

IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA
CHARLESTON

State of West Virginia, *ex rel.*
WARREN D. FRANKLIN,
Appellant,

v.

CASE NO. 06-C-377-2
Habeas Corpus
Prior Felony No. 86-238-2

THOMAS MCBRIDE, Warden,
Mt. Olive Correctional Center,
Appellee.

BRIEF ON BEHALF OF APPELLANT

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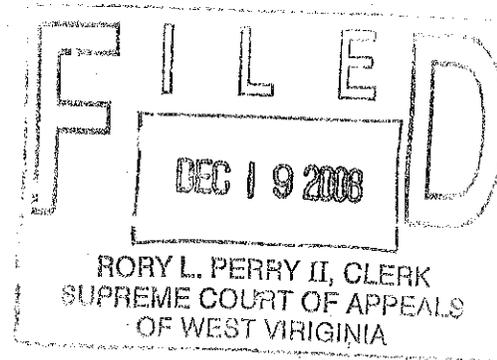


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PROLOGUE

Kent Slie was murdered during the 1986 New Years Day riot at the State Penitentiary in Moundsville. Three men, including William Douglas Franklin and his brother, were tried. The Franklin brothers were both convicted but the trial of the third inmate ended in a mistrial. Appellant's appeal was refused and he now seeks a reversal of the denial of his 1994 Petition for a Writ of *Habeas Corpus* that was not heard until 2007 and 2008.

Wheeling Intelligencer file photo

Former West Virginia Gov. Arch Moore, wearing raincoat, escorts a freed hostage from the West Virginia Penitentiary in Moundsville following a 42-hour riot in January 1986. Three inmates died in the uprising that included 17 people being taken hostage and then released unharmed.



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THOMAS MCBRIDE, Warden,
Mt. Olive Correctional Center,
Appellee.

INTRODUCTION

Warren Douglas Franklin was serving a 100 year sentence for convictions on two counts of First Degree Robbery and one conviction of Assault during the commission of a felony when he was wrongfully convicted of murder in the first degree of inmate Kent Slie. Both men were inmates at the State Penitentiary in Moundsville. The riot and prison take-over ended when an agreement was negotiated by the Governor of the State of West Virginia in which the State, through the Governor, contracted with the inmates that there would be no retaliation as a result of the riot.

The actual murderer was "Red" Snyder, who is now deceased, but, his trial ended in a mistrial following the murder in the Harrison County Jail of inmate John Curry, who told other inmates that he would implicate Snyder. The State knew or had reason to know that Franklin was not the murderer, but indicted and tried him and his brother for the murder in the belief that they could provide the evidence needed to convict Snyder.

I. KIND OF PROCEEDING AND NATURE OF RULINGS BELOW

Warren Douglas Franklin was indicted for murder in 1986, by a Marshall County Grand Jury, Indictment No. 86-F-238, as a result of the death of a fellow inmate – Kent Slie¹ – during a riot at the State Penitentiary in Moundsville. The case was moved to Clarksburg due to intense media coverage of the New Years Day riot. Franklin was convicted and on March 22, 1988 and was sentenced to life imprisonment with no possibility of parole. Appellate Counsel appealed and on June 15, 1989; the appeal Petition was refused.

Subsequently, Franklin filed a *pro se* Petition for a writ of *habeas corpus* directly with the Supreme Court of Appeals. On May 18, 1994, the Court issued a writ of *habeas corpus ad subjiciendum* and assigned it to Judge Frank J. Maxwell, Jr. The aforesaid habeas Petition was based on the argument that State Police Lab chemist Fred Zain offered evidence against Appellant. The Court denied relief on the grounds that the Petition had been “abandoned.” In August of 2006, Franklin filed an amended *pro se* Petition that included allegations that former State Police chemist Fred Zain had testified for the State in his criminal trial, and seeking to have his case reopened under the provisions of *Zain III*.

Counsel was appointed and a scheduling Order was entered. Further investigation revealed that Zain had testified about a co-defendant in a joint

1. In some transcripts, he is identified as Kent Sly.

hearing, but that he did not perform any forensic services in Franklin's case nor did he testify in his case. However, counsel filed an amended Petition on the grounds that former habeas counsel had not pursued the original *pro se* habeas, and that there was reason to believe that Franklin was actually innocent and that there were other meritorious issues under *Losh v. McKenzie*.

Following a status conference and two evidentiary hearings, counsel submitted Proposed Findings of Fact and Conclusions of Law. On April 15, 2008, the Court denied the requested relief. Counsel filed a timely Notice of Intent to Appeal followed by an Appeal Petition. Now, Appellant submits this brief in support of his appeal.

II. STATEMENT OF FACTS

Publicity about the riots made it impossible for Franklin to receive a trial by an unbiased jury; the only evidence submitted on this issue was the testimony of Appellant, but this Court can take judicial notice that the Circuit Court granted a change of venue, that Clarksburg is approximately 120 miles from Moundsville, and, that publicity was widespread in the State and region. Franklin was suffering from post traumatic stress disorder (PTSD) as a result of his experiences during the riot. He had difficulty understanding what counsel told him at trial due to the effects of PTSD and he was unable to assist his trial counsel. (H1: 20)².

2. Parenthetical transcript references are to the Habeas hearings on 8-7-07 (H1), 1-4-08 (H2) and from the underlying criminal case, a hearing on 1-27-87 (T1) and a partial transcript from 3-3-88 (attached, ref. as T2).

Following the trial, his medications were changed and his problems diminished (H1: 22). However, Franklin still suffers nightmares from the trauma of seeing men thrown off a balcony and the lingering effects of PTSD may contribute to some difficulty in communication to this day.

The State knowingly used perjured testimony to obtain the conviction. Corrections officers knew that "Red" Snyder³ committed the murder, but charged Doug Franklin and his brother Charles in an attempt to compel them to testify against Snyder (H1: 25-26, 61). All three men stood trial for the murder of Kent Slie – the order of their trials are: Appellant Doug Franklin, his brother Charles Bruce Franklin, and finally Red Snyder. Snyder's trial ended in a mistrial after a witness was stomped to death while in jail. Snyder was later killed while in prison. Witnesses at Doug's trial gave conflicting testimony about the location of the murder and falsely said that Doug was the assailant (H1: 60-61; H2: 36).

Inmate Gary Gibson testified in the Omnibus *Habeas Corpus* hearing that he saw Snyder kill Slie by stabbing him with a knife; another inmate described it as a "giant ice pick." (H2: 44). He did not see Doug on the day of the riot until after Slie was murdered (H2: 14-15, 20-22, 24). Gibson testified that he did not come forward to testify against Snyder (who died about ten years ago in Moundsville) out of fear for his life (H2: 25-26). While Gibson had no recollection of ever being questioned about Slie's murder by any police officer, he

3. Sometimes spelled "Snider" in transcripts.

acknowledged lying to others who interrogated him while Snyder was still alive (H2: 28, 31).

Inmate Gary Peacher confirmed that Snyder killed Kent Slie by stabbing him with a "long brass sink rod" that had been sharpened like an ice pick (H2: 36, 44). Peacher said Snyder's motive was that Slie had caused him to be confined in "lock up." Peacher denied any involvement in the killing of Slie, but said, "I was there." With regard to Appellant, Peacher testified, "I never did understand how Doug got life when he wasn't even standing there when the man got killed. He wasn't even there." (H2: 40

John Perry⁴ was an inmate at Moundsville at the time of the riot. He and Doug Franklin were transported, together, to the Harrison County Jail for Snyder's criminal trial. On cross examination, Franklin said, "Red called him on behalf of his self as a witness but [Perry] was talking like he was going on the stand and doing the opposite with the jury and I believe that that is why he was murdered." (H1: 70-71) Franklin says sixteen inmates, including himself and Perry, were transported to Clarksburg in the same bus for Snyder's trial. "[Perry] wouldn't say a lot in front of everybody but what he was saying with people that I could overhear" gave Franklin the impression that Perry's testimony would implicate Snyder and exonerate him⁵ (H1: 72).

4. On page 45 of the transcript of the hearing on August 7, 2007, he is identified as John *Curry*.

5. A portion of Appellant's statement was inaudible to the Court Reporter but the context supports this conclusion.

Franklin alleges that the murder of his key witness in the Harrison County Jail denied him the opportunity to show that he was wrongfully convicted. Tellingly, Franklin says he and Perry were both on Snyder's witness list because, "Red put us on the list and we . . . didn't want on there." Perry was found dead in the Harrison County Jail during Snyder's trial before he had the opportunity to implicate Snyder or to testify on behalf of Franklin and his brother, who both hoped to file motions for new trials based on after discovered evidence.

Franklin was sentenced to terms of 60 years and 40 years, with a concurrent two to ten, for his underlying convictions. If his murder conviction were to be overturned, he would have been eligible for parole in October 2001. Born April 18, 1957, he has spent more than half of his life in prison.

**III. ASSIGNMENTS OF ERROR
AND
THE MANNER IN WHICH THEY WERE DECIDED**

A. Appellant was convicted on inmate testimony the State should have known was false. The Court erred in not properly instructing the jury on how they should weigh the evidence of his "accomplices";

1. The State should have known that its witnesses were lying when they gave conflicting statements against Doug Franklin, who had no motive to kill Kent Slie;

Counsel was present at Mt. Olive and can corroborate the statement. J. L. Hickok

2. The jury was not properly instructed about weighing accomplice testimony.

B. Appellant had no opportunity to present his appeal orally and was provided no explanation for the denial. Denial of a hearing on the merits is a denial of fundamental Constitutional Due Process rights;

C. Appellant alleges that even if he was guilty of the aforesaid offense, his sentence was excessive under the United States Constitution, Amendments Eight and Fourteen, and the West Virginia Constitution, Article III, Section 10.

IV. ARGUMENT

A. Appellant was convicted on inmate testimony the State should have known was false. The Court erred in not properly instructing the jury on how they should weigh the evidence of his "accomplices"; Many inmates were involved in the New Years day riot. They could all be considered accomplices. Some were active participants who settled scores and found ways to profit from the general uprising. Others, including Doug Franklin, were passive by-standers who tried to stay out of the way. Some witnesses committed acts of violence, and a few were victims, or, feared retribution. Prison authorities, for the most part, saw very little of what was happening and constructed versions of the facts largely through the statements of the inmates once order was restored.

1. The State should have known that its witnesses were lying when they gave conflicting statements against Doug Franklin, who had no motive to kill Kent Slie; In the standard Losh checklist, Ground No. 17 is, "The knowing use of perjured testimony. See *Losh v. McKenzie*.⁶ There is little or no case law directly on point, although it is clear that for a prosecutor to do so would be professional misconduct.

It is normally assumed that the prosecuting attorney will perform his duties and exercise his powers consistent with his oaths, and while [prosecutorial] discretion is subject to abuse or misuse just as is judicial discretion, deviations from his duty as an agent of the Executive are to be dealt with by his superiors or voters.⁷

Corrections Officers knew or should have known that Doug Franklin did not commit the murder, but they charged him and his brother in an attempt to persuade him to testify against the inmate they thought was guilty. The testimony in the habeas proceedings of other inmates is consistent with Appellant's insistence that he was not in the vicinity of Kent Slie and did not witness his killing.

There is no denying that the State faced a difficult investigation into the death of Kent Slie; all of the witnesses were convicted criminals and co-conspirators in the riot. In essence, every witness called by the State was an informer.

6. *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981)

7. *Handbook on West Virginia Criminal Procedure*, Cleckley, 2nd Ed., Michie (1993)

By definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom.⁸

The decision to prosecute Franklin was somewhat arbitrary; the State had to decide whether to believe those convicted criminals who accused him, with full knowledge that many (if not all of them) had ample reasons to lie. While a prosecutor has discretion in deciding among several persons who are suspected of having participated in the same crime, such discretion is not unlimited.

Arbitrary selection of a defendant may violate the principle of equal protection of the law, although the State has some discretion in such matters as whether to apply the recidivist statutes. See *Oyler v. Boles*,⁹ a U. S. Supreme Court case arising in West Virginia, concerning alleged arbitrariness in the application of the recidivist laws. It is hard to escape the conclusion that the Franklin brothers were chosen because there were witnesses who would testify against them and the State was determined to prosecute *someone* for the murder. They had good reason to fear "Red" Snyder.

2. The jury was not properly instructed about weighing accomplice testimony; A related issue is how the jury was instructed to weigh the evidence

8. *U.S. v. Bernal-Obeso*, 989 F.2d 331 (9th Cir. 1993)

9. *Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962) etc. Gershman *Charging function*

of the purported accomplice. In *State v. Humphreys*¹⁰ this Court fully addressed the issue of uncorroborated accomplice testimony. In *Humphreys*, the appellant had been convicted of breaking and entering a dwelling house in the daytime hours. The appellant had been indicted for this offense with one Okey Keenan. Prior to the appellant's trial, Keenan pleaded guilty and agreed to testify for the prosecution. This Court noted the State's concession that without the testimony of Keenan, the charge would fail, as Keenan was the sole witness to the commission of the crime.

In reversing *Humphreys*' conviction, the Court determined in Syllabus Point 1 that: "Conviction for a crime may be had upon the uncorroborated testimony of an accomplice; but in such case the testimony must be received with caution and the jury should, upon request, be so instructed." Were they?

The Court further addressed the issue of the effect of instructions which failed to advise the jury as to the weight to be accorded such testimony. In Syllabus Point 2 the Court stated:

Upon the trial of an indictment for a felony, *it is reversible error* to give, over the objection of the defendant, an instruction which tells the jury that he may be convicted upon the uncorroborated testimony of an accomplice but *which does not also inform the jury that it must receive such testimony with caution*, unless such cautionary direction is given by some other instruction. [Emphasis added].

10. *State v. Humphreys*, 28 W.Va. 370, 36 S.E.2d 469 (1945)

The standards enunciated in *Humphreys* have not been renounced; rather, they remain in effect and have been fully adopted. In *State v. Spadafore*¹¹ the Court addressed the issue of how the jury should view the testimony of an accomplice. Syllabus Point 3 states:

As a general rule, West Virginia courts are not permitted to comment on the weight of the evidence; however, there is an exception entitling the defendant to an instruction that the uncorroborated testimony of a co-conspirator should be received with great caution when such testimony has a tendency to inculcate the accused.

The totality of circumstances surrounding Franklin's trial made a fair trial impossible. Publicity was widespread; it was national news. The change of venue was warranted but insufficient to assure an unbiased jury. The inmates who testified on behalf of the State were unreliable and the jury was not instructed about the weight they should give such testimony. The murder of John Perry is a stark reminder that some inmates – such as “Red” Snyder -- wield a power over their fellows that is superior to that of the lawful authorities.

Now that Snyder is dead, some of them have stepped forward to speak the truth; Doug Franklin did not kill Kent Slie. In the words of Gary Gibson, “I keep a good secret when it comes to my life.” (H2: 28). “[A]fter Red Snyder's death I didn't see where it could hurt me so I went ahead and told the story.” (H2: 29) “If

11. *State v. Spadafore*, 159 W.Va. 236, 220 S.E.2d 655 (1975); See also *State v. Bolling*, 162 W.Va. 103, 246 S.E.2d 631 (1978); *State v. Messinger*, 163 W.Va. 447, 256 S.E.2d 587 (1979); *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980); *State v. Hall*, 172 W.Va. 138, 304 S.E.2d 43 (1983).

I had been asked before Red Snyder died I wouldn't have told nobody about it.”
(H2: 31) This Court should reverse his conviction and direct that he not be retried.

B. Appellant had no opportunity to present his appeal orally and was provided no explanation for the denial. Denial of a hearing on the merits is a denial of fundamental Constitutional Due Process rights; It is simply unfair and a denial of due process of law for the State of West Virginia to condemn him to spend the rest of his natural life in prison without a merit determination by this Court that he received due process of law, below. Further, to deny a full merit appeal when other similarly situated defendants receive them denies him equal protection of the law guaranteed by the Fourteenth Amendment to the *United States Constitution* and Article III, §10 of the *West Virginia Constitution*.

The federal and state constitutions guarantee that no person shall be deprived of life, liberty, or property without due process of law, “emphasizes fairness between the State and the individual [.]” *Evitts v. Lucey*¹². It is unfair for West Virginia to mete out its harshest punishment under the law to one of its citizens without this mandatory appellate review when almost every other state (and the District of Columbia) in the United States would afford Mr. Franklin this review. West Virginia and New Hampshire are the only states without mandatory

12. *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), *United States Constitution*, Fourteenth Amendment; *West Virginia Constitution*, Article III, §10.

appeals.¹³ However, on January 1, 2004, the New Hampshire Supreme Court adopted new appellate rules providing for appeals in all criminal cases. See *New Hampshire Supreme Court Rules*, Rules 3 and 7. Thus, persons convicted of the most serious offenses in West Virginia are entitled to less due process on appeal than in every other State in the Union.

This is quite disturbing when one considers (1) the importance of appellate review in insuring there was a correct determination of guilt in a fairly conducted trial; and (2) that a substantial proportion of criminal convictions are reversed by state appellate courts. As stated by this Court in *Linger v. Jennings*¹⁴:

All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence. Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts.

Former Justice Brennan eloquently captured the essence of why mandatory appeals are not luxuries, but necessities in our criminal justice system:

There are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property, and the reversal rate of criminal convictions on mandatory appeals in the state courts, while not overwhelming, is certainly high enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction. [internal citations omitted]¹⁵

13. Virginia has mandatory appeals only in death penalty cases and defendants serving life sentences can Petition for discretionary review in the Virginia Court of Appeals and the Virginia Supreme Court.

14. *Linger v. Jennings*, 143 U.S. 57, 99 S.E.2d 740 (1957) [quoting *Griffin v. Illinois*, 351 U.S. 12, 18-19, 76 S.Ct. 585, 590 (1956)]

15. *Jones v. Barnes*, 463 U.S. 745, 756 n.1, 103 S.Ct. 3308, 3315 n.1 (1983) (Brennan, J., joined by Marshall, J., dissenting).

Thus, it is easily understood why mandatory appeals in the most serious criminal cases are deemed necessary in all other states. It is not easy to understand why West Virginia's judicial system does not provide this fundamental appellate review afforded in other states. Reporter Bob Schwartz, reporting the death of former Justice Tom Miller, wrote concerning an interview of the Justice: "He ran for the court in part because he was frustrated with an appeals court unwilling to hear his cases[.]"¹⁶

The panoply of federal constitutional rights afforded state criminal defendants today were only recognized during the last forty-five years of our 232 years as a nation.¹⁷ Even the constitutional rights to the effective assistance of counsel at trial and on appeal were not recognized until 1984 and 1985, respectively.¹⁸ That the right to a mandatory appeal is an integral part of every other state's (except for Virginia) criminal justice system is convincing evidence it is essential to due process to ensure adjudications of guilt are correct.

It is no historical accident that "[t]he history of liberty has largely been the history of observance of procedural safeguards."¹⁹ Moreover, "the degree of procedural regularity required by the Due Process Clause increases with the

16. See Former Supreme Court justice dies, *Charleston Gazette*, August 13, 2008 <http://www.wvgazette.com>

17. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963) (right to counsel).

18. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *Evitts*, 469 U.S. 387, 105 S.Ct. 830.

19. *McNabb v. United States*, 318 U.S. 332, 347, 63 S.Ct. 608, 616 (1943).

importance of the interests at stake.” *McGautha v. California*, (Brennan, J., joined by Douglas and Marshall, J.J., dissenting).²⁰ Given the interests at stake here, it requires no great leap of logic or adoption of revolutionary principle to insure via full appellate review that defendants sentenced to life without parole receive fair trials, “which is this country’s constitutional goal.” *Pointer v. Texas*.²¹

It is quite anomalous that we guarantee all of the rights essential to an adequate appeal (transcript, counsel, effective assistance of counsel), but not the appeal itself. Arguably, the most important part of the appellate process is missing – a written decision by the court as to whether there was a correct adjudication of guilt.

Civil cases involving only money should certainly not receive more appellate review and due process than defendants sentenced to prison for the rest of their lives. In *Rusen v. Hill*,²² you said, “In a criminal trial, the stakes are ordinarily much higher than in a civil case where the loss of money or property is the worse that can be inflicted. In a criminal case, a defendant’s liberty, and sometimes his life, depends on the outcome.”

Justices Davis and Maynard have argued that the present system “works” because relatively few life sentence cases denied review are overturned by the

20. *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711, 58 O.O.2d 243 (1971)

21. *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)

22. *Rusen v. Hill*, 193 W.Va. 133, 134, 454 S.E.2d 427, 437 (1994)

federal courts. This reasoning is flawed because there is any number of reasons why federal habeas relief is not granted, not the least of which is that the Fourth Circuit typically has the lowest reversal rates in criminal cases. See Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*²³ (pointing out that in 1989, 9.3 percent of the direct criminal appeals decided by the federal courts of appeals resulted in reversals, with the lowest percent of reversals in the Fourth Circuit, 4.7 percent). The Fourth Circuit is also the Court that held that the police's failure to administer the warnings required by *Miranda v. Arizona* is not a constitutional violation. See *United States v. Dickerson*,²⁴ which decision was subsequently reversed by the United States Supreme Court in an opinion by Chief Justice Rehnquist. See *Dickerson v. United States*.²⁵

Moreover, indigent criminal defendants are not represented by counsel in federal habeas proceedings unless an evidentiary hearing is required and must navigate a literal minefield of procedural and substantive hurdles to obtain federal habeas relief. As one commentator noted:

The Supreme Court's current decisions in the area of habeas corpus, however, raise troubling questions about the ability of federal habeas corpus to act as a backstop for truncated state appellate or collateral review. Recent Supreme Court decisions have limited the availability of federal collateral relief to state prisoners in a number of ways. (Footnote omitted).²⁶

23. *Constitutional Right To A Criminal Appeal*, 39 UCLA L. Rev. 503, 514-15 (1992)

24. *United States v. Dickerson*, 166 F.3d 667, 690 (4th Cir. 1999)

25. *Dickerson v. United States*, 530 U.S. 428, 120 S.Ct. 2326 (2000)

26 *Arkin, supra* at 511-12.

Judging the adequacy of this Court's discretionary review of cases by subsequent results in the Fourth Circuit is fallacious.

Some may argue that since West Virginia does not have the death penalty, full appellate review is not necessary in life without parole cases. However, as noted by the Supreme Court of California, the penalty of life imprisonment without parole, while qualitatively different, is considered by many to be equally severe:

As the philosopher John Stuart Mill put it: "What comparison can there really be, in point of severity between consigning a man to the short pang of a rapid death, and immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, without any of its alleviation or rewards--debarred from all pleasant sights and sounds, and cut off from all earthly hope, except a slight mitigation of bodily restraint, or a small improvement of diet?"²⁷

Given that, "a substantial proportion of convictions are reversed by state appellate courts," *Griffin*, 351 U.S. at 18-19, 76 S.Ct. at 590, and, as pointed out by Justices Starcher and Albright, our criminal justice system frequently makes mistakes, this statistic can only shock our collective consciences. As Justices Starcher and Albright recognize, "simple fairness" requires full appellate review in these cases. The alternative of possibly depriving someone of their liberty forever without a fair adjudication of guilt is not only risky business, but intolerable.

27. *People v. Bloom*, 774 P.2d 698, 715 n.7 (Cal. 1989)

By refusing to review the vast majority of the most serious criminal cases in the State, this Court is rationing justice to a select few. This brings to mind the wisdom expressed by Judge Learned Hand, "If we are to keep our democracy, there must be one commandment: Thou shall not ration justice."²⁸

The Court has stated that it "is obligated to see that the guarantee of a fair trial under our Constitution is honored." *State v. Guthrie*²⁹ The *Guthrie* Court further recognized "that where there is 'grave doubt' regarding the harmlessness of errors affecting substantial rights, reversal is required." *Id.* [quoting *O'Neal v. McAninch*]³⁰ The Court should use a similar analysis here. Justices Starcher's and Albright's dissents from the Court's refusal to grant full appellate review in life without parole cases demonstrably show there is "grave doubt" that the constitutional guarantee of a fair trial is being honored or insured in all of these cases.

Finally, our State is often looked upon as being economically or otherwise disadvantaged. It is no secret many of our young people are leaving the state and our population is declining. There are, of course, many reasons why our State may not compare favorably to other states in some areas. But this is not a position legislative or executive officials have consciously chosen for the citizens

28. *Hardy v. United States*, 375 U.S. 277, 293-94 n.15, 84 S.Ct. 424, 434 n.15 (1964) (quoting Judge Hand's Address before Legal Aid Society of New York, February 16, 1951).

29. *State v. Guthrie*, 94 W.Va. 657, 685, 461 S.E.2d 163, 191 (1995)

30. *O'Neal v. McAninch*, 513 U.S. 432, 442, 115 S.Ct. 992, 997 (1995)

of our state. In the judicial arena, we should not choose to be dead last in the nation in providing appellate due process to our citizens in the most serious criminal cases. As we begin a new century and millennium, should we not strive to provide the best judicial review for our citizens, at least in the most serious cases? There is a choice.

In 1997, this Court appointed a thirty-eight member Commission on The Future of The West Virginia Judiciary, and one of its recommendations [5.1(h)] was that "each litigant should be guaranteed one appeal-of-right either at the Intermediate Court of Appeals or at the Supreme Court." This Court should take a leadership role in achieving that goal by granting appeals in cases involving life without parole sentences.

For the foregoing reasons, Warren Douglas Franklin respectfully requests the Court to hear the appeal of his *Habeas Corpus* Petition, afford him the relief he was denied when his direct appeal Petition was denied without a hearing, and afford him his right to due process of law and equal protection of the law guaranteed by the Fourteenth Amendment to the *United States Constitution* and Article III, §10 of the *West Virginia Constitution*, respectively.

C. Appellant alleges that even if he was guilty of the aforesaid offense, his sentence was excessive under the United States Constitution, Amendments Eight and Fourteen, and the West Virginia Constitution, Article III, Section 10; "No person shall be deprived of life, liberty, or property,

without due process of law, and the judgment of his peers.” *West Virginia Constitution*, Article III, Section 10. Appellant was subjected to a higher level of punishment than required by his Circuit Court conviction when the internal magistrate placed him in administrative segregation. Not only was he held under more punitive conditions, he lost the opportunity for an early release from his prior convictions. Since the punishment was for the same offense, it was also double jeopardy. Furthermore, prison officials agreed with representatives of the inmates that there would be no retribution for their participation in the riot. Appellant was punished for the murder of Kent Slie by his conviction and sentence to life imprisonment without the possibility of parole. His additional punishment, as administered by the Prison Magistrate, must either be for the murder (hence, double jeopardy) or for the riot, a violation of the agreement.

“Administrative detention” is the *stick* in contrast to the *carrot* of “good time” for good behavior. While each is used as a tool to promote inmate management, this Court has also held that “good time” credit is a valuable liberty interest. “The public policy behind the enactment of our state’s good time statutes (citations omitted) is to provide the prisoner with an incentive to conduct himself according to the rules and regulations of the institution.” *State ex rel Coombs v. Barnette*³¹ Subjecting an inmate to more restrictive punishment may

31. *State ex rel Coombs v. Barnette*, 179 W.Va. 347, 368 S.E.2d 717 (1988).

promote good behavior, but being free of such detention is also a "valuable liberty interest."

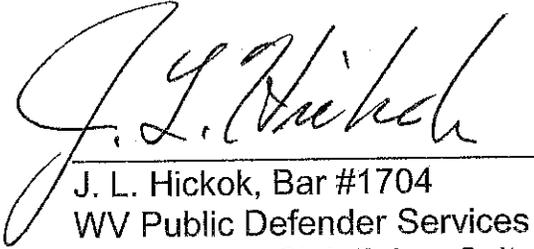
The public policy for administrative segregation, in this case, was arguably to protect Appellant from other inmates. Whether the issue is one of reduction of the length of sentence or reduction of the conditions of confinement, it is still a liberty issue. Furthermore, the magistrate proceeding was closed to the public and Appellant was not represented by counsel. It is but a truism to observe that in the ordinary criminal case, neither the public nor the press may have any great interest in access. The problem will arise in the more controversial case, or in a case of great public moment, where the rights of the accused should be most zealously guarded.

CONCLUSION

Doug Franklin was incarcerated because he had committed serious crimes. Inside the prison at Moundsville, however, he was a good citizen serving his time. He did not kill Kent Slie, but inmates testified that he did, out of fear of the real killer – "Red" Snyder. When John Perry dared to defy Snyder he was brutally killed. Now that Snyder is dead, other inmates have come forward to exonerate Franklin. This Court should grant him the same due process of law that would be the right of any citizen. He asks that you hear the appeal of his *Habeas Corpus* case and relieve him from the burden of a sentence of life imprisonment without the possibility of parole.

Respectfully submitted,

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By Counsel



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CERTIFICATE OF SERVICE

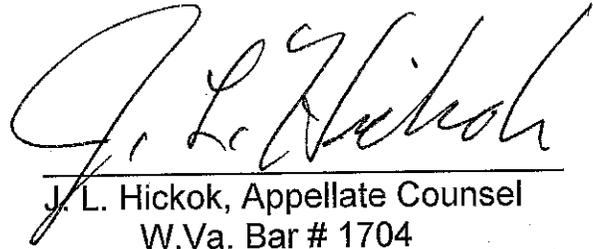
I, J. L. Hickok, counsel of record for Warren D. Franklin, hereby certify that on the 18th day of December, 2008, I served a copy of the foregoing *Brief on Behalf of Appellant* upon the following, at their respective addresses and in the manner noted below:

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