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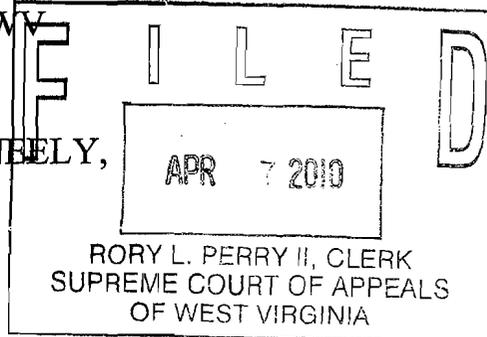
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON, WV

STATE OF WEST VIRGINIA ex rel. GAMES-NEELY,
PETITIONER

V.

HON. GRAY SILVER, III AND JAMES L. BLACKFORD
RESPONDENTS



RESPONDENT BLACKFORD'S OPPOSITION
TO PETITION FOR WRIT OF PROHIBITION

Comes now the Respondent, James I. Blackford, by Counsel, John P. Adams, Public Defender Corp., and respectfully requests this Court deny the Petition for Writ of Prohibition filed by the State.

1. THE RULING OF THE CIRCUIT COURT WAS CORRECT.

The Circuit Court properly dismissed Count 1 of the Indictment, finding that 1st Degree Arson (WV Code 61-3-1) was a lesser included offense of Causing Serious Injury During an Arson Related Crime (WV Code 61-3-7(b)). The Circuit Court properly applied Blockburger v. United States, 284 U.S. 299 (1932), as interpreted by this Court in State v. Julius, 408 S.E. 2d 1, 12 (1991).

Respondent Blackford specifically adopts the reasoning and findings of law set forth by the Circuit Court in its Order dated March 4, 2010.

2. OTHER GROUNDS SUPPORTING THE CIRCUIT COURT'S DECISION.

A. The gravamen of the State's Petition in this case is its inability to seek prison sentences for convictions for both 1st Degree Arson (WV Code 61-3-1) and Causing Serious Injury During an Arson Related Crime (WV Code 61-3-7(b)). That is a legislative rather than a legal concern. As noted by the Circuit Court with regard to WV Code 61-8D-5, the legislature is perfectly capable of specifying that a crime is an " additional" crime carrying additional penalties.

The West Virginia Criminal Code contains many offenses which, when they result in injury or death, carry enhanced or different penalties than the underlying offense. This practice dates back at least 150 years. Common examples of this are DUI + injury or death (WV Code 17C-5-2(a-c)), Child Abuse Resulting in Injury (WV Code 61-8D-3(a)) or Death of a Child ... by Child Abuse (WV Code 61-8D-2a), Dueling Without Ensuing Death (WV Code 61-2-21)(1849) (misdemeanor) and Murder in Dueling (WV Code 61-2-18)(1849) (felony).

B. The Statute in question, WV Code 61-3-7, is clear and unambiguous on its face, and does not require speculation as to legislative intent. It sets forth a list of arson-related crimes which carry indeterminate sentences, and provides that if any of those crimes cause personal injury, the person is then subject to conviction under 61-3-7, which provides for determinate sentences.

C. The State's assertion that it may be prevented from obtaining reparations for the owner of the damaged property if the Defendant is convicted under 61-3-7 is speculative and not ripe for review by this Court. If and when the Defendant is convicted, and the Circuit Court refuses to award damages to the property owner, the State may then challenge the Circuit Court's interpretation of the statute before this Court.

For the reasons set forth above, Respondent Blackford respectfully requests that the Court deny the Petition for Writ of Prohibition.

Respectfully submitted this 7TH day of April, 2010.

JAMES L. BLACKFORD
BY COUNSEL



John P. Adams
State Bar #5967
Public Defender Corporation.
313 Monroe St
Martinsburg, WV 25404
304.263.8909

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MOTION FOR LEAVE TO FILE OUT OF TIME

Comes now the Respondent, James I. Blackford, by Counsel, John P. Adams, Public Defender Corp., and respectfully requests this Court to grant him leave to file RESPONDENT BLACKFORD'S OPPOSITION TO PETITION FOR WRIT OF PROHIBITION beyond the time limits set forth in Rule 14, Rules of Appellate Procedure, and respectfully represents to the Court as follows:

1. The Petition for Writ of Prohibition was filed by the State on March 8, 2010. A Rule to Show Cause was issued by the Court on March 8, 2010, and the proceeding below were stayed. Oral Argument is set for May 4, 2010.
2. A copy of the Rule to Show cause was received by the Public Defender's Office on March 15, 2010.
3. The undersigned counsel normally handles all matters before the Court for the Public Defender Corporation for the 23rd Judicial Circuit, but Counsel was

out of town on extended leave due to a death in his immediate family on March 10, 2010, and did not fully return to work full-time until the end of March, 2010. Trial counsel was unfamiliar with procedure before this Court and was unaware of the 20 day filing limit under Rule 14.

4. Although the issues were extensively briefed by the parties below, and the Rule to Show Cause was issued on a ruling made on Respondent's Motion to Dismiss, it would be appropriate to permit Respondent to file his opposition even though it was technically due on or about April 5, 2010.

Respectfully submitted this 7th day of April 2010.

JAMES L. BLACKFORD
BY COUNSEL



John P. Adams
State Bar #5967
Public Defender Corporation.
313 Monroe St
Martinsburg, WV 25404
304.263.8909

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CERTIFICATE OF SERVICE

I, John P. Adams, do hereby certify that I have served a copy of the foregoing RESPONDENT BLACKFORD'S OPPOSITION TO PETITION FOR WRIT OF PROHIBITION and MOTION FOR LEAVE TO FILE OUT OF TIME upon Christopher C. Quasebarth, Chief Deputy Prosecuting Attorney for Berkeley County, WV at 380 W. South St., Suite 1100, Martinsburg, WV, 25401, by hand, this 7th day of April 2010.



John P. Adams