failing to make a motion, there for a mistrial), essentially providing the answer to the State’s first argument, that the trial court might not have granted the motion to bifurcate. *McBride* indicates that counsel should at least make the motion and put the ball in the state court.

Regarding the second state argument that, if the case were bifurcated, then it could have introduced the fact that defendant began selling drugs at age 15 or 16., Shelton 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. Here compelling prejudice is evidence from the failure at least to attempt bifurcation. See: Wood testimony, Habeas pp 229, 232, 234.

Wood stated that the trial strategy as a whole did not make sense. Habeas p. 229. See *Rompilla* and *Miller* indicating importance of theme and strategy.

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.

THE EFFECT OF IMPROPER PROSECUTION ARGUMENT WAS PREJUDICIAL

The State called Shelton an “assassin,” TT. 297. Though denying the new trial motion, the trial court found “the Prosecuting Attorney’s statement was NOT PROPER.” Habeas, p. 210.

PREJUDICE ALSO OCCURRED WHEN SHELTON, SHACKLED AND REMAINING ON THE BUS WHEN THE JURY VIEWED THE SCENE, DID NOT PERSONALLY WAIVE HIS RIGHT TO BE PRESENT, AND WAS LIKELY SEEN BY JURORS IN FOOT SHACKLES WHEN THEY RE-BOARDED THE BUS

At voir dire, Shelton on the bus, TT. 49, 51 Habeas p. 23, Shelton missed what was said about the locations, which locations the jury should “regard.” Wood found that viewing Shelton shackled could have the effect on deliberations, Habeas p. 233, and the State did not prove beyond a reasonable doubt that the shackling did not impact the jury. As previously shown, each juror likely saw Shelton shackled when that person got back on the bus to return to the courthouse. The State aggravated this effect when it relied upon the jury view in its closing argument. TT. 299.

As Shelton testified, attending the jury view could well have been helpful to preparing to testify. 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.

Shelton had a personal, statutory right to be present at this view, *W.Va. Code 56-6-17*, stating that “the accused shall likewise be taken with the jury.” This statutory aspect would suffice to merit habeas relief, 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 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.”
Felony, T. 49.

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. Cases, such as *People v Maynard*, 928 P.2d 485 (Cal. 1997), suggesting that defendant must personally waive his presence at the jury view. See *Deck v Missouri*, 125 S.Ct. 2007 (2005)(absent “special circumstances” and specific findings by the trial court, shackling is inherently prejudicial).

PREJUDICE FROM THE FLIGHT ROUTE ADMISSION

The flight route exhibit, Felony, p. 62, lacked any basis that the phone was in the car, T. 46-47, when the calls were made. 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. The State did not call the owner of the car and phone, Alberta Banks, to a pretrial hearing because, it said, she had not been **fully debriefed** at the time of hearing, TT. 45-46, suggesting State contact with her.

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 is unavailability of the witness and prior opportunity for cross examination), and *State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006)(Confrontation Clauses of the Sixth Amendment and the state constitution bar the admission of a testimonial statement by a witness who does not appear at trial unless the witness is unavailable to testify and the accused had a prior opportunity to cross examine the witness, overruling *State v. Kennedy*, 205 W.Va. 224, 517 S.E.2d 457, *State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36, and *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843), cited in *McBride*.

FAILURE TO OBJECT

Here as in *McBride*, ineffective assistance arises in part from failure to object. See Shelton Prin. Brf, pp. 36-39.

OTHER FACTORS

Shelton incorporates the other factors set forth at length in his Prin. Brf., pp. 36, 39- 47

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).

In the further alternative, this matter should be remanded to make findings on all the issues raised in the amended petition.

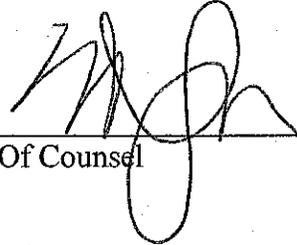
In any case, this matter should be remanded to a different court.

Respectfully submitted,

SHANE SHELTON, Petitioner:

By:

Of Counsel



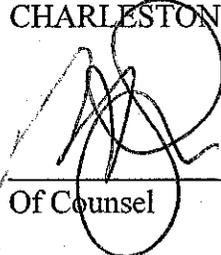
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CERTIFICATE OF SERVICE

Service of the foregoing was had upon the following by United States mail, postage prepaid, at their last known address, this 24th day of May, 2007, as follows:

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