

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0115

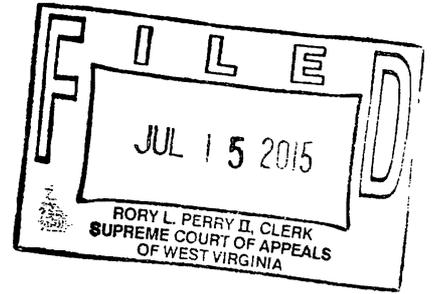
STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent*

v.

TIMOTHY PAUL SHAFER,

*Defendant Below,
Petitioner*



SUMMARY RESPONSE

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vs.

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Defendant Below, Petitioner

SUMMARY RESPONSE

The petitioner, by virtue of his participation in a cold and calculating act of robbery, committed a crime which resulted in the death of an innocent victim. As a result of his crime, he will spend the rest of his life in prison. That sentencing decision—to withhold mercy—is not unconstitutionally disproportionate to the offense and the offender. This was not a binding plea, and the court was neither bound to grant mercy nor to abide by the state’s recommendation. Nor was the court bound to explain why it did not abide by the recommendation. The court based its sentence upon the brutal and senseless nature of the crime and the petitioner’s past behavior. The sentence should be affirmed.

I.

STATEMENT OF THE CASE

The victim was found dead in her home, in a state of decomposition. She had been dead just over three weeks when found on January 26, 2014. (App. 239). Her cars had been stolen, and the petitioner had actually been ticketed for speeding in one of those cars around the middle of January. (*Id.* 240). The victim died from being stabbed nineteen times. (*Id.* 241). Ms. Lynch

was 66 years old and lived alone, save for her dog, which was also found, dead, at the home. (*Id.* 242). During the investigation, it was discovered that checks had been written from Ms. Lynch's bank account to the petitioner for "work on trees" which was patently untrue based on the time of year and the fact that Ms. Lynch had but one tree in her yard, which had not been worked upon. (*Id.* 243). Mr. Shafer was of interest to the police in their investigation because he had previously been investigated for burglary. (*Id.*) During the month of January, the petitioner's girlfriend pawned numerous items of jewelry. (*Id.* 244). One of the items pawned by the girlfriend was a diamond bracelet belonging to the victim. (*Id.* 245).

The petitioner was brought in for questioning and immediately denied responsibility. He then stated he went inside the house and was "present" when the murder was committed. (*Id.* 246). After initially lying about the car, he admitted that he had taken the vehicle. (*Id.*)

The petitioner went to the victim's house on January 3 (23 days before her body was found). (*Id.* 247). On or about that same day, the petitioner attempted to withdraw funds using the victim's ATM card. (*Id.*) The petitioner, and at least one of his co-defendants, waited for the victim to come home and confronted her. The petitioner had a "fake" gun to scare the victim. The petitioner and his co-defendants plotted the robbery. The victim had told Shafer that she had been previously robbed but did not report the robbery. (*Id.* 248).

The petitioner told the victim they were robbing her, and made her go into the house. The victim died of stab wounds, the petitioner denied stabbing her. (*Id.* 250). Inside the house, the petitioner and his co-defendant demanded money, pills, the ATM card and pin number. (*Id.* 251). The two murderers stole items taken including pistols, \$16 cash, a camera, bank card, jewelry and prescription medication. (*Id.* 252-253).

A statement was taken from Jessica Wilson, a co-defendant, who more or less corroborated Shafer's story with the major exception that she stated the petitioner stabbed and killed the victim. (*Id.* 254). Wilson later changed her story to admit that she stabbed the victim, but alleged that the petitioner had also stabbed her. (*Id.* 270).

After the victim was killed, the petitioner and Wilson left the victim and walked to the co-defendant's house. (*Id.* 255). They later returned to the house and removed more property. (*Id.*) The murder weapon was never recovered; Wilson and Shafer each stated the other had gotten rid of the knife. (*Id.* 256). On his second trip back to the house, where the victim lay dead, the petitioner took her car keys and her car. (*Id.* 257). The petitioner returned to the house a third time, accompanied by his girlfriend and stole jewelry, medication, a checkbook, a television, and the victim's other car. (*Id.* 257-258). A series of checks were written to Shafer. (*Id.* 271).

As noted above, Shafer denied stabbing the victim, Wilson says he participated in the stabbing. However, according to his own statement, when Wilson stabbed the victim, he did nothing to help Nancy. (*Id.* 272). Shafer was acquainted with the victim; he was the one she confided in that she'd been robbed and not reported it. (*Id.* 273).

The murder occurred on the night of January 3, or the early morning hours of January 4, and she was not found until January 26. During that time, a neighbor was concerned because her mail had piled up. Later, the mail disappeared, and was found where the petitioner had been staying. (*Id.* 276).

The petitioner and his co-defendants were indicted for numerous felonies. The petitioner was charged with conspiracy to commit robbery, nighttime burglary (with and without breaking

in alternative counts), grand larceny, murder, first degree robbery, and additional burglary counts for returning to the home to steal additional items. (*Id.* 11-17).

A plea agreement was reached in which the petitioner agreed to plead guilty to conspiracy, nighttime burglary (two counts), felony murder, grand larceny (two counts), and daytime burglary. The State agreed to recommend mercy on the felony murder charge, and to stand silent on whether the sentence on the other counts should run concurrently or consecutively. (*Id.* 25-27). Notably absent from the plea letter is any language that would convert this plea agreement to a binding plea.

The petitioner's statement in support of his guilty plea indicates his understanding that the court was not bound by any agreement or recommendation pertaining to sentencing, that sentencing was strictly for the court to decide, and "that the court will not be obligated or required to give any effect whatever to such recommendation. . ." (*Id.* 31). The petitioner is not challenging the voluntary nature of his plea. However, the lengthy plea colloquy (*id.* 35-79) reflects clearly that the plea in this matter was knowing, voluntary, and intelligent.

As part of the plea agreement, the state agreed to dismiss a separate felony indictment in which the petitioner was charged with stealing a car, an offense distinct from the murder. (*Id.* 39). The court asked the petitioner: "Do you understand that I did not participate in the plea negotiations between you and the State of West Virginia and that no one can guarantee you any certain sentence?" (*Id.* 41). The petitioner understood. (*Id.* 42). As to the potential penalty for felony murder, the court informed the petitioner that the sentence was confinement for the rest of his life, with or without the possibility of parole, "and that would be in my discretion;". (*Id.*)

The petitioner was again told that the court did not participate in the plea negotiations, and that no one could guarantee a certain sentence. Further, "And that while the prosecution is

recommending mercy on the murder charge as contained in count four, that is not binding on the Court?”. The petitioner signified his understanding. (*Id.* 43). The petitioner had no questions about the plea, and none about the consequences of his plea, including the penalties. (*Id.* 57).

As to the factual basis for the plea, the petitioner admitted that he and his co-defendants, Wilson and Hughes, planned to rob the victim because “we was running out of drugs and money.” (*Id.* 61). The petitioner and Wilson walked over to the victim’s home. She was not at home, so they waited for her. When they approached Nancy, the victim was friendly, talking about her dog (which died as a result of these crimes.) (*Id.* 63). The petitioner showed the victim his allegedly fake gun, and they went into the house. (*Id.* 63-64). The victim was terrified. The petitioner blamed the stabbing on Wilson. (*Id.* 67). The dog was barking as the two left the victim’s house. (*Id.* 69). The petitioner admitted to returning to the house twice, for the purpose of stealing more property. (*Id.* 71-72).

A pre-sentence report was prepared. Before the murder in January, 2014, the petitioner had been charged with grand larceny (two counts), transferring or receiving stolen property and conspiracy. (*Id.*101). Those offenses were the subject of 14-F-290, which was dismissed pursuant to the plea. (*Id.*) In her statement about the circumstances of the offense, Hughes stated “When Tim and Jessica killed Nancy, they had already robbed her house. . .” (*Id.* 102). The petitioner had a previous criminal history including: driving on a revoked license, no proof of insurance and improper registration which are minor traffic offenses compounded by his failure to appear and the issuance of a *capias*. (*Id.* 103-104). The petitioner had other traffic offenses for which he failed to appear. (*Id.* 104). The petitioner had apparently pled guilty to the felony offense of attempting to commit a daytime burglary, for which he received a probated sentence. He violated probation, and was sentenced to prison. The petitioner received a reduction in

sentence, and was placed back on probation, and violated probation again. He then went to prison to serve an active sentence. (*Id.* 104).

The petitioner was not employed at the time of the murder, admitting that he was supporting himself by stealing and illegal drug activity. (*Id.* 106). The petitioner had a significant history of drug abuse including the use/abuse of marijuana, cocaine, Adderall, RoxyCodone, OxyCodone, and Opana. Other substances abused included methamphetamine and heroin. (*Id.* 109). Although the petitioner accepted “some” responsibility for the offense, he blamed his current situation on his girlfriend and heroin. The probation officer noted that the petitioner had little regard for human life. “This Officer is appalled at how little respect for human life the defendant has in order to gain money to fuel his drug addiction.” (*Id.* 110). The report noted the petitioner was not a stranger to the criminal justice system, and had the opportunity to engage in two substance abuse programs, and did not. (*Id.*) The petitioner had a very high LS/CMI score, with a higher likelihood of recidivating. (*Id.* 111).

The petitioner gave more than one statement to the police, including one (apparently) in which he disclaimed any responsibility for Nancy’s death. He decided to talk more freely after he was informed that his girlfriend was talking about the crime. (*Id.* 153). According to the petitioner’s police statement, his girlfriend was talking about killing the victim and robbing her. (*Id.* 158). In that statement, he blames Wilson for the stabbing. (*Id.* 161). The petitioner admitted going back to the crime scene and getting guns and one of the cars. (*Id.* 167). He also admitted returning to the house some days later and stealing pills and jewelry. (*Id.* 170). He also returned and got the other car. He accompanied Hughes, who went into the house to try to find the title for that car. (*Id.* 173). Apparently the petitioner and his co-defendants did not actively kill the dog, but let it, “a little beagle or something” starve to death. The dog was alive on the trips back to the

house. (*Id.* 193-194). Despite his statements that he didn't expect a death, the petitioner admitted more than once that his girlfriend specifically said why don't you go over there and kill and rob her, and that he did not wear a mask to cover his face nor gloves. (*Id.* 195-196). He also admitted going to back to retrieve the piled up mail after being informed that a police officer was at the victim's house. (*Id.* 198).

The presentence report indicated that the petitioner had a previous felony conviction arising from a burglary in which he and a co-defendant broke into a house and stole \$12,500.00 worth of property. (*Id.* 230). He blamed his actions on stupidity and said he would never do anything like that again. (*Id.*).

The petitioner, at disposition, blamed the crime on his drug habit; the sentencing court was quick to point out that the petitioner had the opportunity to address that habit when he was before the court in 2010. (*Id.* 85). The petitioner flunked day report twice on the previous conviction, and had every opportunity to address his drug problem, and simply refused to participate. (*Id.*) The court questioned the petitioner about his behavior in returning to the victim's house time and again, for which the petitioner acknowledged there was no excuse. (*Id.* 86). Obviously, the court at disposition had access to the pre-sentence report. (See, among others, *Id.* at 82).

The court did not recommend mercy, noting that not only was the murder a "very cold and horrible act that you committed, you compounded it by going back time after time." (*Id.* 97). The petitioner had ignored all other opportunities to get help when he was in the penitentiary on his previous felony offense and had the opportunity for drug treatment. "You needlessly, senselessly caused and participated in the death of this poor victim and caused this grief to this

family. You set a great deal of unrest in this community because of the horrifying facts of this case.” (*Id.* 97).

II. ARGUMENT

The petitioner asserts generally that his sentence of life imprisonment without the possibility of parole is disproportionate both subjectively and objectively. In looking at the subjective and objective tests, this court has said:

The first is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further. 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.

State v. Cooper, 172 W. Va. 266, 272, 304 S.E.2d 851, 857 (1983)

In the instant case, it cannot be said that the petitioner’s sentence is subjectively shocking to a court or to the conscience of society. The petitioner blames the stabbing on his co-defendant; she, at least in some measure, attributes some of the actual violence to the petitioner. However, it is unquestioned that the petitioner and his co-defendant planned to rob a 66 year old lady, whom they believed to be vulnerable because she had not reported robberies in the past. According to the petitioner himself, one of his co-defendants suggested murder during the planning stage. (App. 158). The petitioner armed with a “fake” gun to scare the victim (*id.* 248)

accompanied by his co-defendant armed with a very real knife walked to the victim's house and waited for her to come home. They approached, and she was friendly (*Id.* 60). Nancy was forced into her house. She was terrified. Wilson stabbed her, solo according to the petitioner; according to Wilson, she and the petitioner both stabbed the victim. (*Id.* 67, 270). According to his own statement, the petitioner did nothing to intervene and try to save Nancy. (*Id.* 272).

After participating in the initial burglary and robbery which led directly to the victim's death, the petitioner treated her house, with her decomposing body lying in it, as his personal shopping mall, returning to steal both of the victim's cars, additional money, pills and jewelry. He stole her mail in an effort to mislead police. He was not initially forthcoming with the police, denying any involvement in the crime. (*Id.* 246, 247, 252-253, 255, 257, 257-258, 276). During his trips back to the house, he couldn't even be bothered to feed the "little beagle" leaving it to, apparently, starve to death in the same home where her owner lay dead. (*Id.* 193-194).

The petitioner had a criminal history consisting of numerous minor traffic offenses compounded by failing to appear on those offenses. Additionally, and far more troubling, the petitioner had a felony conviction for which he had received probation, and had twice violated that probation. (*Id.* 104). He had a substantial drug habit, but had not availed himself of the opportunity to get treatment. (*Id.* 110). The probation officer was appalled at the petitioner's insensitivity to human life. (*Id.*)

A sentence of life in prison for participating in cold and calculated actions which led directly to Nancy's death, committed by a selfish, insensitive recidivist is not shocking to the conscience. Nor is it objectively disproportionate.

The legislature has determined that if a death occurs during the commission of an enumerated felony, all participants in the felonious events are equally culpable for the death. W.

Va. Code. §62-2-1. Felony murder is murder of the first degree, punishable by life in prison. The decision on whether to grant mercy is left to a jury, or the sentencing judge. In the facts and circumstances of this case, one cannot say that it was an abuse of discretion for the sentencing court to withhold mercy from a convicted felon who planned a robbery, returned to the home where the victim lay rotting time and again to steal more of her property, and who may, according to his co-defendant, actively participated in the murder.

Other states, as pointed out in petitioner's brief, also have the felony murder rule for which an individual can receive a life sentence with or without parole. Even in the state of Kentucky, which has abolished traditional felony-murder, the petitioner could be subjected to a murder conviction under K.R.S. 507.020, if an individual was killed by another during a course of conduct that indicated the defendant's behavior was wantonness manifesting extreme indifference to human life. His sentence could be life in prison. Further in Georgia, pursuant to Ga. Code Ann. 16-5-1, death in the commission of a felony results in a sentence of death, life imprisonment without parole or life imprisonment. Pursuant to NC §14-17, in North Carolina, felony murder is first degree murder which, if committed by one over the age of 18 results in a sentence of life without parole, or death. According to Tennessee Code 39-13-202, felony murder is first degree murder punishable by death, life without parole, or life.

Therefore, a comparison with other jurisdictions reveals that the sentencing scheme in West Virginia is substantially similar to, or even more lenient than other states. Comparing the petitioner's sentence with other sentences in West Virginia, some individuals who commit felony murder receive mercy, others do not. Because the court had the ability to grant mercy does not make the withholding of mercy constitutionally disproportionate. Based upon the horrific facts of the case, the fact that petitioner's co-defendant also implicated him in the physical acts of

violence, the fact that the petitioner planned the robbery, did not intervene to save the victim (if, indeed, he did not stab her), returned again and again to steal more property, was initially evasive with the police, and had a previous conviction for burglary and failing to comply with the rules and regulations of the court, the decision to withhold mercy was not constitutionally infirm.

The court did not have to justify its refusal to go along with the state's recommendation of mercy. This was not a binding plea under Rule 11 of the Rules of Criminal Procedure.

Rule 11 of the West Virginia Rules of Criminal Procedures addresses different kinds of pleas. In general, the parties may engage in discussions towards reaching an agreement that upon entry of the plea, the State will do any of these actions: move for the dismissal of other charges, make a recommendation for a particular sentence *with the understanding that such recommendation shall not be binding on the court*, agree a specific sentence is the appropriate disposition, or agree not to seek additional charges for other known offenses. (Emphasis added.)

The plea type referenced in Rule 11 (e)(1)(C) is commonly referred to as a binding plea. In that sort of plea, a circuit court has only three options: to accept the agreement, reject the agreement or defer decision. Should the court determine that the bargained for sentence is not appropriate, the petitioner shall be permitted to withdraw his plea, if he chooses. The plea type referenced in Rule 11(e)(1)(B), the type of plea here, involves an agreement for the prosecutor to make a recommendation, which the sentencing court is free to reject. (On the distinction between these types of pleas, please see among many other decisions, *State ex rel. Forbes v. Kaufman*, 185 W. Va. 72, 404 S.E.2d 763 (1991).)

The prosecutor and the defendant, most generally with the advice of counsel, negotiate a plea. If the necessity of a specific sentence is of critical importance to the defendant, it is incumbent upon him to negotiate a binding plea. That did not happen in this case.

The petitioner got exactly what he bargained for, dismissal of other charges and a recommendation of mercy for the murder. The judge, as he was free to do, and as the petitioner knew he was free to do, rejected that recommendation for reasons expounded in the dispositional hearing. The judge was mindful of the recommendation, but he was not bound to that sentence, and did not impose it.

The case of *State v. Robey*, 2014 WL 350911, No. 12-1418, Filed January 28, 2014, is remarkably similar to this case in that the facts involved a felony murder, although Robey did not receive a recommendation of parole eligibility while his co-defendants did. In *Robey*, this Honorable Court reiterated in Syllabus Point 1 that “‘The Supreme Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard unless the order violates statutory or constitutional commands.’ Syl. Pt. 1, in part *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997).” Syl. Pt. 1, *State v. James*, 227 W. Va. 407, 710 S.E.2d 98 (2011) and in Syllabus Point 2, “‘Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.’ Syllabus Point 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982).” Syl. Pt. 6, *State v. Slater*, 222 W. Va. 499, 665 S.E.2d 674 (2008).

Robey and his co-defendants entered a home, robbed a victim, and Robey beat the victim to death. (Although the petitioner in the instant case denies stabbing the victim, his co-defendant implicates him in the stabbing. The petitioner was morally and legally responsible for her death.) A plea agreement was reached in which the State joined with the petitioner in requesting a recommendation of mercy. The Supreme Court upheld the sentence imposed—that is a sentence of life without mercy, determining that the petitioner’s role in the murder clearly justified the

sentence. This Court also specifically rejected the argument that the circuit court failed to make appropriate findings to support the sentence imposed.

Further, this Honorable Court has noted that,

Typically a grant of discretion to a lower court commands this Court to extend substantial deference to such discretionary decisions. Although this Court may not necessarily have obtained the same result had we been presiding over a case determined by a lower court, our mere disagreement with such a ruling does not automatically lead to the conclusion that the lower court abused its discretion

State v. Allen, 208 W. Va. 144, 155, 539 S.E.2d 87, 98 (1999).

The decision to withhold mercy, the decision to deny parole eligibility was not an abuse of discretion. The petitioner got what he bargained for. The reasons for the court's decision are adequately supported in the Appendix. The petitioner voluntarily conspired with others to commit robbery, and by his own statement was aware that murder was a possibility before he and Wilson ever went to the home. Rather than giving up when the victim wasn't home, he waited for her—and he knew the victim at least as an acquaintance. He knew, by his own statement, that Wilson had a knife. The victim was terrified. He says Wilson stabbed her to death; Wilson apparently states that the petitioner also stabbed the victim. At any rate, he did nothing to save her, and it is reasonable to infer that he knew the victim would be killed because he did not wear a mask nor gloves. Nancy died no later than January 4. For the next 22 days the petitioner returned to her home, time and again, as she lay, stripped of all dignity dead in her own home. He took her personal belongings, the life of her beloved dog, and her own life. He blamed drugs for his crimes, rather than truly accepting responsibility. The petitioner previously had been given a chance at rehabilitation, after his first felony conviction, and snubbed those opportunities by violating probation not once, but twice.

The recommendation of the state that the petitioner receive mercy was appropriately refused. Based upon the circumstances of the offense and the offender, this petitioner deserves to spend the rest of his life in prison.

III.

CONCLUSION

Based upon the foregoing recitations of fact and arguments of law, the respondent respectfully requests that the sentencing order of the Circuit Court of Kanawha County, imposing a term of life in prison, without the possibility of parole, upon the petitioner's plea of guilty to felony-murder be affirmed, and that the petitioner not be afforded a new sentencing hearing.

Respectfully submitted,

STATE OF WEST VIRGINIA
Plaintiff Below, Respondent

By counsel

PATRICK MORRISEY
ATTORNEY GENERAL

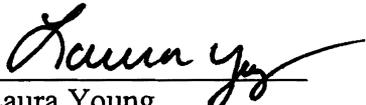


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CERTIFICATE OF SERVICE

I, LAURA YOUNG, Deputy Attorney General and counsel for the respondent, do hereby verify that I have served a true copy of the *SUMMARY RESPONSE* upon counsel for the petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 15th day of July, 2015, addressed as follows:

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