14-0887
95-F-17

IN THE CIRCUIT COURT OF LINCOLN COUNTY, WEST VIRGINIA

State of West Virginia

X ADULT

X FELONY

____ MISDEMEANOR

____ JUVENILE

____ MAGISTRATE

____ OTHER

vs.

Lillie Trail,

ORDER

On this the 23rd day of October, 2007, the Court sua sponte does hereby grant the request of the Defendant for appointed counsel, and does hereby appoint Todd S. Bailess, Attorney at Law, to represent the said Lillie Trail, in the above styled case, based upon the information, if any, contained in the Defendant's sworn affidavit, subject to the potential for reimbursement of any and all of such costs or fees, all in accordance with the applicable provisions of West Virginia Code §29-21-16, et seq.

ENTER this 23rd day of October, 2007.

JUDGE

Entered 10-29 2007

Order Book 671

Page

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20

Todd S. Bailess
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Suite 203
Charleston, WV 25301
(304) 881-6861

IN THE CIRCUIT COURT OF LINCOLN COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

v. CRIMINAL CASE NO. 97-F-28

LILLIE MAE TRAIL,

DEFENDANT.

SENTENCING ORDER

On the 9th day of December, 1998, came the State of West Virginia by W. Jack Stevens, II, Prosecuting Attorney, and came the Defendant, Lillie Mae Trail, in person and by counsel, Timothy Koontz, to proceed with the sentencing of the Defendant pursuant to her earlier conviction by reason of a jury verdict on October 6, 1997, to the charge of "murder in the first degree, without mercy", all in accordance with the applicable provisions of Rule 32 of the West Virginia Rules of Criminal Procedure.

WHEREUPON, the Court after mature consideration of the Pre-Sentence Report prepared by the Chief Probation Officer, Jerry L. Swanson, II, and dated December 8, 1997, did inquire of the parties as to whether or not there were any objections to the report prepared by the Kanawha County Probation Department, dated April 4, 1997, and submitted by Mr. Swanson on December 8, 1997. In response to the Court's inquiry of the State, the State advised the Court that it had no exceptions, corrections or requested revisions to the factual basis set forth in the report as filed. In response

to the Court's inquiry of the Defendant, the Defendant advised the Court that it had no exceptions, correction or requested revisions to the factual basis set forth in the report as filed.

THEREUPON, in response to the inquiry of the Court, the Defendant and her counsel made their respective statements and arguments in support of their position.

FINDINGS AND CONCLUSIONS

UPON MATURE CONSIDERATION OF ALL OF WHICH, including the Defendant's conviction, the Report prepared by the Kanawha County Probation Department, and submitted by Jerry L. Swanson, II, Chief Probation Officer, without objection from the State, the statements by the Defendant and the arguments of her counsel, the Court does hereby make the following findings of fact and conclusions of law:

(1) That this Court has statutory jurisdiction over the subject matter, the parties and the imposition of the sentence to be imposed in this matter, pursuant to the applicable provisions of Rule 32 of the West Virginia Rules of Criminal Procedure and West Virginia Code §61-2-1 and 2, as amended; and,

(2) That on or about the 6th of October, 1997, the Defendant was convicted of the offense of "murder in the first degree, without mercy"; and,

(3) That as result of all of the above and seeing no reason why sentence should not now be imposed, it is just and reasonable that the Court does hereby sentence the Defendant as follows:

(4) That it is the judgment of this Court that the Defendant be taken from the Bar of this Court and transported to the South

Central Regional Jail at 1001 Centre Way, Charleston, West Virginia, which is serving as the designated holding facility of the West Virginia Department of Corrections, into its care, custody and control, and subject to its rules and regulation over her conduct, pursuant to the dictates of State of West Virginia, ex rel Smith v. Skaff, where she will therein be confined until she can be transferred as soon as administratively possible into the custody of the West Virginia Department of Corrections, and its regular facilities.

(5) That the Defendant shall remain there until such time, as determined by the West Virginia Department of Corrections, when the Defendant may conveniently be transferred and transported to the next designated holding facility of the West Virginia Department of Corrections, where he will therein be incarcerated, kept and confined, subject to all rules and regulations thereof, for the rest of her natural lifetime, without the possibility of parole, with credit for time served in all such facilities of the West Virginia Department of Corrections; and,

(6) That the sentence entered by the Circuit Court of Kanawha County against the Defendant for the offense of "unlawful wounding" of not less than one (1) nor more than five (5) years in the State Penitentiary shall run CONCURRENTLY with the sentence herein imposed, based upon the Court's determination that the underlying facts and circumstances of this offense were directly connected, and interwoven, with those of the Kanawha County offense.

ALL OF WHICH WAS ORDERED, ADJUDGED and DECREED.

It is further ORDERED that the Clerk of this Court shall provide a certified copy of this Order to the South Central Regional Jail, West Virginia Department of Corrections, Timothy Koontz, Counsel for the Defendant, and W. Jack Stevens, II, Prosecuting Attorney, by hand delivery, telefax communication, or by USPS First Class mail.

Enter this 7th day of April, 1998.

JUDGE

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Criminal Order Book # 22 Page
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371

IN THE CIRCUIT COURT OF LINCOLN COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

v. Criminal No: 97-F-28

LILLIE M. TRAIL,

Defendant.

POST-CONVICTION PROCEDURAL ORDER:

Order Denying Rule 33 Motion for a New Trial
and
Denying the Rule 29 Motion of Acquittal

Procedural Posture

On the 27th day of October 1997, came the State of West Virginia by W. Jack Stevens, II, Prosecuting Attorney, and came the Defendant, Lillie Mae Trail, in person and by counsel Timothy Koontz, Esq., and was found guilty by a jury of her peers of the offense of "Murder in the First Degree, Without Mercy". Upon which the Defendant's counsel moved that the jury be polled and the Court granted such Motion. The verdict of guilty was affirmed by each and every juror during the jury poll. The Defendant was committed to the custody of the Warden of the West Virginia Penitentiary for the imprisonment for "the rest of her natural lifetime, without the possibility of parole", with credit for time served in all such facilities of the West Virginia Department of Corrections. The Defendant was sentenced to Life Without Mercy on December 9, 1997. At that sentencing hearing, the Court adjudged that the sentence, entered by the Circuit Court of Kanawha County against the Defendant for the offense of "Unlawful Wounding", that carries a sentence of not less than one (1) no more than five

(5) years in the State Penitentiary shall run **Concurrently** with the sentence herein imposed, based upon the Court's determination that the underlying facts and circumstances of this offense were directly connected, and interwoven, with those of the Kanawha County offense.

WHEREUPON, at the conclusion of the trial, the Court did DENY any and all pending Motions to Dismiss the indictment, mistrial, direct a verdict of acquittal or for a new trial, in that there were insufficient grounds for such shown at that time, given the respective standards for such set forth in the West Virginia Rules of Criminal Procedure Rules 12, 26.3, 29, and 33, together with those set forth in State v. Guthrie, 194 W.Va. 657 (1995). The Defendant, Lillie Trail, by and through her attorney, subsequently filed a Motion for a New Trial under Rule 33 of the West Virginia Rules of Criminal Procedure and has also filed a Motion for an Acquittal under Rule 29 of the West Virginia Rules of Criminal Procedure. The Defendant alleges through her Rule 33 Motion that there were issues of jury misconduct.

THEREUPON, the Court noted that it was at this time entering a summary order, with a further order to follow with more particular findings of fact and conclusions of law, as a result of problems when the roof of the Lincoln County Courthouse leaked and caused extensive damages to the Judge's Chambers and the Court's records. Since that time, however, those problems have now been alleviated, thereby allowing this Court to enter this summary order and the following more particular order. Thus, the Court is placing all parties hereto on notice that a further Post-Conviction Procedural Order shall follow.

Findings of Fact and Conclusions of Law

UPON MATURE CONSIDERATION OF ALL OF WHICH, including the Defendant's conviction and arguments made by counsel, the Court does hereby make the following findings of fact

and conclusions of law:

[1] That this Court has statutory and Rule-based jurisdiction and venue over the subject matter as well as the parties, the sentence imposed, and the issues before the Court addressed in this Order, pursuant to the applicable provisions of Rules 29, 32 and 33 of the West Virginia Rules of Criminal Procedure and West Virginia Code §61-2-1 and 2, as amended; and,

[2] That Lillie Mae Trail was convicted of "Murder in the First Degree", as outlined in the applicable provisions of West Virginia Code §61-2-1, as amended; and,.

[3] That the Defendant was sentenced to the rest and remainder of her natural life to the penitentiary, without mercy, in accordance with the controlling provisions of West Virginia Code §61-2-2, as amended, and §62-3-15, as amended; and,.

[4] That by and through her Counsel, Mr. Koontz, the Defendant filed a Motion for a New Trial, in accordance with the applicable provisions of Rule 33 of the West Virginia Rules of Criminal Procedure ; and,

[5] That similarly counsel for Ms. Trail filed a Motion for Directed Verdict of Acquittal, in accordance with the applicable provisions of Rule 29 of the West Virginia Rules of Criminal Procedure; and,

[6] That based upon the Court's holdings from State v. Guthrie at the conclusions of the jury trial herein, as well as the particular findings and conclusions to be set out in the further order entered hereinafter, the Court has determined that it is in the interests of justice to DENY the Rule 29 Motion and to DENY the Rule 33 Motion , subject to the OBJECTIONS and EXCEPTIONS of the Defendant herein noted for the record.

All of which is hereby ORDERED, ADJUDGED AND DECREED.

It is further hereby ORDERED, ADJUDGED AND DECREED that the Clerk of this Court shall provide notice of the entry of this Post-Conviction Procedural Order by certified copy hereof served upon all parties of record, through counsel as appropriate, in accordance with the applicable provisions of Rules 10.01-12.06, as well as Rule 24.01, of the West Virginia Trial Court Rules, by USPS First Class Mail, Certified Return Receipt Requested; by hand delivery; or by facsimile transmission.

ENTERED on this the 8th day of June, 2006, A. D.

JUDGE

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Entered 6-8-2006
Order Book # 40 Page 809
Term _____, 20____
Charles Bunfield, Clerk

IN THE CIRCUIT COURT OF LINCOLN COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

v. Criminal No: 97-F-28

LILLIE M. TRAIL,
Defendant.

FURTHER AND FINAL ORDER:
Order Denying Rule 33 Motion for a New Trial
and
Denying the Rule 29 Motion of Acquittal

Procedural Posture

On or about the 8th day of June 2006, this Court entered an order in response to certain Defense motions filed in this matter, as outlined hereinafter, entitled "Post-Conviction Procedural Order: Order Denying Rule 33 motion for a New Trial and Denying the Rule 29 Motion for Acquittal", as the record will more fully reflect. In particular, the Court in the first section noted that the Order of June 8, 2006, was a summary order, with a further order to follow with more particular findings of fact and conclusions of law, all of which came about after numerous problems with the Court record system, and not as the result of any fault of any of the parties or their respective counsel. This "Further and Final Order" comes therefore in compliance with, and in support of, the Court's previous determinations, all of which are set forth hereinafter.

Thus, the Court takes note that on or about the 27th day of October 1997, came the State of West Virginia by W. Jack Stevens, II, Prosecuting Attorney, and came the Defendant, Lillie

Mae Trail, in person and by counsel Timothy Koontz, Esq., and was found guilty by a jury of her peers of the offense of "Murder in the First Degree, Without Mercy". Upon which the Defendant's counsel moved that the jury be polled and the Court granted such Motion. The verdict of guilty was affirmed by each and every juror during the jury poll. The Defendant was committed to the custody of the Warden of the West Virginia Penitentiary for the imprisonment for "the rest of her natural lifetime, without the possibility of parole", with credit for time served in all such facilities of the West Virginia Department of Corrections. The Defendant was sentenced to Life Without Mercy on December 9, 1997. At that sentencing hearing, the Court adjudged that the sentence, entered by the Circuit Court of Kanawha County against the Defendant for the offense of "Unlawful Wounding" (i. e. Kanawha County Circuit Court Case No. 95-F-235), that carries a sentence of not less than one (1) no more than five (5) years in the State Penitentiary should run **concurrently** with the sentence herein imposed, based upon the Court's determination that the underlying facts and circumstances of this offense were directly connected, and interwoven, with those of the Kanawha County felony offense.

WHEREUPON, at the conclusion of the trial, the Court did DENY any and all articulated Motions to Dismiss the Indictment; grant a mistrial; direct a judgement of acquittal; or, grant a new trial, in that there were insufficient grounds for such shown at that time, given the respective standards for such set forth in the West Virginia Rules of Criminal Procedure Rules 12, 26.3, 29, and 33, together with those set forth in State v. Guthrie, 194 W.Va. 657 (1995) and State v. LaRock, 196 W. Va. 294 (1996). The Defendant, Lillie Trail, by and through her attorney, subsequently filed a Motion for a New Trial under Rule 33 of the West Virginia Rules of Criminal Procedure and has also filed a Motion for an Acquittal under Rule 29 of the West Virginia Rules of Criminal Procedure. The Defendant alleges through her Rule 33 Motion that

there were issues of jury misconduct.

Discussion of Facts and Law

At the conclusion of every jury trial in which the Trial Jury has returned a Guilty Verdict to any crime, this Court entertains by Defense motion, or *sua sponte*, the issues associated with whether or not the Jury's Verdict should stand, by the granting or denial of new trial or by the granting or denial of a directed judgement of acquittal, pursuant to WVRCrP Rule 33 and WVRCrP Rule 29, respectively. Our Supreme Court in the mid-1990's established the standards for such in the following manner. In :the Court's holdings in State v. Guthrie, 194 W. Va. 657 (1995), Justice Cleckley laid the foundation for such analysis by trial Courts as follows in new Syllabus Points:

> 1. The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, **any rationale trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.** (emphasis supplied)
>
> 2. A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. **Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the Jury could find guilt beyond a reasonable doubt.** To the extent that our prior cases are inconsistent, they are expressly overruled.. (emphasis supplied)

If there was any question of the applicability of the standards established by the Court in Guthrie,

the Court removed any remaining doubts by its ruling the following year in State v. LaRock, 196 W. Va. 294 (1996). Again, with Justice Cleckley speaking for the Court, our Court not only reinforced its previous holding in Guthrie, but went on to articulate a new Syllabus Point on the same, or similar, issue of determining when the Trial Jury's verdict should stand. After reiterating its holding from Syllabus Point 1 in Guthrie, our Court in Syllabus Point 2 held:

> When a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed from the prosecutor's coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict. **This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution's favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt.** (emphasis supplied)

The Court's statement of a trial jury verdict's import, and the trial jury's inferences drawn in support of its verdict, as an element of the judicially created public policy of the State of West Virginia cannot be overestimated. In succeeding years, and in differing contexts, our Court has continually reinforced its faith in, and support of, the ability and competence of a trial jury in this State to hear evidence from the witness box; to receive the Court's instructions of law; to analyze factual and legal issues; and render sound verdicts, based upon those facts and the legal principles that it determines are controlling. Whether it be in the context of the weight and credit to give expert witnesses [i. e. Watson v. INCO Alloys International, Inc., 209 W. Va. 234 (2001)]; or, the trial jury's ability to discern competing medical malpractice theories in a civil case [i. e. Sydenstricker v. Mohan, 217 W. Va. 552 (2005)]; or, the trial jury's ability to discern competing defense theories in a criminal case [i. e. State v. Earl McCoy, Docket No. 32860 (May 24, 2006)], our Supreme Court has repeatedly relied upon the trial jury's unique composite character and aggregate qualities to discern and determine factual and legal issues.

It is within this comprehensive context that this Court reviews and considers such trial jury verdict issues. This particular case, however, raised issues that challenged the trial jury's operative and systemic integrity by asserting the issue of juror misconduct. The Defense, as the

primary basis of its challenge under WVRCrP Rules 29 and 33, alleged that one of the trial juror's actions at her employment during the trial tainted her ability to conduct herself in accordance with the Court's instructions that the Defendant was unconstitutionally denied a fair and impartial verdict by the entire jury, as was arguably manifested in the trial jury's Verdict of Guilty.

Here, the Court finds it instructive to return to the same time-frame (e. g. the mid-1990's), as the Guthrie-LaRock standard for such Motions challenging the trial jury's verdict, to find the controlling case of State v. Sutphin, 195 W. Va. 551 (1995). Our Court in the Sutphin analyzed the rare issues of what is "juror misconduct"; and what should be the policy and procedure for determining such issues.

In relying upon certain historical cases, on both the State and federal levels, our Court, again in Sutphin, articulated two (2) new Syllabus Points, below as No. 2 and No. 3, all as follows:

1. "A motion for a new trial on the ground of the misconduct of a jury is addressed to the sound discretion of the court, which as a rule will not be disturbed on appeal where it appears that defendant was not injured by the misconduct or influence complained of. The question as to whether or not a juror has been subjected to improper influence affecting the verdict, is a fact primarily to be determined by the trial judge from the circumstances, which must be clear and convincing to require a new trial, proof of mere opportunity to influence the jury being insufficient." Syllabus Point 7, State v. Johnson, 111 W. Va. 653, 164 S. E. 31 (1932).

2. In any case where there are allegations of any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about a matter pending before the jury not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial with full knowledge of the parties; it is the **duty of the trial judge** upon learning of the alleged communication, contact, or tampering, to conduct a hearing as soon as is practicable, with all parties present; and a record made in order to fully consider any evidence of influence or prejudice; and thereafter **to make findings and conclusions** as to whether such communication, contact, or tampering was prejudicial to the defendant to the extent that he has not received a fair trial. (emphasis supplied)

3. In the absence of any evidence that an interested party induced the juror misconduct, no jury verdict will be reversed on the ground of juror misconduct **unless the defendant**

proves by clear and convincing evidence that the misconduct has prejudiced the defendant to the extent that the defendant has not received a fair trial. (emphasis supplied)

In light of the public policy standards in support of the integrity of trial jury verdicts that have been articulated historically by our Court, as a result of the nature of the allegation itself which lies as the basis of a Defendant's Motion (i. e. that of "juror misconduct"), our Court directs that it is the duty of the trial judge to hold the hearings; to make a record; and to make findings and conclusions thereon.

As is expressly supported by the record, that procedure was followed by this Court. During the post-conviction hearings, the Court sat as the "trier-of-fact" in its review and consideration of the evidence adduced from the weight and credit of the three (3) witnesses called by the Defendant. The Court observed each and all of the witnesses while testifying as to the tone and inflections of their voices; as to their eye contact and eye movements; as to their body language; and, to the eleven (11) factors explicitly set out in the Supreme Court's Model Jury Charge, particularly the interest of the witness in the outcome of the proceeding, the witness relationship to the Defendant, and the bias or friendliness of the witness for the Defendant. Following the hearing(s) where the evidence of the three (3) witnesses, including the subject juror, was adduced, the Court held subject to the Court's Order and under admonitions against any contacts whatsoever regrading this inquiry, or any other matter regarding this case, the remainder of the jury panel for examination by the Defendant for several months. Moreover, it should be noted that, as Sutphin's Syllabus Point No. 3 expressly states, it is the Defendant's burden to prove by clear and convincing evidence that any misconduct prejudiced the Defendant's right to receive a fair trial Here, the Defendant has clearly failed to do so. The Defendant called no further jurors to determine if the subject juror had spoken improperly with the remaining eleven

(11) jurors, or had acted in any manner to influence the Trial Jury's Verdict, other than merely to vote when called upon by the foreman. As a result of all of the above, the Court has determined that it is proper to make and issue its findings of fact and conclusions of law set out hereinafter in supplement to the Court's Order of June 8, 2006, A. D.

Findings of Fact and Conclusions of Law

UPON MATURE CONSIDERATION OF ALL OF WHICH, including the entire trial record; the Trial Jury's Verdict and the Defendant's conviction based thereupon; the Defendant's Post-Conviction Rule 29 and Rule 33 Motions; and the State v. Sutphin post-trial proceeding and the evidence generated thereat; the respective arguments made by Defense counsel and the Prosecuting Attorney; and the entire record thusfar generated; the Court does hereby make the following findings of fact and conclusions of law:

[1] That this Court has statutory and Rule-based jurisdiction and venue over the subject matter as well as the parties, the sentence imposed, and the issues before the Court addressed in this Order, pursuant to the applicable provisions of Rules 29, 32 and 33 of the West Virginia Rules of Criminal Procedure and West Virginia Code §61-2-1 and 2, as amended, together with the respective points and authorities set out herein; and,

[2] That as it outlined in the record to this matter, the Defendant, Lillie Mae Trail, was convicted by the jury in the Circuit Court of Lincoln County, West Virginia in the above-styled matter of "Murder in the First Degree", as outlined in the applicable provisions of West Virginia Code §61-2-1, as amended. Subsequent thereto, the Defendant was sentenced to the rest and remainder of her natural life to the penitentiary, without mercy, in accordance with the controlling provisions of West Virginia Code §61-2-2, as amended, and §62-3-15, as amended, with said sentence to run **concurrently** with the statutorily indeterminate term of not less that

one (1) nor more than five (5) years in the state penitentiary imposed by the Circuit Court of Kanawha County, West Virginia in Criminal Case No. 95-F-235; and,.

[3] That by and through her Counsel, Mr. Koontz, the Defendant filed post-conviction motions in accordance with the applicable provisions of Rules 29 and 33, alternatively, as a Motion for a New Trial, and a Motion for a Judgment of Acquittal, in accordance with the applicable provisions of the West Virginia Rules of Criminal Procedure; and,

[4] That within the specific context of the primary basis of the Defendant's Motion(s), the Defendant has alleged that post-conviction relief should be granted to her based upon her inability to receive a fair trial, given that the Defendant suffered from the misconduct of a juror sitting during the trial in process. In particular, the alleged misconduct was that juror, Ms. Theresa Nunley, had contact with a co-worker, Ms. Linda Shamblin, and another co-worker, Ms. Misty Holtzman, during the trial of the Defendant, Lillie Mae Trail, at their collective place of employment, namely "Sam's Club", located at or near U. S. Rt. 119, at the South Ridge Shopping Plaza, in Charleston, West Virginia; and, that said contact involved a oral conversation about the Defendant's guilt or innocence. The Defendant alleges that Ms. Linda Shamblin told Theresa Nunley, the juror impaneled and sitting in this case, that the Defendant, Lillie Mae Trail, was "guilty as sin". The Defendant further alleges that Ms. Theresa Nunley asked her other co-worker, Ms. Misty Holtzman, a friend of the Defendant's, what she thought about Lillie Trail; and,

[5] That as a result of these allegations contained in the Defendant's Motion(s), a Sutphin hearing was held on November 5, 1998, in accordance with the standards outlined in State v. Sutphin, op cit, where each juror affected and/or witnesses were interviewed within the framework established for the Sutphin hearing. In this case, during the entirety of the Sutphin

proceeding, the Defense called only three (3) witnesses; and,

[6] That given the Court's explicit duties directed by the Court in Sutphin, the Court did subpoena all twelve (12) jurors and alternates to be appear. The Clerk of the Court called roll and every juror and the alternates were present, with admonitions reinforced regarding confidentiality and their service; and,

[7] That with the commencement of the proceeding, the Defense called three persons: Theresa Nunley, Misty Holtzman and Linda Shamblin. Ms. Theresa Nunley, an employee of the Sam's Club store, served as a sitting juror during the pendency of the Defendant's lengthy murder trial. Ms. Linda Shamblin worked as well at the same Sam's Club store with Ms. Theresa Nunley. At the Sutphin hearing during direct and cross-examination, Ms. Shamblin testified that her daughter, Terry Trail, was married to the Defendant's son, but they were divorced. Ms. Shamblin further testified that she knew Theresa Nunley only from work, and that no relationship existed between them beyond that one. In fact, both Ms. Shamblin and Ms. Nunley testified that Ms. Shamblin called her "Anna", which was the wrong name for Ms. Nunley, because her first name was Theresa, and was never known as "Anna". {The Court notes that this is substantiating evidence of how remote their relationship was}. Ms. Shamblin states that she heard at work that Ms. Nunley was on the Defendant's jury. Ms. Shamblin testified that she did ask Ms. Nunley "Are you on **Lillie's trial?"** Ms. Shamblin further testified that Ms. Nunley responded, **"I am not allowed to talk about that"**. Ms. Shamblin testified that she never asked Ms. Nunley about the trial again; and,

[8] That the Defense subsequently called Ms. Theresa Nunley, the juror in question. During direct and cross-examination, Ms. Nunley testified that, prior to Ms. Nunley sitting as a juror on this trial, she did not know the Defendant, or who the Defendant, Lillie Trail, was. In

regard to Ms. Shamblin, Ms. Nunley further testified that she did not know Ms. Shamblin, other than seeing her at work. Ms. Nunley testified that on one occasion Ms. Shamblin did approach her in the break room at Sam's club, and asked her "was she on Lillie's trial?" Ms. Nunley testified that Ms. Shamblin stated she knew the Defendant and that Ms. Shamblin did say that the Defendant "was guilty". Ms. Nunley testified that the conversation in the break room **did not last longer than fifteen (15) seconds**. Ms. Nunley further testified that in no way did the short conversation influence her decision. She further testified that she did not think another thing about the conversation, and did not tell the other jurors about the conversation. Ms. Nunley testified that many people expressed their opinions to her about this trial and Ms. Shamblin's remarks were just another opinion. Ms. Nunley testified that **she never talked to anyone about her service as a juror**, or what she was thinking with anyone other than during jury deliberations. Ms. Nunley again testified that she **never discussed the conversation with the other jurors**, nor did it have any influence on her own decision making process while sitting as a juror. The Court then inquired of Ms. Nunley if she made **"any representations to the jury either directly or indirectly of what her and Ms. Shamblin stated to one another?"** Ms. Nunley testified that she **"absolutely did not"**; and,

[9] That the final witness called to testify during this special proceeding was Misty Holtzman. During direct and cross-examination, Ms. Holtzman testified that she worked with Ms. Nunley at Sam's Club during the period of time of the trial. They worked next to each other and had a good working relationship, but not a friendship outside of work. Ms. Holtzman further testified that she was a family friend of the Defendant, Lillie Trail. She stated that she grew up knowing the Defendant and her family. She stated that her mother and the Defendant were friends. Ms. Holtzman testified that Ms. Nunley approached her and asked her if she knew Lillie

Trial and that she was sitting on her jury. Ms. Holtzman testified that Ms. Nunley appeared to be influenced by what Ms. Shamblin told her. Ms. Holtzman testified that Ms. Nunley never said she was influenced, but she "appeared to be influenced by certain facial expressions she made when talking about the trial". According to the witness, this alleged conversation took place before the jury had reached a verdict, but Ms. Holtzman could not remember the date; and,

[10] That following the testimony of these three (3) witnesses called by the Defendant, the Defense then rested and called no other witnesses, or other jurors who served with Ms. Theresa Nunley and who were present subject to the Court's order and admonitions. The Defendant and her counsel took a recess to discuss whether to call any other jurors; and,

[11] That neither following this recess, nor any other recess, did the Defense call any other jurors from the trial jury's panel. The Court then admonished the jury with strong admonishments, directing them to talk to no one, not the press, police or investigators about this proceeding or this case. The Court then released the jury panel, subject to recall, if requested by either the Defendant or by the State; and,

[12] That in response to and following which, the State neither called any jurors from the trial jury panel, nor any other witnesses, arguing that given the posture of this proceeding it was the Defendant's burden and not the State's burden to prove by clear and convincing evidence that the Defendant's Motion should be granted and the trial jury's verdict be set aside and a new trial granted; and,

[13] That as a result of which, the Defense then argued that the Remmer standard should be adopted by this Court. [see U.S. v. Remmer, 347 U. S. 22, 74 S. Ct. 450 (1954)]. The Defense strenuously argued that the Remmer burden of proof be adopted by this Court, in opposition to that set out by our Court in Sutphin in 1995 . The United States Supreme Court

established a presumption in favor of the Defendant, i. e. that if such juror misconduct had occurred, it was "presumptively prejudicial". Over forty-one (41) years later, however, in the West Virginia controlling case, State v. Sutphin, *op cit*, Justice Recht speaking for the Court did use Remmer, *op cit,* to design and require a post-trial proceeding with the due process requirements of proper notice and the full opportunity to be heard on the issue of such alleged juror misconduct. Moreover, according to our Court holdings in Sutphin, this "presumptively prejudicial" federal element is not translated into a burden of proof required of the State; and,

[14] That given the controlling standard here, the Court has determined that the elements required to be shown of any alleged "juror misconduct" (as Sutphin relies upon Remmer) to denote "no fair trial" are:

A. Did the alleged misconduct manifest any indication that the juror had reached a premature decision;
B. Did the alleged misconduct have any influence upon the juror relating to the guilt or innocence of the Defendant; or,
C. Did the alleged misconduct introduce any extrinsic evidence to the remaining jurors which influenced in any manner the jury's verdict of guilty. (See Sutphin, *op cit*, at 558).

[15] That given the applicability of the three(3) part test noted above from Sutphin, at the Sutphin hearing the Defendant called Ms. Nunley, Ms. Shamblin and Misty Holtzman. When viewed synoptically, there is insufficient evidence of any actual "juror misconduct", in that it is not "misconduct" to experience while a juror living in contemporary society:

A. An unsolicited statement by a co-worker (i. e. not a request for information from a person, or witness, with factually relevant information);
B. That the juror has little or no personal relationship with;
C. Of an extremely short duration, (i. e. fifteen (15) seconds);
D. Of a very general nature (i. e. that she thought Trail was guilty);
E. That the juror in response told clearly that she could not discuss her service as a juror;
F. With the juror not giving any more thought to the statement;
G. Which had no impact upon the juror's individual determination of guilt or innocence; and,

H. Which the juror did not mention to, or attempt to influence, any other jurors during the jury's deliberations toward a verdict in the case; and,

[16] That when the operative facts are placed within the analytical framework from Sutphin, then, the Court has determined that it just and reasonable to conclude that there is clearly insufficient evidence to support the Defendant's allegation of "juror misconduct", as the basis of her Rules 29 and 33 Motions, given that:

A. There was insufficient evidence of any manifested indication that Ms. Nunley had reached a premature decision in this case;
B. There was insufficient evidence that Ms. Nunley had suffered any influence relating to the guilt or innocence of the Defendant; and,
C. There was insufficient evidence to show the introduction of any extrinsic evidence to the remaining jurors which influenced in any manner the jury's verdict of guilty.

[17] That in regard to any other grounds, the Defendant's Motion for a New Trial was not filed until August of 1998 on the issue of jury misconduct. Although an oral motion for a new trial was made on October 24, 1997 under Rule 33 of the West Virginia Rules of Criminal Procedure, the Defense stated that the issue then would be the statements made by witness and co-defendant, Gregory Whittington and that Motion was denied in the March 18th, 1998, Sentencing Order of this Court; and,

[18]. That the Defendant's Motion for a New Trial was not timely under Rule 33 of the West Virginia Rules of Criminal Procedure. The Motion for a new trial was filed in August of 1998, well past the ten (10) days allowed for filing a Motion for New Trial. However, the Defendant's attorney did file a Motion for Extension of Time to file certain items, including an Appeal; in response to which the Court noted that until this Order was issued, there would be no final order; and,

[19] That in this perspective, the Court notes that Rule 33 of the West Virginia Rules of Criminal Procedure states in applicable part, the following:

"The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony, and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within ten days after verdict or finding of guilty or within such further time as the court may fix during the ten-day period."

[20] That the time under Rule 33 required for service of a motion for a new trial cannot be extended by the Court or by the parties. Boggs v.Settle, 150 W.Va. 330, 145 S.E.2d 446 (1965); Roberts v. Consolidation Coal Co., 208 W.Va. 218, 539 S.E2d 478 (2000). The requirement of this rule that a motion for a new trial shall be served not more than a specified time after entry of the judgment is mandatory and jurisdictional and cannot be extended by the Court or either parties.

[21] That the Court further notes that it is well established law that a new trial should rarely be granted. "A trial judge should rarely grant a new trial; a new trial should be granted only where it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done". Morrison v. Sharma, 200 W.Va. 192, 488 S.E.2d 467 (1997). Refusing to set aside verdict of jury and grant new trial is within sound discretion of trial court. Tincher v. U.S., 1926, 11 F.2d 18, **certiorari denied** 46 S.Ct. 475, 271 U.S. 664, 70 L.Ed. 1139; and,

[22] That given the Defendant's allegations and arguments, post-conviction hearings have been held on the juror misconduct issue and the Court is satisfied that **no prejudice was**

manifested against the Defendant. The Defendant was not injured by the remarks made by Ms. Shamblin to Ms. Nunley, all as noted hereinbefore; and,

[23] That while this WVRCrP Rule 33 Motion was not timely filed, it was not the deciding factor as to why this Motion is DENIED. Given the gravity of the allegations and given the nature of the offense charge and the conviction returned by the trial jury, this Court proceeded in the interests of justice and held Sutphin hearing(s) to investigate and determine the Defendant's allegations of "juror misconduct", but found little or no evidence of "jury misconduct", and with such in no way approaching the "clear and convincing" evidence standard within the test set out in Sutphin; and,

[24] That a Rule 29 Motion for Judgment of Acquittal under the applicable provisions of the West Virginia Rules of Criminal Procedure was filed by the Defendant by and through Counsel as well.

Within this context, Rule 29 of the West Virginia Rules of Criminal Procedure states as follows:

> (a) Motion Before Submission to Jury.
>
> Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the state is not granted, the defendant may offer evidence without having reserved the right.
>
> (b) Reservation of Decision on Motion.
>
> The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) Motion After Discharge of Jury.

> If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within ten days after the jury is discharged or within such further time as the court may fix during the ten-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

[25] That the standard to examine this Rule 29 Motion is that "upon motion to direct a verdict for defendant (now called Judgment of Acquittal), evidence is to be viewed in light most favorable to prosecution; it is not necessary in appraising its sufficiency that trial court or reviewing court be convinced beyond reasonable doubt of guilt of defendant; question is whether there is substantial evidence upon which jury might justifiably find defendant guilty beyond reasonable doubt". State v. Cook, 175 W. Va. 185 (1985); and,

[26] That "a criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden". State v. Catlett, 207 W.Va. 747 (2000). In this same context, the Guthrie/LaRock , *op cit*, standards become applicable as well. Thus, within the framework established, the Court has determined that it is necessary and proper, as well as just and reasonable to conclude, that upon the entirety of the record that any rationale trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt (see Syllabus Point 1, Guthrie, *op cit*); and,

[27] That as noted in Syllabus Point 3 of Guthrie, *op cit*, "...a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the Jury could find guilt beyond a reasonable doubt." In the present case, there is clearly sufficient evidence upon which the Jury could find guilt beyond a reasonable doubt; and,

[28] That as further noted in Syllabus Point 2 of LaRock, *op cit* , the standard of review also requires that:

> When a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed from the prosecutor's coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict. This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution's favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt; and,

[29] That when this standard is applied to the facts and circumstances of the present case set out in the record, both by direct and circumstantial evidence, and viewed from the prosecutor's coign of vantage, accepting all reasonable inferences from the record consistent with the verdict, the Court has determined that it is further just and equitable to conclude that the trial jury's verdict in this matter should not be set aside; thus, the Defendant's WVRCrP Rule 29 Motion for Directed Judgment of Acquittal should not be granted, and must be DENIED; and,

[30] That although the Court has ruled originally on this Motion for Judgment of Acquittal, thereat denying the same at the close of trial, the Court entertained the Defendant's Rule 29 Motion once again in the interest of justice. This Court allowed the Defendant to revive such Motions under Rule 33. As noted heein, as well as by the Court's previous order of June 8, 2006, following a further and careful review and consideration of the entirety of the record, that Defense Motion is hereby reaffirmed and DENIED.

All of which is hereby ORDERED, ADJUDGED AND DECREED.

It is further hereby ORDERED, ADJUDGED and DECREED that the Clerk of this Court, in accordance with Rules 10.01-12.06, as well as Rule 24.01, of the West Virginia Trial Court Rules, shall provide notice of the entry of this Further and Final Order by forwarding a certified copy hereof to all parties of interest, through counsel as appropriate, including but not limited to the Clerk of the Supreme Court of Appeals, as they may be listed at their last known address in the Court's file by USPS First Class Mail, Certified with Return Receipt Requested; or by hand

delivery; or by facsimile transmission/communication at the numbers for such set out in the Court's file.

ISSUED on this the 8th day of January, 2007, A. D.

Jay M. Hoke
CHIEF JUDGE

Crim 1-8-07

CERTIFIED A TRUE COPY OF 20 ORDER
DULY ENTERED IN
Order Book # Page
Order Book #
Term 20
Given under my hand Clerk

IN THE CIRCUIT COURT OF LINCOLN COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

v.

CASE NO. 97-F-28
JUDGE HOKE

LILLIE M. TRAIL,

Defendant.

RESENTENCING ORDER

On a prior date came the Defendant, Lillie M. Trail, by counsel, Todd S. Bailess, and filed her "Motion For Resentencing For Purposes of Restarting Appeal." The Court having reviewed said Motion, the record of this proceeding and having consulted pertinent legal authority is of the opinion to and hereby does **GRANT** said Motion for Resentencing for purposes of restarting the time in which she may appeal her conviction and/or sentence herein.

Accordingly, the Defendant's Motion for Resentencing For Purposes of Restarting Appeal is hereby **GRANTED** and it is the **ORDER, JUDGMENT** and **SENTENCE** of this Court that the Defendant, Lillie M. Trail, is guilty of "Murder in the First Degree, Without Mercy," and it is **CONSIDERED** and **ORDERED** by the Court that the Defendant, Lillie M. Trail, be sentenced, as she was by Order entered April 7, 1998, (attached hereto with this Court hereby approving, adopting and incorporating said previous Order, as follows:

(1) The Defendant will be incarcerated, kept and confined, subject to all rules and regulations thereof, for the rest of her natural lifetime, without the possibility of parole, with credit for time served in all such facilities of the West Virginia Department of Corrections; and,

(2) That the sentence entered by the Circuit Court of Kanawha County against the Defendant for the offense of "unlawful wounding" of not less than one (1) nor more than five (5) years in the State Penitentiary shall run CONCURRENTLY with the sentence herein imposed, based upon Court's determination that the underlying facts and circumstances of this offense were directly connected, and interwoven, with those of the Kanawha County offense.

ALL OF WHICH WAS ORDERED, ADJUDGED and DECREED.

It is further **ORDERED** that the Defendant shall have the right to file an appeal with the West Virginia Supreme Court of Appeals by filing a Notice of Intent to appeal within thirty (30) days from the final judgment in this proceeding and by filing a petition for appeal with the West Virginia Supreme Court of Appeals within four (4) months of the entry of judgment and otherwise complying with the West Virginia Supreme Court of Appeals Rules and Appellate Procedure.

Custody of the Defendant is hereby returned to the Commissioner of the West Virginia Division of Corrections for the execution of the sentences imposed upon the Defendant herein.

It is further **ORDERED** that the Clerk of this Court shall provide a certified copy of this **Order** to Todd S. Bailess, 120 Capitol Street, Charleston, West Virginia, 25301, James Gabhart, Prosecuting Attorney, and the Division of Corrections, all subject to Rule 24.01 of the West Virginia Trial Court Rules.

ENTERED this 15th day of July 2014

HON. JAY HOKE, JUDGE

A TRUE COPY
TESTE

ENTERED
JUL 17 2014
BY:

Prepared By:

Todd S. Bailess (WVSB# 10482)
Bailess Law, PLLC
120 Capitol Street
Charleston, West Virginia 25301
Telephone: (304) 342-0550
Facsimile: (304) 344-5529

IN THE CIRCUIT COURT OF LINCOLN COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

v. CRIMINAL CASE NO. 97-F-28

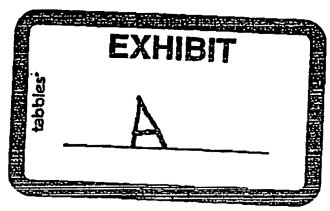
LILLIE MAE TRAIL,

DEFENDANT.

SENTENCING ORDER

On the 9th day of December, 1998, came the State of West Virginia by W. Jack Stevens, II, Prosecuting Attorney, and came the Defendant, Lillie Mae Trail, in person and by counsel, Timothy Koontz, to proceed with the sentencing of the Defendant pursuant to her earlier conviction by reason of a jury verdict on October 6, 1997, to the charge of "murder in the first degree, without mercy", all in accordance with the applicable provisions of Rule 32 of the West Virginia Rules of Criminal Procedure.

WHEREUPON, the Court after mature consideration of the Pre-Sentence Report prepared by the Chief Probation Officer, Jerry L. Swanson, II, and dated December 8, 1997, did inquire of the parties as to whether or not there were any objections to the report prepared by the Kanawha County Probation Department, dated April 4, 1997, and submitted by Mr. Swanson on December 8, 1997. In response to the Court's inquiry of the State, the State advised the Court that it had no exceptions, corrections or requested revisions to the factual basis set forth in the report as filed. In response



to the Court's inquiry of the Defendant, the Defendant advised the Court that it had no exceptions, correction or requested revisions to the factual basis set forth in the report as filed.

THEREUPON, in response to the inquiry of the Court, the Defendant and her counsel made their respective statements and arguments in support of their position.

FINDINGS AND CONCLUSIONS

UPON MATURE CONSIDERATION OF ALL OF WHICH, including the Defendant's conviction, the Report prepared by the Kanawha County Probation Department, and submitted by Jerry L. Swanson, II, Chief Probation Officer, without objection from the State, the statements by the Defendant and the arguments of her counsel, the Court does hereby make the following findings of fact and conclusions of law:

(1) That this Court has statutory jurisdiction over the subject matter, the parties and the imposition of the sentence to be imposed in this matter, pursuant to the applicable provisions of Rule 32 of the West Virginia Rules of Criminal Procedure and West Virginia Code §61-2-1 and 2, as amended; and,

(2) That on or about the 6th of October, 1997, the Defendant was convicted of the offense of "murder in the first degree, without mercy"; and,

(3) That as result of all of the above and seeing no reason why sentence should not now be imposed, it is just and reasonable that the Court does hereby sentence the Defendant as follows:

(4) That it is the judgment of this Court that the Defendant be taken from the Bar of this Court and transported to the South

Central Regional Jail at 1001 Centre Way, Charleston, West Virginia, which is serving as the designated holding facility of the West Virginia Department of Corrections, into its care, custody and control, and subject to its rules and regulation over her conduct, pursuant to the dictates of State of West Virginia, ex rel Smith v. Skaff, where she will therein be confined until she can be transferred as soon as administratively possible into the custody of the West Virginia Department of Corrections, and its regular facilities.

(5) That the Defendant shall remain there until such time, as determined by the West Virginia Department of Corrections, when the Defendant may conveniently be transferred and transported to the next designated holding facility of the West Virginia Department of Corrections, where he will therein be incarcerated, kept and confined, subject to all rules and regulations thereof, for the rest of her natural lifetime, without the possibility of parole, with credit for time served in all such facilities of the West Virginia Department of Corrections; and,

(6) That the sentence entered by the Circuit Court of Kanawha County against the Defendant for the offense of "unlawful wounding" of not less than one (1) nor more than five (5) years in the State Penitentiary shall run CONCURRENTLY with the sentence herein imposed, based upon the Court's determination that the underlying facts and circumstances of this offense were directly connected, and interwoven, with those of the Kanawha County offense.

ALL OF WHICH WAS ORDERED, ADJUDGED and DECREED.

It is further ORDERED that the Clerk of this Court shall provide a certified copy of this Order to the South Central Regional Jail, West Virginia Department of Corrections, Timothy Koontz, Counsel for the Defendant, and W. Jack Stevens, II, Prosecuting Attorney, by hand delivery, telefax communication, or by USPS First Class mail.

Enter this 7th day of April, 1998.

JUDGE

Entered April 7 19 98
Criminal Order Book # 29 Page 368
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