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IN THE CIRCUIT COURT OF GREENBRIER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

VS.

CASE NO. 96-F-42

BILLY RAY MCLAUGHLIN,

DEFENDANT.

**ORDER CERTIFYING QUESTIONS PURSUANT TO CHAPTER 58
ARTICLE 5 SECTION 2 OF THE WEST VIRGINIA CODE**

On this the ~~15~~ day of December, 2008 came the Court to rule on an earlier request to certify questions to the Supreme Court of Appeals for the State of West Virginia. On the 16th day of October, 2008, appeared the defendant, Billy McLaughlin, in person and by counsel, Joseph A. Noggy, and Marcia Hebb and the State of West Virginia by R. Kevin Hanson, Greenbrier County Prosecuting Attorney pursuant to notice setting this matter for a hearing on pretrial issues in this case, including the Defendant's "Request For Certified Questions". The Court, after entertaining presentations of the parties, rules that it is appropriate to certify the following questions to the West Virginia Supreme Court of Appeals pursuant to Rule 13 of the West Virginia Rules of Appellate Procedure and Chapter 58 Article 5 Section 2 of the West Virginia Code:

QUESTION 1

Whether or not Chapter 62 Article 3 section 15 of the West Virginia Code unconstitutionally shifts the burden of persuasion on the issue of mercy to the defendant in the penalty phase of a case? Specifically, the language of the statute indicates; "if a person indicted for murder pleads guilty to murder of the first degree, he or she shall be punished by imprisonment in the penitentiary for life, and he or she, notwithstanding the provisions of Article Twelve, Chapter Sixty Two of this code, shall not be eligible for parole: Provided, That the jury may, in their discretion, recommend mercy, and if such recommendation is added to their verdict, such person shall be eligible

for parole in accordance with the provisions of said Article Twelve.

(W.Va. Code 62-3-15).”

THE COURT’S ANSWER TO QUESTION 1 is yes, if the language of the statute permits the burden of proving mercy to shift to the Defendant or permits less than a unanimous verdict of the jury on the issue of mercy.

DISCUSSION

The Court finds that insofar as the language of Chapter 62 Article 3 Section 15 of the West Virginia Code may permit a decision of less than a unanimous verdict by a jury finding beyond a reasonable doubt that a defendant is not entitled to a recommendation of mercy, such would be unconstitutional. The Court finds the application of the statute must be made in light of the decision made by our State Supreme Court. Specifically Our Supreme Court indicates in State v. Rygh, 206 W.Va. 295, 524 S.E.2d 447 (1999), that conceptually there isn’t any separate or distinctive burden of proof, or burden of production associated with the jury’s mercy/no mercy determination, in a bifurcated mercy phase of a murder trial. If we followed that language is, then the statute would have to be interpreted to provide that the State has the burden of proof, and that burden is beyond a reasonable doubt, and it has to be a unanimous verdict. This position is further reinforced by the ruling in State v. Stamm, 222 W.Va. 276, 664 S.E.2d 161 (2008), where the Court ruled that although a defendant can be required to prove an affirmative defense, this does not change the burden of the State to prove certain things and to do so beyond a reasonable doubt.

In State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1996), our Supreme Court indicated the (mercy) statute was unconstitutional, and they did so because they said insofar as the statute - and they quote it - shifts to a defendant, the burden of disproving a material element of the State’s case, in violation of the due process clauses found in Article 3, Section 10, of the Constitution of West Virginia, and the 14th Amendment of the United States Constitution, that individual provision, severed from the remainder of the statute, is unconstitutional and unenforceable. Justice Davis in that case goes on to summarize due process, stating the due process requirement places on the

defendant no burden of proving mitigation, excuse, or justification in a First Degree Murder Case.

This Court feels the Supreme Court needs to provide some clarity with regards to this question. Justice Workman in her dissent in Schofield v. Department of Corrections, 185 W.Va. 199, 406 S.E.2nd 425 (1991), states, "The determination of whether a defendant should receive mercy is so crucially important that justice for both the State and the defendant would be best served by a full presentation of all relevant circumstances without regard to strategy during trial on the merits." This impresses upon this Court just how important this question is..

It is this Court's opinion, based on the cases set forth hereinbefore, the language of Chapter 62 Article 3 Section 15 of the West Virginia Code, as the same may permit any burden shifting to the defendant or a less than unanimous verdict of a jury, the same is unconstitutional.

QUESTION 2

Is it required that the jury, which determined guilt, be the same jury that determines the issue of mercy in a first degree murder case given the language of W.Va. Code 62-3-15 that provides : "if the jury find in their verdict that ... [the accused] is guilty of murder in the first degree... the jury may, in their discretion, recommend mercy, and if such recommendation is added to their verdict, such a person shall be eligible for parole[.]"? (Emphasis added).

THE COURT'S ANSWER TO QUESTION 2 is no.

DISCUSSION

This Court realizes this issue has not been ruled on specifically in a syllabus point, but our State Supreme Court has ruled the same jury on the issue of guilt does not have to be the same jury determining mercy. Specifically, this issue has been ruled on in State v. Doman, 204 W.Va. 289, 512 S.E2d 211(1998), and State v. Finley 219 W.Va. 747, 639 S.E2d 839 (2006), where it was ruled that a separate trial on the issue of mercy alone would be appropriate. Further, more recently in

State ex. rel. Shelton v. Painter 221 W.Va. 578, 655 S.E. 2d 794, (2007), the Court remanded a First Degree Murder case, solely on the issue of mercy.

This Court agrees with those cases cited previously and therefore finds it is not necessary for the same jury that determines guilt of a defendant to also rule on the issue of mercy.

QUESTION 3

Is the prosecution limited in the mercy stage of a bifurcated trial to the presentation of evidence introduced in the guilt stage of trial and rebuttal of evidence presented by the defendant?

THE COURT'S ANSWER TO QUESTION 3

This Court finds that the answer to this question depends in part on the determination on how the first two questions are answered. With respect to Question 3, it is this Court's position that since the burden is on the State, (based on the answer to Question 1), the State would be required to present its case first.

APPLICATION OF W.Va. CODE 58-5-2

With respect to how Chapter 58 Article 5 Section 2 applies to these certified questions the Court notes the code provision does not provide an exclusive list of the areas for certified questions. The questions certified by this Court pertain to the constitutionality of Chapter 62 Article 3 Section 15 of the West Virginia Code as well as the application and process the Courts must follow to properly effectuate a trial on the issue of mercy. These certified questions may apply to the Court's jurisdiction over the person and subject matter in this case, since no Court has the jurisdiction to apply an unconstitutional law nor to apply a law unconstitutionally against an individual. Practically speaking, resolution of these questions would bring about uniformity in applying Chapter 62 Article 3 Section 15 of the West Virginia Code. Not just this Court but every Circuit Court in this State is unsure of the application of the procedures in a trial on the issue of mercy. It is with the

hope that the Supreme Court of this State provide guidance to the trial courts that this particular Court prays for their acceptance and ruling with regard to these certified questions.

It is this courts belief that the Supreme Courts action in resolving these issues is necessary to the ultimate decision of the case at hand. Although the issue of constitutionality is not commonly raised by certified question, our Supreme Court, as early as 1947 in State v. Harrison, 130 W.Va. 246, 43 S.E 2d 214, (1947), has ruled when the language of a statute is vague that statute may be determined to be unconstitutional through a certified question proceeding. The contrasting language between the statute and clear principles of law established through cases and the State and Federal Constitutions results in a criminal defendant charged in one county of this state facing an entirely different process and burden than in another county. That uneven application of law which can results in cases where a defendant may be incarcerated for life is clearly unconstitutional and a violation of due process and the equal protection clauses to the West Virginia and federal constitutions. The answer to these questions will not only ensure due process and equitable treatment for all defendants but it would assist judges with clear rules and procedures in such matters. For all the above these questions are submitted to be finally ruled upon and resolved by the Supreme Court of Appeals for West Virginia.

ORDER

ENTER this the 18th day of December, 2008.

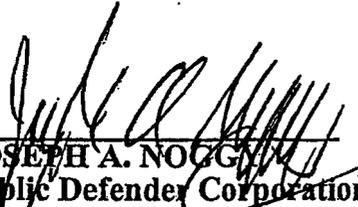


JUDGE FRANK E. JOLLIFFE
Senior Status Judge 11th Judicial Circuit

CIRCUIT COURT GREENBRIER CO., W.VA.

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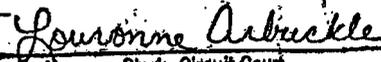


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Clerk, Circuit Court
Greenbrier County, WV

By _____ Deputy