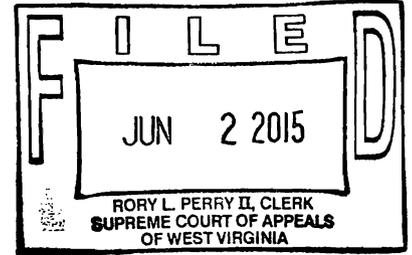


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 15-0115



STATE OF WEST VIRGINIA,

**Plaintiff Below,
Respondent,**

vs)

No. 15-0115 (Kanawha County 14-F-227)

TIMOTHY PAUL SHAFER,

**Defendant Below,
Petitioner.**

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

THE CIRCUIT COURT OF KANAWHA COUNTY ABUSED ITS DISCRETION AND VIOLATED THE WEST VIRGINIA AND UNITED STATES CONSTITUTIONS IN SENTENCING THE DEFENDANT TO LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE AND CONSECUTIVE SENTENCES TOTALING SIX TO SEVENTY FIVE YEARS.

- A. The Sentence Of Life Imprisonment Without the Possibility Of Parole Violates The Proportionality Provision Found In Article III, Section 5 Of The West Virginia Constitution.**
- B. The Circuit Court Abused Its Discretion By Ignoring Without Explanation The State's Recommendation Of Mercy**

STATEMENT OF THE CASE

A. Plea and Sentence

Timothy Paul Shafer ("Petitioner") was convicted in Kanawha County Circuit Court of the crime of First Degree Murder (Felony Murder) in violation of Chapter 61, Article 2, Section 1 for which he received a sentence of life imprisonment without the possibility of parole. App. 3. Petitioner pleaded guilty to First Degree Murder (Felony Murder) on July 11, 2014. App. 6; App. 35. Petitioner was sentenced on August 22, 2014. App. 3; App. 80.

In addition to his guilty plea to Felony Murder as contained in Count Four of Felony Indictment 14-F-227, (App. 11) the Petitioner also plead guilty to:

Count One (Conspiracy) and received a sentence of one to fifteen years of imprisonment to run CONSECUTIVE to Count Four;

Count Two (Burglary) and received a sentence of one to fifteen years of imprisonment to run CONSECUTIVE to Counts one and Four;

Count Six (Burglary) and received a sentence of one to fifteen years of imprisonment to be served CONSECUTIVE to Counts One, Two and Four;

Count Eight (Grand Larceny) and received a sentence of one to ten years of imprisonment to run CONSECUTIVE to Counts One, Two, Four and Six;

Count Nine (Burglary) and received a sentence of one to fifteen years of imprisonment to run CONSECUTIVE to Counts One, Two, Four, Six and Eight; and,

Count Eleven (Grand Larceny) and received a sentence of one to fifteen years of imprisonment to run CONSECUTIVE to Counts One, Two, Four, Eight and Nine.

App. 6-9; App. 3-5.

The Petitioner's total sentence is Life Imprisonment Without the Possibility of Parole plus not less than six nor more than seventy-five years imprisonment.

B. Plea Agreement and Recommendation of Mercy

Petitioner entered his plea of guilty to First Degree Murder (Felony Murder), as well as the six additional felony charges described above, pursuant to a written Plea Agreement. App. 25-27. In exchange for Petitioner's plea of guilty, the State of West Virginia agreed to make a recommendation of mercy pertaining to the Felony Murder charge.

Paragraph 8 of the Plea Agreement provides:

8. In regard to disposition, the State of West Virginia recommends commitment to the penitentiary on all county, and further recommends Mercy pertaining to the First Degree Murder charge contained in Count Four. Also, the State of West Virginia will stand silent as to whether the sentences on the other counts should run consecutive or concurrent therewith.

App. 26.

The Plea Agreement also contained language relating to the Petitioner's cooperation and assistance to law enforcement. Paragraph 9 of the Plea Agreement provides:

9. The Defendant, Timothy Paul Shafer, will be completely forthright and truthful with the office of the Prosecuting Attorney for Kanawha County and investigators with regard to all inquiries made of him. Timothy Paul Shafer will assist agents of the State of West Virginia by reasonable cooperation with the agents and will give, as needed, signed sworn statements and/or trial testimony relative thereto. Also, with respect to disposition, the State of West Virginia will advise the court of the extent of the Defendant's cooperation.

App. 26.

C. Facts

On January 4, 2014, Petitioner, along with Co-Defendants, Jessica Wilson and Megan Hughes decided they were going to rob Nancy Lynch. App. 60-61. Jessica Wilson had purchased prescription medication from Ms. Lynch in the past and knew that she had money and prescription pills. App. 60-61.

Petitioner had also met Ms. Lynch on two prior occasions. Once when he was a sales clerk that sold her a cell phone and a second occasion when Ms. Lynch saw Petitioner and Megan Hughes walking by her house. She recognized Petitioner and began talking with him. During this conversation, Ms. Lynch stated to Petitioner that she had been robbed three or four times but never reported the robberies. Ms. Lynch explained that she was afraid that if she reported the crimes she may be killed. App. 158-160; App. 248.

While planning the robbery on January 4, 2014, Petitioner told Jessica Wilson about the conversation with Ms. Lynch and Petitioner told Ms. Wilson that she is not going to turn us in. App. 160. For this reason, Petitioner had no reason to harm Ms. Lynch or to believe any harm would come to Ms. Lynch. App. 159-60; App. 196.

Before leaving to commit the robbery, Petitioner grabbed a toy gun and put it in his pants

while Jessica Wilson grabbed a kitchen knife and put it in her pants. App. 62; App. 160; App. 248. According to Petitioner his intention was just to scare Ms. Lynch with the toy gun. App. 248.

Petitioner and Jessica Wilson then left Ms. Wilson's house and walked approximately three blocks to Nancy Lynch's house. App. 63. Ms. Lynch was not at home so they went to purchase cigarettes and waited at the bus stop across the railroad tracks watching for her to come home. App. 63; App. 250.

When Ms. Lynch returned home, Petitioner and Jessica Wilson approached her and began a conversation. App. 63. Petitioner then lifted his shirt exposing the toy gun and said, "Let's go in the house." Ms. Lynch appeared to believe Petitioner was joking and it was then Jessica Wilson took out the knife and said, "No, let's go in the house." App. 62-63; App. 160.

Jessica Wilson then pushed Ms. Lynch into the kitchen area of the house and Petitioner followed. App. 64-65; App. 160. Jessica Wilson then began asking, "Where are the drugs and money?" Ms. Lynch responded, "I don't have any drugs. I don't have any money." App. 66. Jessica Wilson then asked where her purse was to which Ms. Lynch responded out in the car. Jessica Wilson went to the car but the purse was not there. App. 160. Jessica Wilson then pushed Ms. Lynch into the living room arguing over money. At this point Jessica Wilson saw the purse on the couch, she looked through the purse she found sixteen dollars (\$16.00) and began hitting Ms. Lynch. App. 66.

Jessica Wilson also located a bank card in Ms. Lynch's purse and asked how much was in the account to which Ms. Lynch replied, "There might be a little bit of money in there." App. 66; App. 160. At this point Jessica Wilson began demanding the PIN code. Ms. Lynch began listing different numbers. This appeared to infuriate Jessica Wilson who pulled out the knife and

demanded, "You have one more chance to tell me the truth." App. 67; App. 161.

Ms. Lynch then responded with another set of numbers and in response Jessica Wilson told Petitioner to turn around. Petitioner did so believing this was just an attempt to intimidate Ms. Lynch. App. 67. Petitioner turned away but when he looked back, Jessica Wilson was stabbing Ms. Lynch on the left side. Ms. Lynch fell on the couch and Jessica Wilson got on top of her and continued stabbing her in the neck area and Ms. Lynch ultimately fell onto the floor dead. App. 67; App. 161. Petitioner stated that, "She was stabbing her fast....She was stabbing her fast like she was pissed." App. ____.

Petitioner then ran out of the house into the back yard. Jessica stated, "I know she's got more money." and then went into Ms. Lynch's bedroom where she found the jewelry, pills and guns which Jessica Wilson and the Petitioner carried away. App. 162.

Petitioner and Jessica Wilson proceeded toward an ATM to use the bank card. On the way, Jessica Wilson wiped the blood off the knife and stuck it into the ground beside the railroad tracks. App. 164.

Petitioner and Jessica Wilson returned to the house where they retrieved the car keys and drove the car to Jessica Wilson's house. App. 71.

Petitioner and Co-Defendant, Megan Hughes would return two days later and take a flat screen TV, jewelry, some prescription pills and a 1991 Toyota Corolla. App. 72-73.

Petitioner was arrested by the Saint Albans Police Department on January 31, 2014 and charged with First Degree Murder and First Degree Robbery. App. 101. The police Detective, M.K. Elkins testified before the Grand Jury that when they initially began questioning Petitioner, "he didn't want to talk to anybody", and then he came back and said, "Yeah, I want to talk to you all and

it was at that time he starting explaining that, you know, he had went inside the house and he was present when she was murdered.” App. 246.

Petitioner then fully cooperated with the investigation beginning with his sixty-one (61) page statement/interview. App. 147-207. Throughout the investigation the Petitioner consistently stated and testified that Jessica Wilson was the only one who inflicted injuries on Ms. Lynch by stabbing her multiple times resulting in her death. Id.; App. 60-74; App. 248, 250, 255, 270, 272-273.

Jessica Wilson, on the other hand, continually changed her story initially denying any involvement. App. 253. Detective Elkins testified, “”Yes. As well as when we interviewed Jessica, she had confessed to stabbing Nancy.” App. 270. Detective Elkins further testified:

A. During the time of her interview, Jessica actually demonstrated on myself how she had stabbed Nancy. She initially said she maybe just stabbed her in the toe, and then after speaking with her forever, she admitted she had stabbed Nancy eight to nine times.

App. 270.

According to Detective Elkins’ Grand Jury Testimony the medical examiner stated that, “It could have been a female that committed the crime.” App. 254-255.

Petitioner was 29 years old when he was sentenced. App.100. While the Petitioner dropped out of school in the eighth grade, and in spite of being diagnosed with ADD in 2012, he was able to obtain his GED and one college credit while incarcerated at Huttonsville Correctional Center. App. 105. At the time Petitioner was sentenced he had a single felony conviction for Attempt To Commit Daytime Burglary and had never been charged with a crime of violence until the instant offense. App. 103-105. The trial court imposed a sentence of life without the possibility of parole plus consecutive sentences totaling not less than 6 nor more than 75 years. App. 3.

SUMMARY OF ARGUMENT

The Circuit Court of Kanawha County, West Virginia violated the proportionality principle of Article III, Section 5 of the West Virginia Constitution in sentencing the Petitioner to life imprisonment without the possibility of parole and consecutive terms of incarceration totaling not less than six nor more than seventy-five years for a felony murder conviction where the totality of the evidence indicates that all the injuries and resulting death were inflicted by the Petitioner's Co-Defendant Jessica Wilson; where a second Co-Defendant selected the target of the felony (Robbery); and, where the Petitioner was convinced that not only would there be no violence involved in the robbery but that no violence would even be necessary given statements by the victim that she does not report robberies.

Furthermore, the Circuit Court abused its discretion by ignoring, without any explanation, the State's recommendation for Mercy where the State acknowledged the accuracy of the Petitioner's allocation as to the fact that the injuries and resulting death were caused solely by the Petitioner's Co-Defendant and where a second Co-Defendant selected the target of the felony (Robbery); and, where the Petitioner was convinced that not only would there be no violence involved in the robbery but that no violence would even be necessary given statements by the victim that she does not report robberies.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes that the questions raised in this appeal regarding the constitutionality of Petitioner's sentence of life imprisonment without the possibility of parole, as well as the unsustainable exercise of discretion in and by the Kanawha County Circuit Court are appropriate for oral argument pursuant to Rule 19 or Rule 20 in the discretion of this Court.

ARGUMENT

The Circuit Court of Kanawha County abused its discretion and violated the West Virginia and United States Constitutions in sentencing the defendant to life imprisonment without the possibility of parole and consecutive sentences totaling six to seventy five years.

A. The Sentence Of Life Imprisonment Without the Possibility Of Parole Violates The Proportionality Provision Found In Article III, Section 5 Of The West Virginia Constitution.

Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: “Penalties shall be proportioned to the character and degree of the offence.” Syl. Pt. 8, State v. Vance, 164 W.Va. 216, 262 S.E.2d 423 (1980).

In Syl. Pt. 5 of State v. Cooper, State v. Cooper, 172 W.Va. 266, 304 S.E.2d 851 (1983), this Court explained that, “Punishment may be constitutionally impermissible, although not cruel and unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense.

There are two tests for determining whether a sentence is so disproportionate that it violates our constitution. Stockton v. Leeke, 237 S.E. 896, 897 (W.Va. 1977). The first test is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. State v. Cooper, 172 W.Va. 266, 272, 304 S.E.2d 851, 857 (1983) If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further. Id.

When it cannot be said that a sentence shocks the conscience, a disproportionality challenge

is guided by the objective test we spelled out in Syllabus Point 5 of Wanstreet v. Bordenkircher, 166 W.Va. 523, 276 S.E.2d 205 (1981):

In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.

To determine whether a sentence shocks the conscience, we consider all of the circumstances surrounding the offense. State v. Phillips, 199 W. Va. 507, 513, 485 S.E.2d 676, 682 (1997). Likewise, regarding the objective test, this Court has also indicated that the second test charges that a “dis-proportionality challenge should be resolved by more objective factors which include the consideration of the nature of the offense, the defendant’s past criminal history, and his proclivity to engage in violent acts.” State v. Broughton, 196 W.Va. 281, 292, 470 S.E.2d 413, 424 (1996) (quoting State v. Ross, 184 W.Va. 579, 581-82, 402 S.E.2d 248, 250-51 (1990)).

The Petitioner asserts that his Life Imprisonment sentence without the possibility of parole is in violation of the proportionality principle found in Article III, Section 5 of the West Virginia Constitution under the subjective test of State v. Cooper, *supra* and / or the objective test spelled out in Wanstreet v. Bordenkircher, *supra*.

1. The Petitioner’s Sentence Of Life Imprisonment Without the Possibility Of Parole Violates The Proportionality Provision Found In Article III, Section 5 Of The West Virginia Constitution because it “shocks the conscience.”

This Court stated in State v. Phillips, *supra*, in order “[t]o determine whether a sentence shocks the conscience, we consider all of the circumstances surrounding the offense.” The circumstances surrounding this case as contained in the record are essentially undisputed. The record clearly establishes the details of how this particular crime occurred. These facts were provided in

great detail by the Petitioner in his sixty-one page statement given at the time of his arrest on these charges in his efforts early on in this case to provide his full cooperation. App. 146-207.

Detective M.K. Elkins testified before the Grand Jury, "He denied everything initially, being there or anything. And after speaking with him, he didn't want to talk to anybody, and then he came back and said 'Yeah, I want to talk to you all,' and it was at that time, he started explaining that, you know, he had went inside the house and he was present when she was murdered." App. 246. In fact, page three of the Presentence Investigation Report cites the Petitioner's sworn statement as "B. OFFICIAL VERSION OF THE OFFENSE." App. 102.

The Petitioner basically restated these events, although with much less detail, in his allocution to the Court at his Guilty Plea Hearing on July 11, 2014. App. 35 These facts are further summarized above in the Statement Of The Case section herein. The essential facts the Court must consider in determining whether the Petitioner's sentence of Life Without Mercy "shocks the conscience" are these: The Petitioner is a thirty (30) year old male (28 at the time this incident occurred) who, although he dropped out of school in the eighth grade, he has since obtained his G.E.D.; The Petitioner fully acknowledges his drug problem which existed at the time this crime occurred; The plan to commit the robbery herein was formed at the home of the petitioner's co-defendant Jessica Wilson; The target of the robbery, Nancy Lynch, was selected by the Petitioner's co-defendant, Megan Hughes; Prior to the crime, the Petitioner was advised by Nancy Lynch that she had been robbed on three or four prior occasions and that she refuses to report the crimes; The Petitioner believed that Nancy Lynch would not report this robbery and believed that no violence would occur or be necessary; The fact that Jessica Wilson had previously purchased pills from Ms. Lynch only help to reinforce this belief; The Petitioner told Jessica Lynch about the prior robberies

and that Ms. Lynch would not report this robbery; Before walking over to the victims home, the Petitioner took a toy gun and put in his pants feeling this would be sufficient to convince Nancy Lynch to cooperate; Jessica Wilson brought a knife and put in her pants.

On January 4, 2014, the Petitioner and Jessica Wilson walked the three blocks over to the victims home; When Ms. Lynch arrived, they started a conversation and Petitioner lifted his shirt and showed the toy gun and said “ Let’s Go in the house” and Ms. Lynch appeared to believe he was joking; Jessica Wilson then showed her knife and demanded that Ms. Lynch go in the house; Jessica Wilson shoved Ms. Lynch into the kitchen and demanded money and pills; Jessica Wilson pushed Ms. Lynch into the living room and asking for her purse; Jessica Wilson went through the purse and found a bank card and demanded the PIN; Jessica Wilson appeared to get upset believing Ms. Lynch was lying about the PIN; Jessica Wilson then began stabbing Ms. Lynch very fast, “like she was pissed” and until she was dead, a total of nineteen times. Defendant was in a state of shock when this occurred. App. 272.

The State acknowledged that the Petitioner’s description is accurate and truthful, making no corrections to any of these critical facts at the plea hearing. App. 35, 60-73. The State also acknowledged and advised the Court as to the significant and helpful cooperation and assistance provided the Petitioner in this and other cases, as contained in the sealed sentencing hearing transcripts. App. 87-94. Finally, based upon the level of Petitioner’s involvement and the extent of his assistance and cooperation, the State recommended Mercy on the Felony Murder charge. App. 26.

The Petitioner comes before this Court convicted of Felony Murder, a crime that does not require proof of the elements of malice, premeditation or specific intent to kill. In fact, the undisputed record clearly establishes he did not possess any of these. The Petitioner never intended

violence, believed no violence would be used or necessary, never laid a hand on the victim and did not inflict any of the injuries resulting in the victims death. The Petitioner had one prior felony conviction for attempt to commit daytime burglary for which he was sentenced to one to three years, after two parole violations. The Petitioner served his time, was paroled and discharged from parole on April 22, 2013.

This thirty year old man has been sentenced to Life Imprisonment without the possibility of parole. He could spend sixty years or more incarcerated by the State of West Virginia. It shocks the conscience and offends fundamental notions of human dignity for the Petitioner to be subjected to the ultimate penalty that can be handed down in West Virginia under this set of facts. While an egregious crime has occurred which resulted in a sad and unnecessary death, this penalty should be reserved for those criminals performing the malicious and violent acts resulting in homicide rather than based upon an imputed malice theory. Perhaps if the issue was life in prison or release this would not be so shocking. But the issue is whether the Petitioner will ever be eligible for parole or become eligible after twenty-one years, when he is fifty.

2. The Petitioner's Sentence Of Life Imprisonment Without the Possibility Of Parole Violates The Proportionality Provision Found In Article III, Section 5 Of The West Virginia Constitution under the objective test in *Wanstreet*

As noted above, if the Court finds that the Petitioner's sentence does not shock the conscience, then the disproportionality challenge is guided by the objective test spelled out in Wanstreet v. Bordenkircher, *supra*. In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a

comparison with other offenses within the same jurisdiction.

a. Nature of the Offense.

The Petitioner recognizes the horrible nature of this offense and the actions which led to the unfortunate and unnecessary death of Nancy Lynch. These cannot be diminished, nor does the Petitioner attempt to do so. However, the Court is required to consider the totality of circumstances regarding this crime in relation to this Petitioner and his constitutional rights.

Pursuant to West Virginia Code §61-2-1 , the following acts constitute first degree murder:

Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing, or in the commission of, or attempt to commit, arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivering a controlled substance as defined in article four [§§ 60A-4-401 et seq.] chapter sixty-a of this code, is murder of the first degree. All other murder is murder of the second degree.

W.Va.Code § 61-2-1; see Syl. Pt. 6, State v. Sims, 162 W.Va. 212, 248 S.E.2d 834 (1978) (recognizing that felony murder is one of three broad categories of first degree murder under W.Va.Code § 61-2-1).

The elements which the State is required to prove to obtain a conviction of felony murder are:

(1) the commission of, or attempt to commit, one or more of the enumerated felonies; (2) the defendant's participation in such commission or attempt; and (3) the death of the victim as a result of injuries received during the course of such commission or attempt. State v. Williams, 172 W.Va. 295, 305 S.E.2d 251 (1983); State v. Mayle, 178 W.Va. 26, 357 S.E.2d 219 (1987)

The crime of felony-murder in this State does not require proof of the elements of malice, premeditation or specific intent to kill. It is deemed sufficient if the homicide occurs accidentally during the commission of, or the attempt to commit, one of the enumerated felonies. State v. Sims, 162 W.Va. 212, 213, 248 S.E.2d 834, 836.

There is a very low level of proof required for the state to obtain a conviction for felony

murder. The state does not have to prove malice, premeditation or specific intent to kill. The state need only prove that a victim died in the course of the commission of or attempt to commit one of the enumerated felonies and that the defendant participated in the commission or attempted felonies. The Petitioner has plead guilty based upon these factors. However, the Court should give significant weight to the limited proof required of the State when evaluating whether a life sentence without the possibility of parole is disproportionate to nature of the offense that the Petitioner stands convicted.

Petitioner's participation in the underlying felony and the level of his involvement in the actions leading to injuries and death being inflicted upon the victim by Jessica Wilson have been exhaustively set forth in the preceding section as well as the in the Statement of Case. The State acknowledged and agreed with the Petitioner's version of the facts in the case below and with the State's understanding of these facts recommended mercy in this case. Given the significance of the imposition of the State's ultimate punishment this Court should give substantial weight to the actual participation and the lack thereof by the Petitioner.

As noted above, the Petitioner has a single prior felony conviction for which he served his time. There is nothing in the record to establish any proclivity for violence. While the PSI indicates three DVP's were file, two were denied and the one which was granted was in conjunction with a final divorce decree. The record contains no details as to the nature of those requests.

Finally, the Petitioner has exhibited significant remorse. In fact he offered apologies to the victim's family at his plea and at sentencing. At his plea the Petitioner stated, " I would like to apologize to the, to the victim's family. I did not intend for Nancy to get hurt; and I'm sorry that you had lost her." App. 77-78. At Sentencing the Petitioner stated, "I'd again like to apologize to the family. There's no excuse or reason for the things that happened. If I could take it all back, I would. I know that doesn't make anything right. I'll never be able to, to say exactly how sorry I am. At this time I just – I'm ready to take my punishment because I know I did – the things I did was wrong.

It was all over a stupid drug habit.” App. 84-85.

b. The Legislative Purpose Behind the Punishment.

“Much of the legal scholarship indicates that the purpose of the felony murder rule is to deter felonies and to make felons limit their use of violence while they're committing the felony by making the felon internalize more fully the negative consequences of their actions. It's unclear whether legislatures that adopt felony murder rules are more concerned with deterring criminal behavior or making criminals less violent when committing felonies....Our results indicate that the felony murder rule does not have a significant effect on crime rates or crime-related death rates.” The American Felony Murder Rule: Purpose and Effect, Daniel Ganz, UC Berkeley, Spring 2012, Legal Studies Honors Thesis.

The common law felony-murder rule is that Homicide, a killing, resulting from the perpetration (or attempted perpetration) of a felony is Murder. Perkins on Criminal Law, Ch. 2, at 37, et seq. (2nd ed.). Therefore, at common law, a homicide resulting from the commission of any felony constituted murder. W.Va. Code, § 61-2-1, altered the scope of the common law felony-murder rule by confining its application to the crimes of arson, rape, robbery or burglary, or the attempt to commit such crimes. The Legislature later expanded the offenses that are subject to the felony-murder rule to include kidnaping, sexual assault, breaking and entering, escape from lawful custody, and the felony offense of manufacturing or delivering a controlled substance. See State v. Sims, 162 W.Va. 212, 248 S.E.2d 834

It appears that the legislative purpose was to limit the types of cases that would be subject to our murder statute. Obviously, however, the legislature has nonetheless recognized the serious nature of the current enumerated felonies to the extent that a homicide committed in the commission of one of these felonies is subject to our murder statute. Nonetheless, the limiting nature of the felony murder statute, together with the fact that a felony murder conviction does not require proof

of the elements of malice, premeditation or specific intent to kill, should give the Court's great pause to insure that the sentence imposed, whether life with mercy or life without mercy, is proportionate to the nature of the crime actually committed by a defendant.

c. Comparison of the Punishment in Other Jurisdictions.

The state of Kentucky, with the enactment of Kentucky Revised Statutes § 507.020, has completely abolished the common law felony murder rule. Bonnie, R.J. et al. Criminal Law, Second Edition. Foundation Press, New York, NY: 2004, p. 860.

In addition to Kentucky, Hawaii has also abolished "felony murder." The Hawaii Code Commentary explains, "In recognition of the trend toward, and the substantial body of criticism supporting, the abolition of the felony-murder rule, and because of the extremely questionable results which the rule has worked in other jurisdictions, the Code has eliminated from our law the felony-murder rule. See, Commentary On §707-701 Hawaii Legislature Official Website, http://www.capitol.hawaii.gov/hrscurrent/Vol14_Ch0701-0853/HRS0707/HRS_0707-0701.htm.

Ohio has two felony-murder rules. One is a relatively traditional felony-murder rule similar to West Virginia, which does not require the state to allege or prove any particular means regarding the death. Violation of this law results in a conviction for "murder" as distinguished from the more serious offense of "aggravated murder." The penalty for murder in Ohio is an indefinite term of imprisonment for fifteen years to life. Ohio Rev. Code § 2903.02.

In the Commonwealth of Pennsylvania, common law felony murder was codified as "Murder of the Second Degree." The statute provides that "[c]riminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony." 18 Pa.C.S.A. § 2502(b). "Perpetration of a felony" is defined as "The act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual

intercourse by force or threat of force, arson, burglary or kidnaping.” 18 Pa.C.S.A. § 2502(d)

In Maryland, felony murder constitutes murder in the first degree. A person who commits a murder in the first degree is guilty of a felony and on conviction shall be sentenced to imprisonment for life without the possibility of parole or imprisonment for life. Md. Criminal Law Code Ann. § 2-201 (2014).

Virginia has a felony murder statutory provision similar to West Virginia’s: “Murder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate or animate object sexual penetration, robbery, burglary or abduction, except as provided in § 18.2-31, is murder of the first degree, punishable as a Class 2 felony. Virginia Code § 18-2-32. The penalty for Class 2 felonies in Virginia is imprisonment for life or for any term not less than 20 years. Virginia Code § 18-2-10.

That covers each of the surrounding border states to West Virginia plus Hawaii, which has abolished the felony murder rule. What is interesting is that had this crime occurred in Kentucky there would have been no murder charge against Petitioner because felony murder has been completely abolished. In Ohio, the maximum sentence would be an indefinite term of imprisonment for fifteen years to life. This is a State that has much harsher sentences available including life without parole and the death penalty. In Virginia the sentence would be from 20 years up to life. In Maryland life, with or without parole, and in Pennsylvania, where the crime is murder in the second degree but results in a life sentence.

However, even in Virginia and Maryland, under the facts of this case, the Petitioner is not going to receive the sentence that was handed out in this case.

d. Comparison With Other Offenses Within the Same Jurisdiction.

State v Stitley, No. 14-0265 (W. Va. Supreme Court, November 3, 2014) (Memorandum

Opinion) The defendant received mercy (possibility of parole) on his felony murder plea conviction. The Court noted that “the petitioner instigated and planned the crimes; the victims were his mother and stepfather; petitioner recruited the co-defendant for the crimes because the co-defendant was large and imposing; petitioner drove the co-defendant to the Clems’s home; petitioner struck his stepfather in the head with a baseball bat and stabbed him in the groin with a knife; petitioner urged the co-defendant to “help him” with the attack; petitioner either participated in, or failed to stop, the murder of his own mother; petitioner stole money and credit cards from the victims and withdrew money from his mother’s bank account using her bank card; and, petitioner thereafter returned to the home and consumed alcohol and drugs while his mother lay dead in her bedroom and his stepfather was trapped in the bathroom bleeding from the knife wound.” The co-defendant also received mercy. It should be noted that the two defendants also received consecutive robbery convictions of sixty and fifty years respectively. Nonetheless both will be eligible for parole at some point unlike the Petitioner herein.

State v Wisotzkey, No. 13-1240 (W.Va. Supreme Court, November 21, 2014) (Memorandum Opinion). Life with Mercy. See **State v. Stitley** above. Mr. Wisotzkey was the co-defendant in that case.

State v. Sims 238 S.E. 2d 834 (W.Va. 1978) Felony Murder conviction sentenced to Life with Mercy. The operative facts are these: Around 2:00 a. m. on January 16, 1976, the defendant Paul Sims, Clay Grimmer and Arthur Burns went to the home of Mr. and Mrs. Oscar Schmidt. After cutting the telephone wires on the outside of the house, Sims and Burns proceeded onto the front porch of the home. Both men were armed. Sims carried a 20-gauge sawed-off shotgun and Burns had a pistol. While Sims remained on the porch adjacent to the windows, his companion Burns broke the windows and stepped through them into the bedroom. Sims pointed his shotgun and a flashlight into the bedroom. Oscar Schmidt was able to seize his pistol and fire it at Sims. The bullet struck

Sims' right arm, and he claimed this caused an involuntary muscle spasm in his trigger finger which resulted in the discharge of the shotgun, killing Walter Schmidt. The State did not agree with the involuntary reflex theory cross-examined the doctor, who conceded that the same type of wound might instead have caused the defendant to drop the gun. Sims received mercy even though he actually killed the victim.

State v Kent, 678 S.E. 2d 26 (W.Va. 1978) On July 26, 1998, an officer of the Fairmont Police Department discovered the body of Thomas Allen in a van along the side of a dead-end road. Mr. Allen had sustained two fatal gunshots to the head. Mr. Gary Wayne Kent, was arrested in connection with the murder. Upon a retrial, the jury returned a verdict finding Mr. Kent guilty of murder of the first degree, felony murder, and recommended mercy.

State v Welch, 734 S.E.2d 194 (W.Va. 2012). No Mercy. During the search of Mr. Welch's residence, the police found the dead body of Ms. Smith concealed in Mr. Welch's bedroom. The police also discovered an index card that was signed with Mr. Welch's first name. The card stated: "To whom it May Concern: This was not intentional, but then nothing ever is. I'm going to find a rock to crawl under and die. I have nothing to look forward to but death now." The police additionally discovered a computer that eventually revealed video images of Mr. Welch sexually assaulting Ms. Smith. The police ultimately were able to locate Mr. Welch in Virginia. Mr. Welch was extradited back to West Virginia in September 2008. Mr. Welch was sentenced to life imprisonment without parole for first degree (felony) murder; ten to twenty-five years imprisonment on each of nine counts of sexual assault in the second degree and one to five years imprisonment on each of three counts of sexual abuse in the first degree

State v Hottle, 476 S.E.2d 200, (W.Va. 1996). No Mercy. On August 5, 1993, Mr. Hottle escaped from a Work Release Center. On August 21, 1993, he stole a truck in which a .22 caliber Ruger semi-automatic pistol had been left. Mr. Hottle walked to the residence of Leon Miller and Donna Ours, their bodies were found and both had been shot three times. Mr. Hottle and his cousin,

were seen at a 7-Eleven store in Keyser, Mineral County, West Virginia. The 7-Eleven clerk was found dead shortly thereafter. She had been shot once in the head. Subsequent ballistics testing confirmed that the .22 caliber Ruger pistol was the murder weapon in all three deaths. On August 27, 1993 police converged on Mr. Hottle at a local automobile dealership. Mr. Hottle, using an employee as a shield, attempted to escape by forcing the employee to drive away from the dealership. During this attempt, Mr. Hottle was shot and the employee/hostage was injured. When Mr. Hottle was captured, he still had the .22 caliber Ruger pistol in his possession. Mr. Hottle received three life terms for two felony murder and one kidnapping convictions, two terms of not less than one nor more than five years for the two attempted murder convictions, a ten-year minimum term for the attempted aggravated robbery and three terms of not less than one nor more than ten years for three grand larceny convictions. Mr. Hottle's sentences were to run consecutively with any other sentences and with no recommendation of mercy. While the multiple consecutive sentences sound like a much greater sentence than the Petitioner herein, the net result is they will both spend one life in prison.

State v Tara Williams, No. 25815 (W.Va. Supreme Court, June 15, 1999) (Per Curiam) (Codefendants **Mark Yoney** and **Wally Swafford**). Tara Williams went to Joseph Hundley's house with three of her friends, Jenny Dawn Suttle, Margaret Talouzi, and H. During the visit, Hundley offered to pay the girls one hundred dollars each if they would come back the next evening and "strip dance" for him. The girls then planned to go to Hundley's house that evening and trick him out of his money by telling him that they would dance for him. Later Appellant Wilson saw her friend, Mark Yoney who was with Wally Swafford. The girls told these men of their plan to trick Hundley out of his money and they decided to accompany the girls to Hundley's house. The group came up with a plan to take Hundley's money by force if the girls were unable to trick him. Upon arrival the men stayed in the car. Inside the house, the girls asked Hundley if he had the money. He said "yes" and showed them a wad of bills. He told them that he still wanted them to dance and that he had

bought some beer for them. Yoney and Swafford rushed in with a gun and demanded the money. A struggle commenced between the three men and Swafford fired the gun. In the meantime, Yoney instructed the appellant to disconnect the phone and grab the case of beer. The three girls then ran toward the car. The appellant looked back and saw Hundley running out of the house with Swafford behind him. Swafford fired a second shot at Hundley and Yoney attacked him. The men then quickly got in the car leaving Hundley laying in the yard. The five sped away and later discarded Yoney's bloodstained sweatshirt over a hill. The next day they learned that Hundley had died of the gunshot wounds.

The Appellant charged with murder accepted a plea to attempted aggravated robbery in exchange for her cooperation and testimony against Yoney and Swafford. She was sentenced to fifty years. Yoney and Swafford were separately convicted of murder. Yoney was sentenced to Life with Mercy and Swafford was sentenced to Life without Mercy.

There is a significant disparity in this jurisdiction between the Life without Mercy sentence of Petitioner and those defendants that are being sentenced to Life with the possibility of parole for much more egregious criminal activity where they, unlike Petitioner, were directly responsible for the killing which constituted the felony murder. When that is considered with the current sentencing framework of the states surrounding West Virginia, the Petitioner's Life without Mercy sentence constitutes a violation of the proportionality principle found in Article III, Section 5 of the West Virginia Constitution.

B. The Circuit Court Abused Its Discretion By Ignoring Without Explanation The State's Recommendation Of Mercy

Petitioner's final assignment of error is also relevant to the proportionality review above and should be considered by the Court in that analysis. The Court in sentencing the Petitioner to the ultimate penalty, life imprisonment without the possibility of parole, failed to give any justifiable

basis for that decision. The only issue the Court cited was the Petitioner's failure to get treatment for his drug problem. App. 97. Addiction to drugs is hardly a basis for sentencing an individual to spend his natural life in prison.

The record in this matter established that the Petitioner is guilty of felony murder under the law. However, the undisputed record in this matter establishes that the Petitioner did not inflict any injuries upon or cause the death of the victim, Nancy Lynch, those were the actions of Jessica Wilson, who has admitted to stabbing the victim. App. 270. The State acknowledged that the Petitioner's description is accurate and truthful, making no corrections to any of these critical facts at the plea hearing. App. 35, 60-73. The Presentence Investigation Report designates Petitioner interview with the Saint Albans Police as the "Official Version Of The Offense." App. 102. The State also acknowledged and advised the Court as to the significant and helpful cooperation and assistance provided the Petitioner in this and other cases, as contained in the sealed sentencing hearing transcripts. App. 87-94. Finally, based upon the level of Petitioner's involvement and the extent of his assistance and cooperation, the State recommended Mercy on the Felony Murder charge. App. 26. Petitioner joined in the State's recommendation for mercy. App. 83-84.

As noted above, the only justification the Court gave for sentencing the Petitioner to life without the possibility of parole was that he did not get drug treatment and help while he was in the penitentiary. However, the record refutes this. In fact, at the sentencing hearing the Petitioner advised the Court that after Day Report he was doing good and off of drugs, and while he was in the penitentiary he participated in the drug courses offered. App. 85-86.

Petitioner notes that the Court did mention the fact that Petitioner returned to the house after the crime. However, this would not justify life without parole either, particularly since the Court sentenced Petitioner to consecutive sentences totaling 6 to 75 years for the crimes that were related to returning to the house. App. 3. The only other issue addressed by the Court was that this was a

cold and horrible act and that the Petitioner participated in this woman's death. App. 97. While the Petitioner acknowledges that a cold and horrible act occurred resulting in the death of the victim, the record clearly establishes that Petitioner did not participate in the actual killing of Nancy Lynch.

This Court has previously held that disparate sentences for codefendants are not per se unconstitutional. Courts consider many factors such as each codefendant's respective involvement in the criminal transaction (including who was the prime mover), prior records, rehabilitative potential (including post-arrest conduct, age and maturity), and lack of remorse. If codefendants are similarly situated, some courts will reverse on disparity of sentence alone. Syl. Pt. 2, State v. Buck, 173 W.Va. 243, 314 S.E.2d 406 (1984).

While the factors above relate to reviewing the proportionality of a sentence between codefendant's, those factors are still relevant to the review of Petitioner's sentence herein. With regard to the respective involvement in the criminal transaction, the record is clear that the prime mover was Jessica Wilson, in fact she was the sole mover regarding the killing of the victim; Petitioner's prior record has been discussed above. At the time Petitioner was sentenced he had a single felony conviction for Attempt To Commit Daytime Burglary and had never been charged with a crime of violence until the instant offense. App. 103-105; Petitioner's rehabilitative potential is great. Petitioner was 29 years old when he was sentenced. App.100. While the Petitioner dropped out of school in the eighth grade, and in spite of being diagnosed with ADD in 2012, he was able to obtain his GED and one college credit while incarcerated at Huttonsville Correctional Center. App. 105. As noted above, Petitioner advised the Court that after Day Report he was doing good and off of drugs, and while he was in the penitentiary he participated in the drug courses offered. App. 85-86. Unfortunately, he relapsed but that is not unusual for drug addicts. Petitioner has an opportunity to become drug free before he would ever be paroled were he to get mercy. Regarding his post arrest conduct, Petitioner has been fully cooperative with the State in this case, providing substantial

assistance regarding this case and others. App. 87-94. Finally, as addressed above, the Petitioner has exhibited significant remorse. In fact he offered apologies to the victim's family at his plea and at sentencing. App. 77-78, 84-85.

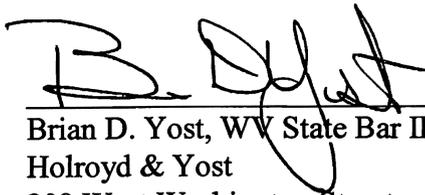
CONCLUSION

Based upon the foregoing, it is clear that Petitioner's sentence of life imprisonment without the possibility of parole violates the proportionality provision found in article III, section 5 of the West Virginia Constitution. Furthermore, the Circuit Court abused its discretion by ignoring without explanation or just cause the State's recommendation of mercy.

The Circuit Court's Order sentencing Petitioner should be vacated and this matter should be remanded for further proceedings.

Respectfully Submitted,

**Timothy Paul Shafer, Petitioner
by Counsel**



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 15-0115

STATE OF WEST VIRGINIA,

Plaintiff Below,
Respondent,

vs)

No. 15-0115 (Kanawha County 14-F-227)

TIMOTHY PAUL SHAFER,

Defendant Below,
Petitioner.

CERTIFICATE OF SERVICE

The undersigned Counsel for the Petitioner hereby certifies that I have, on this day, served a copy of the foregoing PETITIONER'S BRIEF, via regular U.S. Mail, postage prepaid, to the following:

Laura Young, Esq.
Deputy Attorney General
West Virginia Attorney General's Office
812 Quarrier Street, 6th Floor
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Date: June 2, 2015



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