

**FILED**

**June 12, 2007**

released at 3:00 p.m.

RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

Starcher, J., concurring:

I join the majority opinion and write separately to address several points.

First, to characterize an opinion written by a Justice of this Court as giving a “gift” to a criminal defendant, as the dissent does, is mistaken. No responsible jurist will reverse a jury verdict unless there is a bona fide belief that serious legal unfairness has occurred. And a fair trial is not a “gift” – it is the *right* of every defendant.

Second, the simple facts and legal reasoning underlying the result reached by the majority opinion in the instant case were clearly discerned by the United State Supreme Court when it sent the case back to this Court. A police officer obtained a document that called into question the veracity of one or more major prosecution witnesses; the document would likely have been a powerful cross-examination tool for the defendant; and the document should have been disclosed by the State to the defendant. Because the document was not disclosed, a new trial is required. It is that simple.

Third, I want to briefly address the issue of the circuit court’s requirement that the defendant wear a “stun belt” during his trial. Stun belts are fearful and exceptionally coercive devices that should be used only in the most extraordinary situations. I believe that the leading cases on the use of stun belts on defendants during a trial are still *U.S. v. Durham*, 287 P.3d 1297 (2002) and *People v. Mar*, 52 P.2d 95 (Cal. 2002). I also believe

that this Court should follow the reasoning of these cases. It would behoove circuit courts, prosecutors, and defense counsel to cleave to these cases' teachings if the issue of possible stun belt use arises. I would also apply a strict standard and would presume both harm and reversible error from the use of a stun belt – if a circuit court does not follow thorough pre-use procedures, to determine a stun belt's necessity and propriety *vel non*.

Accordingly, I concur.