



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BILLY RAY MCLAUGHLIN,

Supreme Court No. _____

Petitioner,

v.

Circuit Court No. 96-F-42
(Greenbrier County)

STATE OF WEST VIRGINIA

No. 34860 (accepting cert. questions)

Respondent

**BRIEF ON THE MERITS by PROPOSED INTERVENOR, SHANE SHELTON,
OR IN THE ALTERNATIVE, BY PROPOSED AMICUS CURIA, REGARDING
THREE CERTIFIED QUESTIONS**

Comes Shane Shelton, hereafter "Shelton" or "defendant," by counsel, Timothy F. Cogan and William C. Gallagher, and CASSIDY MYERS COGAN & VOEGELIN, L.C., and accompanies his MOTION TO INTERVENE OR IN THE ALTERNATIVE TO FILE AN AMICUS BRIEF with this BRIEF ON THE MERITS. In this brief all emphases are added unless indicated.

Shelton also seeks to be heard at oral argument on these issues, particularly on his right to waive the rule against additional evidence by the State at sentencing phase.

TABLE OF AUTHORITIES

Cases

<i>Abdul-Kabir v. Quarterman</i> 550 U.S. 233, 127 S.Ct. 1654 (2007)	16, 18
<i>Beck v. State</i> , 396 So.2d 645 (1980).....	16
<i>Billotti v. Dodrill</i> , 183 W.Va. 48, 57, 394 S.E.2d 32, 41 (1990)	23
<i>Eddings v Oklahoma</i> , 455 U.S. 104, 102 S.Ct. 869 (1982)	9, 18
<i>Ford v Wainwright</i> , 477 U.S. 399, 106 S.Ct. 2595 (1986)	17, 18
<i>Furman v. Georgia</i> 408 U.S. 238, 92 S.Ct. 2726 (1972)	13
<i>Gardner v Florida</i> , 430 U.S. 349, 97 S.Ct. 1197 (1977)	18
<i>Gregg v. Georgia</i> , 428 U.S. 153, 96 S.Ct. 2909 (1976) ,	7
<i>Lockett v Ohio</i> , 438 U.S. 586, 98 S.Ct. 2954 (1978)	9, 16, 17, 21, 22
<i>Nebraska Press Ass'n v. Stuart</i> 427 U.S. 539, 555, 96 S.Ct. 2791, 2801 (1976)	9
<i>Pennsylvania ex rel. Sullivan v. Ashe</i> , 302 U.S. 51, 55, 58 S.Ct. 59, 61 (1937)	7, 15, 17
<i>Schofield v. West Virginia Dept. of Corrections</i> , 185 W.Va. 199, 207, 406 S.E.2d 425, 433 (1991)	20
<i>Skipper v. South Carolina</i> , 476 U.S. 1, 106 S.Ct. 1669 (1986)	6, 7, 9, 10, 12, 18
<i>State ex rel Leach v Hamilton</i> , 280 S.E.2d 62 (1980).....	5, 7, 21
<i>State ex rel Shelton v Painter</i> , 221 W.Va. 578, 655 S.E.2d 794 (2007)	20
<i>State v Britton</i> , 157 W.Va. 711, 203 S.E.2d 462 (1974)	18
<i>State v. Finley</i> , 219 W.Va. 747, 639 S.E.2d 839 (2006).....	18
<i>State v Rygh</i> 206 W.Va. 295, 524 S.E.2d 447 (1999)	6, 23
<i>State v. Gangwer</i> 168 W.Va. 190, 283 S.E.2d 839 (1981)	19
<i>State v. Goff</i> 166 W.Va. 47, 272 S.E.2d 457 (1980)	23

<i>State v. Harden</i> , 2009 WL 1574873 (W.Va. 6/4/09).....	23
<i>State v. Miller</i> , 178 W.Va. 618 363 S.E.2d 504 (1987).....	23, 24, 25
<i>State v. Waldron</i> , 71 W.Va. 1, 75 S.E. 558 (1912)	19
<i>Townsend v. Burke</i> , 334 U.S. 736, 741, 68 S.Ct. 1252 (1948).....	7, 21
<i>U.S. v Jackson</i> , 649 F.2d 967 (3 rd Cir. 1981)	21
<i>U.S. v Jones</i> , 640 F.2d 284 (10 th Cir. 1981).....	21
<i>Witherspoon v Illinois</i> , 391 U.S. 510, 88 S.Ct. 1770 (1968).....	18
<i>Woodson v North Carolina</i> , 428 U.S. 280, 96 S.Ct. 2978 (1976)	15

Code Constitutions & Rules

<i>Eighth Amendment to the U.S Constitution</i>	15, 16, 17, 18
<i>Fourteenth Amendments to the U.S. Constitution</i>	15, 16, 17
<i>Art III, §10 of the West Virginia Constitution</i>	18, 19
<i>Art III § 14 of the West Virginia Constitution</i>)	19
<i>W. Va. Code, § 5-10A-7</i>	22
<i>W. Va. Code, §§ 16-1-6, (o) and (p)</i>	22
<i>W.Va. Code § 28-5-31(b)</i>	19
<i>W.Va. Code 61-11A-3(d)</i>	19
<i>WVRE 404(b)</i>	19
<i>WVRE 609(b)</i>	19

Other Sources

<i>Haddad et al, Criminal Procedure, Cases and Comments</i> (5 th ed.).....	21
35 GEO.L.J., ANN. REV CRIM. PROC. at 702	10
<i>II Cleckley, West Virginia Criminal Procedure</i>	18, 19, 20

THE RULING BELOW ON THE ISSUES

The certified question of most current interest to Shelton involves what sort of evidence can come in. The Circuit Court of Ohio County (“trial court”) has ruled that no evidence could enter the sentencing hearing unless it would have been available on the day following the end of the trial, which occurred in May, 1998. See Order of 4/24/08 as Revised and Proffered 7/3/08 Ex. A to the Motion to Intervene. Because of its importance in this case, argument on this issue is set out first, at I, *infra*, and at greatest length.

Shelton sought a writ of prohibition to prohibit application of this ruling, but the writ was refused.

A second certified question is who bears the burden of proof in such a sentencing trial and what the standard of proof is. The trial court has repeatedly ruled from the bench that the burden, beyond a reasonable doubt, remains on the State. See II, *infra* at 19-20.

The third question is whether the same jury has to make the sentencing decision on such a remand. The trial court has ruled that an entirely new jury can conduct the trial. See Order from Status/Scheduling Conference of January 11, 2008, pp. 1-2, attached as Ex. B to the Motion to Intervene. See III, *infra* at 22.

I. REGARDING THE QUESTION OF WHAT SORT OF EVIDENCE MAY BE ADMITTED AT A SENTENCING RETRIAL, DEFENDANT WANTS TO WAIVE HIS RIGHT TO INSIST THAT THE STATE ADDUCE ONLY EVIDENCE THAT IT ADDUCED AT A GUILT PHASE BECAUSE SHELTON MUST BE PERMITTED TO INTRODUCE EVIDENCE REGARDING HIS CURRENT CHARACTER

The trial court limited evidence at the sentencing re-trial trial (which is not currently scheduled) to evidence which could have been presented at the final day of last trial, in May, 1998. (“Ohio County Evidentiary Limitation”). It initially forecast its ruling as having the jury instructed that defendant had been convicted of murder. Upon the State’s objection, the trial court stated that a witness could read the trial transcript and fairly summarize it. That person has been deposed.

Shelton waives the rule, created for his benefit, which is put forth by McLaughlin, § III, to the effect that the State can only introduce evidence that it put on in the case in chief.¹ *Leach v Hamilton* states:

Other factors that a jury might consider in granting mercy-defendant's age, mental state, defenses, family responsibilities, the nature of the offense and circumstances surrounding the crime-will be made available to a jury in the guilt-or-innocent trial... We cannot envision a murder defense, however, that would not **REQUIRE introduction of all possible evidence toward reduction of a jury's view of the severity of defendant's acts.**

280 S.E.2d 62, 65 (1980)

That indicates that the evidence that a defendant, already convicted of murder, wishes to introduce (“toward reduction...of the severity of defendant’s acts”) is treated more favorably than evidence the state might wish to introduce. This is confirmed by

¹ Defendant maintains his objection to failure to permit introduction of certain favorable evidence at the sentencing phase that was not introduced in the guilt phase, conducted years ago. This evidence is set forth more fully in Shelton’s Omnibus Proffer, ¶¶ 2-11, pp. 1-4; REVISED AND AMENDED PETITION FOR HABEAS CORPUS AD SUBJICIENUM Section B, No. 1-11, pp. 3-6, as well as other pleadings filed in the trial court; and BRIEF IN SUPPORT OF PETITION FOR APPEAL OF DENIAL OF HABEAS CORPUS PETITION, filed in this Court.

the law of this case, referring to “any evidence in the case which may tend to support a mercy argument.” 221 W.Va. 578, 585, 655 S.E.2d 794, 881 n 3. See State v. Rygh 206 W.Va. 295, 524 S.E.2d 447 (1999):

[T]here is nothing in LaRock that creates, merely by bifurcating a murder trial, a qualitative change in or a substantive expansion of the scope or type of evidence that the prosecution may put on against a defendant-as compared to that evidence that would be admissible in a unitary trial. Stated another way, discretionary trial-management bifurcation does not itself alter or expand the scope of admissible prosecutorial evidence to include evidence that has been historically inadmissible in murder cases in this State... In making its overall verdict, in a unitary trial or a bifurcated trial, the jury looks at all of the evidence that the defendant and the prosecution have put on-and if the jury concludes that an offense punishable by life imprisonment was committed, then the jury determines the mercy/no-mercy portion of its verdict, again **based on all of the evidence presented to them at the time of their determination...**

206 W.Va. at 297, 524 S.E.2d at 449, n 1, citing State v LaRock, 196 W.Va. 294, 470 S.E.2d 632 (1996)

Were that restriction not the rule, defendants with a conviction record of any substance would never choose a bifurcated trial.

This Defendant differs from most defendants in that his criminal record is so minor that he wants to increase the evidence to include current relevant evidence, which the trial court eliminated in a ruling we name the Ohio County Evidentiary Limitation, *infra*, contrary to Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669 (1986).

This Defendant thus differs from the prosecution of McLaughlin and Amicus Curiae Finley in the trial court ruling - and in the presence of voir dire responses that show the harm in those rulings.

While Shelton maintains his belief in that right of defendants in this situation, he here indicates his wish to waive it, for his conviction record so minimal and remote. In Shelton's case, the process structured by the trial court keeps out his most probative evidence on mercy: his actions since he was incarcerated. Thus this Court permitted (and the trial court excluded) "evidence in the case which may tend to support a mercy argument." 221 W.Va. at 585, 655 S.E.2d at 881 n 3, echoing *Gregg v. Georgia*, 428 U.S. 153, 191, 96 S.Ct. 2909, 2934 (1976), *infra* at 11. See also *Skipper v. South Carolina*, *supra* and *infra*, *LaRock* 196 W.Va. at 314, 470 S.E.2d at 633, *supra* and *infra* at 9, 19, 20, 22; *State ex rel Leach v Hamilton*, 280 S.E.2d 62 (1980), *infra* at 16; *Pennsylvania ex rel Sullivan v Ashe*, 302 U.S. 51, 55, 58 S.Ct. 58, 61 (1937), *infra* at 8-9, 12, and *Townsend v. Burke*, 334 U.S. 736, 741, 68 S.Ct. 1252 (1948), *infra* at 16, 21.

As seen by the trial court's eliminating a question from the juror questionnaire² the Ohio County Evidentiary Limitation will most likely result in another tainted verdict of life without mercy. While Shelton believes the Ohio County Evidentiary Limitation is reversible error, Shelton would approach this Court having received two separate "no mercy" jury verdicts, a substantial deficit to his appeal, no matter how meritorious his issues.

² Question 42 in the questionnaire used in the voir dire conducted in the summer of 2008 was "What would you find or look for as a sign or signs that a person who committed a serious crime had changed enough to merit a chance at parole?" On 10/8/08, Shelton filed a proffer containing certain answers to this question "summer 2008 questionnaire." This proffer, together with the responses summarized in the proffer, Brief Ex. A, and the other proffered, excerpts, Brief Ex. B, there from the 11/08 jury panel, are attached hereto and incorporated by reference herein.

The Ohio County Evidentiary Limitation is ALSO directly contrary to the bad result about which this Court was concerned in. *LaRock*, 196 W.Va. at 314, 470 S.E.2d at 633: “The ends of criminal justice would be defeated **if mercy decisions were to be founded on a partial or speculative presentation of the facts.**” A “partial or speculative presentation of the facts” is exactly the result should the evidence be limited by depriving the jury of information about Shelton from the past eleven years.

Knowing that he was convicted, preamble to juror questionnaire p. 2 (“Shelton has been convicted”), **the jurors will know that he was in prison.** See proffer from former potential juror Carra, *infra* at 6, Writ of Prohibition (“Writ”) Ex. A hereto. For example, Forshey asked “How can you disregard what’s happened since then [the 1998 trial].”

The jurors will be forced to SPECULATE on his conduct in prison. They will develop speculative answers to the questions that their responses said that they had.

These questions are evident from the summer, 2008, voir dire in this case. Many jurors indicated a virtual inability to apply the burden of proof, placed on the State, to prove that life imprisonment was appropriate, given that absence of evidence. See Proffer and questionnaire excerpts, Writ Exs. A, incorporated by reference herein (including Donohew, Posin, Wilson-Richey, Myers) and B, e.g. Crawford, Doyle. Indeed, so many reflected that inability in the summer of 2008 as to deprive Shelton of a trial on that day.

Though denying that he would hold not testifying against Shelton, Physician Urval said “I would like to know his side of the story, why he did it and whether he has

any remorse." Writ Brief Ex. B. Similarly, Crawford said a defendant must testify to get mercy "to determine if they are remorseful." Cross said it "depends on conditions crime was done under and their actions since." Writ Brief Ex. B. See also responses by Crawford, Kiger, Sanders, Straight, Writ Brief Ex. C.

While he can testify to his remorse, he cannot, if the evidentiary limitation were followed, SHOW remorse by good conduct.

Perhaps most directly, *Skipper* held that the exclusion of testimony in a bifurcated trial of jailers and a regular visitor, regarding defendant's good behavior during the time he spent awaiting trial deprived defendant of his right to introduce relevant evidence, citing *Lockett v Ohio*, 438 U.S. 586, 98 S.Ct. 2954 (1978) and *Eddings v Oklahoma*, 455 U.S. 104, 102 S.Ct. 869 (1982) Cf *Nebraska Press Ass'n v. Stuart* 427 U.S. 539, 555, 96 S.Ct. 2791, 2801 (1976).

[A] reversal means that justice has been delayed for both the defendant and the State; in some cases, because of lapse of time retrial is impossible or further prosecution is gravely handicapped. Moreover, in borderline cases in which the conviction is not reversed, there is some possibility of an injustice unredressed").

Here it is not the State that would be handicapped. It is Shelton that is handicapped, and even more than in *Skipper*, given his longer time awaiting re-sentencing than in *Skipper*. The trial court's ruling would prohibit defendant from introducing three kinds of evidence.

One was evidence of Shelton's achieving a GED and then taking college courses, very similar to the evidence wrongly barred in *Skipper* See infra at A, pp. 5-6, and Ex. C hereto. Another came from a statement from a teacher of Shelton's, Katherine Toler, to

the effect that such achievements were rare for a person who was facing life without mercy. See infra at B, pp. 6-7. Again, this is similar to the testimony admitted in *Skipper*.

A third was the diagnosis from a psychologist of Shelton and application of her opinion to what occurred on the night of the shooting.³ See below at C, p. 8.

The trial court seems to be reasoning that, in affirming the conviction the Supreme Court was saying that he should have had an adequate sentencing hearing beginning immediately after the conviction in May 1998.

A trial in May, 1998, it would have been in front of the same jury, as otherwise argued. See infra, at Remaining Question. The delay in the re-sentencing is not the fault of Shelton. He appealed, was rejected, and filed a federal habeas corpus (which was dismissed), filed a state habeas corpus (which was denied), and filed a timely appeal. See 35 GEO.L.J., ANN. REV. CRIM. PROC. at 702 (“A court must impose a sentence without unnecessary delay” (citations omitted)). Certainly there has been a very long delay between conviction and a properly-arrived-at-sentence and Shelton should **not** suffer from it.⁴

A. SHELTON’S PRISON RECORD THAT WOULD MEET THE JUROR’S EXPRESS DEMANDS BUT IT WOULD BE BARRED BY THE EVIDENTIARY RULING

³ The limit on the psychologist’s opinion was not precisely the snapshot reasoning and it came in a rather informal meeting on or about 8/5/08, defense counsel’s understanding of which he reduced to writing as a proposed order; the state responded by letter and no order, to defense counsel’s knowledge, entered as of the date of this argument.

⁴ Shelton has suffered from it in his classification of a “life without mercy” recipient. To the knowledge of his counsel, he remains in that classification, though that sentence has been vacated, limiting his avenues for rehabilitation.

1. EXPRESS DEMANDS

Asked what sign would be for her that a person who committed a serious crime had changed enough to merit a chance at parole, former potential juror O'Brien states that she would require "getting an education." Questionnaire used 7/08.

Asked for information in the previous questionnaire, at least four other jurors ALSO demanded similar evidence. They include:

- Carra ("Stays out of trouble **while incarcerated**. Advances his education or acquires skills. Recognizes his responsibility for his **current** circumstances. Contributes something positive to the 'society' **in which he lives.**");
- Branch ("remorse for their acts would be a start");
- Witzgall ("It just may take some rehab to put them on the right path");
- Hall ("attitude and completed an rehabilitation [sic] program");
- Crowder ("I do believe one can show change and reform over time").

Writ Ex. A;

- Lamb: **what happened for the last 10 years? Writ Ex. B;**
- Cross ("depends on their activities since then");
- Leshuk ("Depends on if any new facts or evidence has come up");
- Shinsky, wondering what evidence relates to the limiting of presentation to 3/25/98; Roe, "I can't answer that one way or the other without hearing the evidence;"

- Taylor (it depends on the information I receive) Writ Ex. B.
- Gaus and Rittenhouse said it depends on the facts and circumstances without indicating how or why. *Id*
- Conway and Hoffman simply said they couldn't explain what sign would show them that a person who committed a serious crime had changed enough to merit a chance at parole. Ex. B.

2. SHELTON HAS EVIDENCE THAT MEETS THIS REQUIREMENT.

Though facing life without mercy, Shelton was taking classes from WV Tech, getting his GED, and taking college courses - English 101, 102, Algebra, US history (2 courses), Afro-American History, Marketing, finite math, Fundamental of Management, and Aladrue I and II. See certificates attached hereto and incorporated by reference herein, Ex. C. Indeed in *Skipper*, defendant was permitted to testify about topics here excluded, that he had earned a GED.

One juror (Marshall) alluded to future dangers from anger; Shelton has completed a course in Advanced Anger Management. Writ Ex. C., and Aladrue, an acronym for Alcohol and Drug Education, a drug treatment program. Shelton suffers from the prejudice against drug sellers, reflected in virtually every questionnaire, for he admitted to selling drugs in his previous testimony. Trial Tr. 252. Completion of Aldarue would help him overcome that prejudice and show his rehabilitation.

The Court specifically struck from the questionnaire the evocative question, No. 42 ("What would you find or look for as a sign or signs that a person who committed a

serious crime had changed enough to merit a chance at parole?") from the 11/08 Jury Questionnaire, which Shelton will assign as a separate post-trial error. This shows that, when the jurors said they could be fair without hearing about the last ten years, they wanted and needed the information withheld from them.

Note that one juror, asked if she could base her decision on evidence as of 3/25/98, said it depends: "I'd need to be sure the witnesses recalled correctly." Rogers, Writ Ex. B. Since the first trial would be presented OVER OBJECTION by a summary witness who could little be cross examined, this juror will not get what she said she needed. A potential juror, Schultze, said he could not base his decision on evidence as of 3/25/98: "New investigation tools are available." *Id.*

B. TESTIMONY FROM KATHERINE TOLER ABOUT HOW UNIQUE WAS SHELTON'S PURSUIT OF EDUCATION WOULD PUT SHELTON IN A PLACE OF A RARE ACHIEVEMENT

Associated with the education program at Mount Olive Prison, Toler stated to counsel, on or about 1/15/07, that Shelton's GED was unusual. She explained that it was, in a sense, impressive, since he resides in maximum security because the sentence (from the 1998 trial) is still life without mercy. Such people generally see no point in furthering their education. See *Furman v. Georgia* 408 U.S. 238, 302, 92 S.Ct. 2726, 2759 (1972) n 57 (plurality opinion), noting the argument that that a person facing life imprisonment has "nothing to lose," absent the death penalty, by committing another capital offense. Toler's testimony would provide context for Shelton's achievement.

C. THE COURT ERRONEOUSLY REFUSED TO LET DR. BAILEY TESTIFY REGARDING HOW SHELTON'S POST TRAUMATIC STRESS DISORDER WOULD HAVE AFFECTED HIM AT THE TIME OF THE SHOOTING

Dr. Patricia Bailey, a psychologist, was permitted to testify about Shelton's mental and psychological condition **but not** about events related to the shooting. Her report indicated that she would testify, if permitted, that Shelton was suffering from Post-Traumatic Stress Disorder, caused by events from his youth, at the time of the shooting. She was barred from testifying about the effects of PTSD: consistent with PTSD, Shelton was hyper-vigilant. That hyper-vigilance was triggered by a sound he heard that sounded to him like a firearm being prepared for shooting.⁵ Writ Ex. E.

This would be consistent with juror's statements that they would consider mercy to the extent that Shelton had a reason or explanation for his actions.⁶ The juror questionnaires attached indicates a response into which Bailey's testimony would fit precisely. Question 41 essentially asks whether a person who shoots and kills another should ever get a chance at parole. See Writ Ex. F, her report. A potential juror responded "depends on events that have led up to the crime whether **mental state or abuse had any factor.**" Bloch statement. Another referred to an "unstable

⁵ The limit on the psychologist's opinion came in a rather informal meeting on 8/5/08, while the Court was finishing up another trial. Counsel's understanding was reduced to writing as a proposed order. The state responded with a letter objection and no order has been entered to counsel's knowledge despite counsel's suggestion that the state proposed an alternate order.

The trial court has indicated that the sentencing trial would focus on the State's side, apart from the "summary witness," of testimony from the decedent's mother and cousin. The former did not testify at the first trial.

⁶ The state's "evidence" implicitly recognized the importance of such evidence at the previous trial. It led one of its witnesses, Tracy Wade, Tr. 201-203, to say what the decedent MEANT when he said words to the effect of "I don't got nothing," and she divinized that he meant he didn't have a gun, and nodded in response to the question about whether the decedent "was his usual peaceful self."

situation/frame of mind” as a key factor in the parole decision. Merkle statement. A third wrote of “mental damage prior to the crime. Writ Ex. B, Pelaez.

D. THE COURT’S RULING IS CONTRARY TO THE CONSTITUTIONS

The trial Court’s is not writing on a blank slate. This slate remains cabined by the Fifth, Eighth, and Fourteenth amendments to the U.S. Constitution and parallel W.Va. Constitution and even the ruling of the Supreme Court of Appeals in this case.

1. THE EXCLUDED EVIDENCE SHOWS SHELTON’S “PRESENT PURPOSES AND TENDENCIES”

In a mercy decision, the sentencer is ultimately attempting to discern defendant’s “**present purposes and tendencies,**” for they “significantly... suggest the period of restraint and the kind of discipline that ought to be imposed upon him.” *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55, 58 S.Ct. 59, 61 (1937)

Thus past conduct is relevant only to the extent that it suggests “defendant’s present purposes and tendencies,” suggesting also the rule that Shelton here would waive, that the sentencing trial be limited on the State’s side.

Woodson v North Carolina, 428 U.S. 280, 96 S.Ct. 2978 (1976) relied in part upon the due process guarantee to hold that

“(f)or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.”

428 U.S. at 304, 96 S.Ct. at 2291, quoting *Pennsylvania ex rel. Sullivan, supra*, 302 U.S. at 55, 58 S.Ct. 59.

Here, by analogy, the State is seeking to get life without mercy not regarding the person that Shelton is today, but the person that he was 10 years ago. **It is trying not this individual but, to a great extent, another one. This is contrary to the cases *infra*, requiring an individualized proceeding.** One of the proposed jurors said that he thought he could be a good juror "after hearing **all the facts of the case**" P. 22 The Snapshot Analogy would deprive him of hearing "all the facts."

2. LOOKING AT CAPITAL U.S. SUPREME COURT CASES, THIS EVIDENCE HAS TO BE ADMITTED, FOR IT IS PROFFERED BY DEFENDANT AS AN ASPECT OF DEFENDANT'S **CURRENT CHARACTER**

The U.S. Supreme Court, in *Abdul-Kabir v. Quarterman* 550 U.S. 233, 127 S.Ct. 1654 (2007), recently relied on *Lockett, supra*, and cited its crucial language:

"that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, **any** aspect of a defendant's character or record and any of the circumstances of the offense **that the defendant proffers** as a basis for a sentence less than death."

438 U.S. at 604, 98 S.Ct. 2954

This language again suggests the rule, that any expansion in the sentencing phase can come only through evidence "that the defendant proffers." See *Beck v. State*, 396 So.2d 645 (1980), where the Alabama Supreme Court, though affirming the penalty,

relied upon *Pennsylvania ex rel v Ashe*, focusing on the inexperience of the jury in sentencing and the corresponding need for accurate information.

If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned determination... by a jury of people who may never before have made a sentencing decision.

396 So.2d at 661

Here, in contrast, the information injected is stale while the excluded information is current.

Lockett held that the Ohio death penalty statute was defective for failing to permit the type of individualized consideration of mitigating factors required by *Eighth and Fourteenth Amendments* in capital cases. The requirement of *Lockett* - "any of the circumstances of the offense that the defendant proffers as a basis for a sentence," *Lockett at id* - illumines the court's mistake in excluding evidence **proffered by defendant** , including but not limited to Dr. Bailey's evidence and other evidence. "[C]ircumstances of the offense that the defendant proffers as a basis for a sentence" also includes other evidence, argued in previous motion, to include evidence neglected in the first trial. E.g. **Preliminary Motions By Defendant Shelton To Suppress Certain State Evidence And/Or In Limine**, filed on or about 4/22/08. See n 1, supra, and more generally *Ford v Wainwright*, 477 U.S. 399, 409-10 (1986)(Eighth Amendment prohibits capital punishment of a person who becomes insane was awaiting execution: the prisoner's **current** state of mind can deprive the State of the ability to execute him or

her). *Ford* thus confirms the importance of recency under the test of the *Eighth Amendment*: this demand for “currency” bars the old evidence in this case and supports the rule that old evidence of convictions is barred from the sentencing trial as a general rule.

The U.S. Supreme Court had repeatedly stressed that the sentencing in capital cases MUST relate to the individual on trial. E.g. *Eddings, supra*, and *Skipper, citing Eddings*, which “emphasized... that “the sentencer in capital cases must be permitted to consider *any* relevant mitigating factor.” *Abdul-Kabir*. 550 U.S. 233, 127 S.Ct. at 1665. Here the sentencer is to be deprived of virtually **all** current mitigating circumstance.

In this, one of West Virginia’s “capital” cases. *Cleckley*, p. 302, constitutional relevance of evidence arises most clearly from the *Due Process Clauses* in the 14th *Amendment* and *Art III § 10 of the West Virginia Constitution*. *Art III § 10* states: “No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.” Due process demands that “[t]he sentencing process, just like the trial itself,... satisfy the requirements of the due process clause.” *Cleckley*, 305, *citing Gardner v Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204-5 (1977) and *Witherspoon v Illinois*, 391 U.S. 510, 521-3, 88 S.Ct. 1770, 1776-8 (1968). Due process undoubtedly informs the sentencing process in such cases. *See State v. Finley*, 219 W.Va. 747, 639 S.E.2d 839 (2006), which relied upon due process to vacate a penalty phase result.

Thus due process in this situation **requires** that Shelton be permitted to introduce evidence simply because it is more recent than the ten-year old evidence limit. *See State v Britton*, 157 W.Va. 711, 203 S.E.2d 462 (1974)(accused is guaranteed a

fair trial by Art III, §10, requiring due process, and Art III § 14 of the West Virginia Constitution); *West Virginia Code § 28-5-31(b) (1980) (Repl. Vol. 2001)*, stating in part “[i]n all proceedings hereunder...the likelihood of serious harm must be based upon evidence of **recent** overt acts). Regarding W.Va. policy in favor of correct, updated information as the basis of sentencing, see *W.Va. Code 61-11A-3(d)*, giving defendant right to review victim impact statement and grant a hearing “whereby he may introduce testimony or other information related to any alleged factual inaccuracies in the statement, cited in *Cleckley* at 373, and *LaRock*, 196 W.Va. at 312, 470 S.E.2d at 631 (considering admission of evidence under *WVRE 404(b)*,” the theory under which such evidence is allowed arises from the idea that, when a defendant has demonstrated the same type of violence towards a victim on a **recent** occasion, it is probative of his or her intent, motive, malice, and premeditation”), n 27; *State v. Waldron*, 71 W.Va. 1, 75 S.E. 558 (1912)(**recent acts** of violence by decedent in certain circumstances admissible in homicide where self-defense argued); *State v. Gangwer* 168 W.Va. 190, 198, 283 S.E.2d 839, 844 (1981), where the court approved rejection of evidence regarding defendant’s mental state on grounds of **remoteness**. Evidentiary rules restrict evidence on grounds of remoteness, e.g. *WVRE 609(b)*, setting a time limit of 10 years for impeachment by evidence of conviction of a crime.

A key reason to bifurcate occurs when “a party desires to introduce evidence solely for sentencing purposes but not on the merits” *State v. LaRock*, 196 W.Va. at 315, 470 S.E.2d at 634.

The Ohio County Evidentiary Limitation is contrary to the language from Justice

Workman:

The determination of whether a defendant should receive mercy is so crucially important that justice for both the state and defendant would be best served by a **full presentation of all relevant circumstances...**

Schofield v. West Virginia Dept. of Corrections, 185 W.Va. 199, 207, 406 S.E.2d 425, 433 (1991) (Workman, J., dissenting)

While in dissent, Justice Workman's statement was quoted by the Supreme Court of Appeals **in this case**, *State ex rel Shelton v Painter*, 221 W.Va. 578, 586, 655 S.E.2d 794, 802 n 7 (2007), as well as in *LaRock*. 196 W.Va. at 314, 470 S.2d at 633.

State v. Brewster, 213 W.Va. 227, 229, 579 S.E.2d 715, 717 (2003), reflects the crucial additional element - all evidence **offered by defendant**, speaking of the "[r]ule of criminal procedure requiring the sentencing court to address the defendant personally and determine whether the **defendant wishes...to present any information in mitigation of sentence**" citing *Rules Crim.Proc.*, R. 32(c)(3)(C).

Such protective rules, supporting both the general rule and the specific waiver by Shelton here, the Supreme Court of Appeals has stated, are mandatory. *State v Wallace*, 205 W.Va. 155, 517 S.E.2d 20 (1999). See *State v Franklin*, 174 W.Va. 469, 475, 327 S.E.2d 449, 456 (1985)(sentence subject to review if imposed not on the informed discretion of the trial court but upon misinformation, as characterized by *Cleckley* at 326). Indeed *Cleckley* clearly states that misinformation or an unfounded assumption concerning facts of importance is an impermissible factor in determining sentence. *Id* at -323-4, citing *inter alia* *U.S. v Powell*, 487 F.2d 325 (4th Cir. 1973).

Powell held that failure of record to support material factors on which severity of punishment rested, and defendant's lack of an opportunity to explain or refute derogatory information on which court relied in imposing punishment, denied defendant **due process**.

While not every type of misinformation will justify relief, a sentence cannot stand if it is based on assumptions concerning the defendant's criminal record that are "materially false," *Townsend v. Burke*, 334 U.S. 736, 741, 68 S.Ct. 1252... (1948), or if it is founded "in part upon misinformation of constitutional magnitude." *United States v. Tucker*, 404 U.S. 443, 447, 92 S.Ct. 589, 592... (1972).

Powell at 328

See *Haddad et al, Criminal Procedure, Cases and Comments* (5th ed.), stating: "it has been generally understood that a sentence clearly based upon incorrect information is a violation of due process," p. 1517, citing *U.S. v Jackson* , 649 F.2d 967 (3rd Cir. 1981) and *U.S. v Jones*, 640 F.2d 284 (10th Cir. 1981). A sentence cannot stand if it is based on assumptions concerning the defendant's criminal record that are "materially false," *id*, citing *Townsend, supra*.

While *Leach v Hamilton*, 280 S.E.2d 62 (1980), did distinguish *Lockett* and death cases from other capital cases, that is more rationale and less holding. The holding in *Leach* is that a unitary trial is not required and that a "life sentence, with or without possibility of parole, is not a cruel and unusual punishment unless so disproportionate to the offense as to shock the general conscience or degrade human dignity" 280 S.E.2d at 63, citing *Trop v Dulles, infra* (other citation omitted).

F. EVEN IF THE WEST VIRGINIA DUE PROCESS CLAUSE DID NOT REQUIRE IT, THIS STATE'S "PUBLIC POLICY, ENACTED INTO STATUTE," DOES

Even if current information were not *arguendo* required by due process, West Virginia's "public policy enacted into statutes," *Lockett*, shows the strong public policy in this state in favor of rehabilitation requires the information in this case. *E.g. W. Va. Code, § 5-10A-7* (person convicted a crime but who has discharged all penalties and been rehabilitated may participate in new benefits; *W. Va. Code, §§ 16-1-6, (o) and (p)*, duties of the Commissioner of Health, focusing on rehabilitation; *§16-29D-1*, public policies of state in favor of rehabilitation services. See also November, 2008, questionnaires: when counsel arranged the juror responses in alphabetical order, the very first listed potential juror indicated that she valued rehabilitation most highly of the three choices offered. Other 11/08 responses also mentioning rehab or listing rehabilitation first included Adams, Castello, Conway, Hastings, Hockenberry, Norton, Patterson, Lin, Marshall, McDermott, Miller, Moffit, Robbins, Sikole, Smith, Stauffer, Steed, Terry, and Yoho. Palaez as well spoke of reform. Writ Ex. B.

CONCLUSION ON THIS ISSUE

Shelton seeks that the Court admit all relevant evidence at the sentencing trial, waiving the right to have only the evidence at the guilty phase introduced against him

II. IN ANSWER TO THE SECOND QUESTION, WHO BEARS THE BURDEN, THAT BURDEN RESTS ON THE STATE

This Court stated in *Rygh* “[w]e do not believe that conceptually there is any separate or distinctive ‘burden of proof’ with the jury’s mercy/no-mercy determination in a bifurcated mercy phase of a murder trial, if the court in its discretion decides to bifurcate the proceedings” 206 W.Va. at 297, 524 S.E.2d at 449, n 1.

While [t]here is a fundamental right to have a presumption of innocence and burden of proof instruction in a criminal case,” *State v. Goff* 166 W.Va. 47, 55, 272 S.E.2d 457, 462 (1980), most recently relied upon in *State v. Harden*, 2009 WL 1574873 (W.Va. 6/4/09), that right comes from the federal guarantees of due process. It has been exceeded in these bifurcated cases.

The jury may grant mercy on a “whim.” *State v. Miller*, 178 W.Va. 618, 622, 363 S.E.2d 504, 508 (1987). No instruction should be given outlining factors which jury should consider in determining whether to grant mercy in first-degree murder case. *Billotti v. Dodrill*, 183 W.Va. 48, 57, 394 S.E.2d 32, 41 (1990).

Thus this standard, of jury discretion, is analytically a greater burden for the state than even the reasonable doubt instruction, which is what the Ohio County Circuit Court indicated it would apply. Thus Shelton puts the Ohio County Circuit Court closer to the true answer to the question; the State, in Shelton, greatly errs in somehow imposing on Shelton any burden to prove his eligibility for mercy.

Thus the burden of proof is placed on, and remains with, the State. That burden of proof is that announced in *Miller*, of requiring absolutely no proof from the Defendant, and exceeding even the “beyond a reasonable doubt” standard.

In the alternative, this defendant seeks that the burden of proof be recognized as beyond a reasonable doubt, as reviewable as such by the trial court and this Court.⁷

III. REGARDING THE FINAL QUESTION, WHETHER THE SAME JURY MUST HEAR THE SENTENCING, IT MUST; ABSENT THAT SAME JURY, THE SENTENCE AN CAN ONLY BE LIFE WITH MERCY

Shelton adopts the argument of *McLaughlin*, brief section II.

RELIEF REQUESTED.

Shelton requests the following relief

1. He should be retried on the guilt aspect as well as the sentencing phase, if convicted, because of the State’s inability to provide him with the “same jury,” under III *supra*, incorporating *McLaughlin*’s argument on this issue, its section II; and that in the alternative regarding that his punishment be limited to life with mercy.
2. That the rule against additional evidence by the State in the sentencing phase, beyond that adduced by the State at the guilt

⁷ Shelton recognizes that he differs from *McLaughlin*, in that Shelton argues that a “beyond a reasonable doubt” standard is appropriate, in the alternative to the “whim” standard of absolute discretion in *Miller*. Shelton does not waive the argument that the failure to provide standards for awarding mercy is unconstitutional and incorporates the arguments of *McLaughlin* on this issue. Shelton maintains all the arguments that he has advanced at the trial court, before this court on his habeas appeal here, and to the trial court on remand.

phase be recognized, even as he seeks to waive it, contrary to the ruling of the trial court, thus prohibiting testimony from the decedent's mother, but permitting testimony from Shelton and on his behalf, reflected *supra*.

3. The burden of proof be recognized as placed on, and remaining with, the State and that burden of proof is that annunciated in *State v Miller*, of requiring absolutely no proof from the Defendant.
4. In the alternative, that the burden of proof be recognized as beyond a reasonable doubt, as reviewable as such by the trial court and this Court.

Respectfully submitted,

SHANE SHELTON, Petitioner:

By: Timothy F. Cogan by L.V.V.
Of Counsel

Timothy F. Cogan, Esq.
W.Va. State Bar No. 764
William C. Gallagher, Esq.
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 regular U.S. Mail,
postage prepaid, 13th day of July, 2009, as follows:

GREGORY L AYERS ESQ
PUBLIC DEFENDER
OFFICE OF THE PUBLIC DEFENDER
KANAWHA COUNTY
PO BOX 2827
CHARLESTON WV 25330-2827

KEVIN HANSON
PROSECUTING ATTORNEY
GREENBRIER COUNTY
PO BOX 911
LEWISBURG WV 24901

SCOTT SMITH
PROSECUTING ATTORNEY
STEPHEN L VOGRIN ESQ
ASSISTANT PROSECUTING ATTORNEY
OHIO COUNTY COURTHOUSE
1500 CHAPLINE STREET
WHEELING WV 26003-3590

DARRYL MCGRAW
ATTORNEY GENERAL
STATE CAPITOL
CHARLESTON WV 25305

Timothy F. Cogan by W.V.V.
Timothy F. Cogan

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