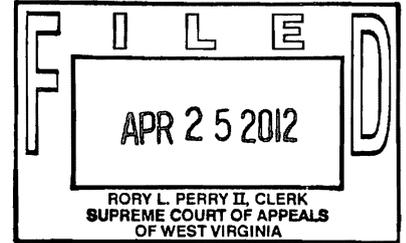


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 12-0197



STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

V.

APPEAL FROM A FINAL ORDER
OF THE CIRCUIT COURT OF
CABELL COUNTY (06-F-088)

LEVON FLOURNOY,
Defendant Below, Appellant

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

I. It was error for the trial court to permit the jury to hear the confession of Flournoy because Flournoy was denied the right to appear before a Magistrate without unreasonable delay as required by statute. A delay occasioned only by the desire of the police to obtain a confession is an unreasonable delay. Flournoy's only remedy was for the court to deny the State the use of his confession as evidence at his trial. He was denied that remedy and a new trial must be awarded.

II. The trial court abused the discretion provided to it when it refused to give insanity instructions to the jury thereby preventing Flournoy from getting his theory of defense to the jury, a denial of the process due Flournoy guaranteed by both the state and federal constitutions.

III. W. Va. Code, Section 62-3-15 is unconstitutional because it provides no guidance concerning what factors a jury may consider when deciding the matter of mercy, and the trial court gave no instruction to the jury. Consequently, the jury might have acted arbitrarily and in consideration of constitutionally impermissible reasons like race or sex in reaching that decision.

IV. No guidance was given the jury about the use of notes during its consideration of the evidence during deliberations.

STATEMENT OF THE CASE

Levon Flournoy, a Vietnam War veteran, who suffered post traumatic stress disorder because of his service to our nation, had been employed by the Veteran's Administration for many years on August 20, 2005. Flournoy served in the United States Air Force for twelve years, including a year in Vietnam where he was a munitions specialist. His duties included assembling bombs and other ordinance designed to be dropped or fired from aircraft for use against military and civilian targets. Tr. Vol. V., pp. 1198-1202. The base where Flournoy was billeted while serving in Vietnam was often attacked by the Viet Cong. The mess hall where Flournoy ate was attacked by mortars on one occasion. There were sixteen people killed. Flournoy was required to help clean up the area after the attack, including removal of human remains. Tr. Vol. V., pp. 1202-1204.

Flournoy, like many other soldiers stationed in Vietnam, sometimes left his base for recreation. While visiting a civilian gym for martial arts classes, the North Vietnamese entered the village. Flournoy, another black soldier and four white soldiers were captured. Flournoy and the other black soldier were released. The white soldiers were executed. Tr. Vol. V., pp. 1204-1207. On another occasion, Flournoy was working in an area that was infiltrated by the Viet Cong. He hid in a locker for two or three hours until the area was cleared. Tr. Vol. V., pp. 1207-1210. Flournoy had difficulty adjusting to civilian life after his service ended.

Tr. Vol. V., p. 1212. Flournoy sought services from the Veteran's Administration because of difficulty with sleep. Medication was ordered. He enrolled in college, found work with the Veteran's Administration and earned a degree. Later he attended graduate school. Tr. Vol. V., pp. 1214-1216. The Veteran's Administration began treating Flournoy for post traumatic stress disorder in 1992. Tr. Vol. V., page 1220. He had problems with depression, anxiety and impulse control. Tr. Vol. V, pp. 1221-1222. He attempted suicide. Tr. Vol. V., p. 1222, line 22. He married six times. One of his wives died of cancer. The other marriages ended in divorce. Tr. Vol. V., p. 1270.

Flournoy met Vicky West some months before her death. West and Flournoy's wife were friendly. When the Flournoys separated, West initiated a sexual relationship with Flournoy. Tr. Vol. V, p. 1228. She told Flournoy that she was a lawyer and that she represented Social Security and VA claimants. Tr. Vol. V., p. 1229. West told Flournoy that she was pregnant with triplets. Later she told him that she was only having twins and then that she had miscarried. Still later, she claimed to be pregnant again. Tr. Vol. V., p. 1230. She told Flournoy that she needed money to keep her business going and that she had applied for a loan from the Small Business Administration. Tr. Vol. V., p. 1231. Flournoy arranged a bridge loan to her in the amount of \$81,000, until her SBA loan came through. West never repaid the money. Tr. Vol. V., pp. 1231-1233. West asked Flournoy for his bank account number so that she could deposit repayment of the loan to his

account. Someone, likely West, forged 18 checks drawn on his account. Tr. Vol. V., pp. 1235-1237. West told Flournoy that her sister stole the checks. Tr. Vol. V., p. 1238. One of the checks was written to West's company, Paralegal Temporary Services. Tr. Vol. V., pp. 1240-1241. One check was a payroll check to one of West's employees. Tr. Vol. V., p. 1247. Another check was written to Paralegal Temporary Services for \$2500. Tr. Vol. V., p. 1248. Flournoy did not have \$2500 in his account and he did not write the check. Tr. Vol. V., p. 1249. The police made no arrests. Tr. Vol. V., p. 1253. West told him that nothing would happen to her for it. Tr. Vol. V., p. 1253.

Part of the money that Flournoy loaned West came from credit card cash advances. When West did not repay as promised, Flournoy could not repay, and the issuers sued Flournoy. Tr. Vol. V., pp. 1261. He learned that he had been sued on August 20, 2005. Tr. Vol. V., p. 1261.

Flournoy tried to end the relationship with West, but she kept coming back. Tr. Vol. V., p. 1267. When he tried to stop having sex with her, she became violent and he phoned 911. She came to his home and wouldn't leave. She came to his place of employment and stood by his vehicle. Tr. Vol. V., p. 1268. She stalked him on the computer at work and phoned so frequently that his voice mail filled up. Tr. Vol. V., p. 1269.

West came by Flournoy's home on Saturday morning August 20, 2005, at around 8 or 9 o'clock. She had a cup of bacon that she left it on the

counter in the kitchen, looked through his trash, and then left. She returned at 11:00 o'clock and took some plastic plates from his kitchen for a picnic with her children. She told him that she would be back around three to watch races with him. He did not invite her. Tr. Vol. V., pp. 1273-1274. West returned that evening and they went to Trish's house to see the races. Trish made margaritas. Trish's boyfriend, Dave, told Flournoy that he read in the newspaper that Flournoy had been sued by one of the credit card issuers. West was angry that Dave told him about the suit. Tr. Vol. V., pp. 1276-1277. Trish and Dave had words about it, Dave went in Trish's house and Flournoy went home so he wouldn't have to listen to West bicker with Dave. West followed Flournoy. She asked if they could sit on the porch and talk. Tr. Vol. V., pp. 1278-1279. Flournoy agreed to talk to West for an hour. Tr. Vol. V., p. 1280. Flournoy customarily armed himself when sitting on the porch because he felt threatened by strange people coming to his house. Tr. Vol. V., p. 1281. He felt safer with the gun. Tr. Vol. V., p. 1283, lines 23-24. He returned to the porch with a beer and a loaded 9 mm. handgun. Tr. Vol. V., p. 1284. Trish was on the porch when he returned. Trish and West talked for a bit and Trish left for her home. West was sitting on a cooler on the porch located about two or three feet from where Flournoy was sitting in a rocking chair. West moved the cooler closer to him and asked to go into the house to watch a movie. When Flournoy declined to let her in his house, she asked him to go to a motel with her. Flournoy told her that he didn't want to have sex with her and asked her to leave.

West told him that she didn't want to leave. Tr. Vol. V., p. 1289. West grabbed Flournoy by the throat, and he lost consciousness. He saw red. Tr. Vol. V., p. 1290, lines 8-15. He started blinking his eyes to clear them. He saw West's legs on the cooler and then tried to shoot himself. Tr. Vol. V., p. 1290, lines 20-24. Flournoy became aware of the arrival of neighbors, the arrival of the fire department and being hand cuffed by a police officer. He remembered being in a glass booth at the police department, being in a car, arriving at the jail and taking a shower. He remembered waking in a suicide watch cell at the jail. Tr. Vol. V., p. 1291. Flournoy had no memory for a couple of months after his arrest about making a statement to the police. Tr. Vol. V., p. 1292. He started having flashbacks, nightmares and dreams. Tr. Vol. V., p. 1293. He had instances of memory loss before then. Tr. Vol. V., p. 1295, lines 19-21. He did not remember waiving his right to speak to counsel prior to making a statement to the police or making the statement. Tr. Vol. V., p. 1296. He did not plan to kill West when he came outside with the gun. Tr. Vol. V., p. 1297.

The first emergency responder to arrive was a fireman named Ray who testified that he found two people on the front porch of Flournoy's home. He checked on West first and found that she wasn't breathing and there was no pulse. Ray saw a handgun on the porch and he and another fireman placed themselves between the weapon and Flournoy. Tr. Vol. II., p. 325, lines 7-19. Ray checked on Flournoy and found him conscious and breathing. He asked Flournoy to give him his name, what happened, if he was hurt and things of that nature. Flournoy said

that he had tried to shoot himself and that he had missed. Tr. Vol. II, pp. 324-325. Ray did not attempt to orient Flournoy as to time and place and Flournoy did not respond intelligibly. Tr. Vol. II., p. 328.

The first police officer to arrive, Ted Backus, found Flournoy on the front porch. It appeared to Backus that Flournoy was reaching for a handgun so he handcuffed Flournoy for “officer safety”. Tr. Vol. II, p. 335. When he saw the woman with a wound, he secured Flournoy and removed him from the porch. Flournoy told Backus that he wanted his gun back because he had missed and wanted to shoot himself. Tr. Vol. II., p. 337.

Chris Sperry, a Huntington police detective arrived at 10:27 P. M. and went up to the porch, turned around and told Backus to secure Flournoy in his vehicle and to take him to headquarters. The trip took two to five minutes. Tr. Vol. II., pp. 338-339, 344-345. Sperry did not go onto the porch of Flournoy’s home. Tr. Vol. I., p. 42. Flournoy was under arrest when Sperry arrived because he was not free to leave. Tr. Vol. I., p. 43, lines 7-24, p. 44, lines 1-24, p. 45, lines 1-24, p. 46, 1-24. Sperry left Flournoy’s home at around midnight. Tr. Vol. I., p. 49. Flournoy was under arrest and the charge was either first or second degree murder. Tr. Vol. I., p. 51, Flournoy was removed from Crestmont Dr. at 10:29 P. M. for transport to headquarters. Tr. Vol. I., p. 53. Sperry decided to have Flournoy charged with murder within two minutes of his arrival. Tr. Vol. I., p. 53, lines 19-24, p. 54, lines 1-22. Backus would have arrived at headquarters around 10:45. Tr.

Vol. I, p. 55, lines 14-17. Flournoy was not taken to a magistrate after his person and clothing were processed for evidence and after he was photographed because Sperry needed to do an arrest booking report. Tr. Vol. I., p. 59. Sperry had to get a confession before taking Flournoy to a magistrate because it is part of the process. Tr. Vol. I., p. 60, lines 1-10. However, Backus had completed most of the arrest booking report before Sperry arrived. Tr. Vol. I., p. 62, lines 23-24, p. 63, lines 1-24, and completed the report after he arrived. Sperry was busy finding a CD for the CD recorder so that he could interrogate Flournoy. Tr. Vol. I, p. 63, lines 22-24, p. 64, lines 1-12. At 1:09 A. M. on August 21, 2005, there was no reason for Flournoy to be present other than to make a statement. Tr. Vol. I., p. 69, lines 11-16. Sperry was unaware of his duty to present Flournoy to a magistrate without unreasonable delay. Vol. I., p. 70, lines 9-14. Flournoy was never advised that he had the right to be promptly presented to a magistrate. Tr. Vol. I., p. 72. lines 5-14.

Sperry was able to confirm through investigation that West had run up many thousands of dollars of debt owed to credit card companies in Flournoy's name. He also determined that West had forged checks drawn on Flournoy's account. Tr. Vol. IV., p. 1010. West often hung around the courthouse. Tr. Vol. IV., p. 1013. The newspaper reported initially that West was a lawyer. Tr. Vol. IV., p. 1013. There were records to confirm calls made to 911 by Flournoy about West. Tr. Vol. IV., p 1019. There were many reports of calls from the house, but none from West about Flournoy. Tr. Vol. IV., pp. 1019-1020.

Steve Compton, employed by the Huntington Police Department as a crime scene investigator, arrived at the police department at 11:10 P. M. on August 20, 2005, to photograph and process the person and clothing of Levon Flournoy for evidence. Tr. Vol. II., p. 386. Compton finished collecting gunshot residue at 11:22 and finished photographing Flournoy at 11:33 P. M. The record shows that he had finished processing Flournoy for evidence prior to 11:45 P. M. because he arrived at Crestmont Drive at that time. Tr. Vol. II., p. 484.

Three expert witnesses gave testimony about Flournoy's mental status. The first of these was Bobby Miller, M. D., a board certified forensic psychiatrist and adjunct professor at West Virginia University engaged by the defense. Flournoy was initially treated by the Veteran's Administration (VA) Hospital for depression, anxiety, psychosis, paranoia and mood disorders in 1992. He was prescribed a number of a drugs, including: Celexa, Tegretol, Depakote, Vistaril, Buspar, Halidol, Cogentin, Mellaril, Risperdal, Trazadone. And Seroquel. Tr. Vol. III., pp. 757-759. The most common diagnosis made at VA was post traumatic stress disorder (PTSD). Flournoy experienced flashbacks to his service in Viet Nam, irritability, and mood disturbances. Tr. Vol. III., p. 760. Flournoy experienced PTSD perhaps relating to his service in Viet Nam. His military experience involved things like putting bombs together that he knew would be used to kill people; cleaning up body parts after a mess hall was hit by mortar rounds; on an occasion when four of his Caucasian friends were executed

by the Viet Cong but he and another African American were spared because of race, and when he hid in a locker from the enemy for about an hour believing that he would be tortured or executed if found. Tr. Vol. III., p. 761. Flournoy had periods of depression and he became suicidal or attempted suicide. He complained of flashbacks, nightmares, and intrusive thoughts of Viet Nam. He often complained that he felt aggressive. Tr. Vol. III., p 762. Flournoy also suffered from survivor guilt, and he placed himself in dangerous situations. Tr. Vol. III., pp. 763-764.

Dr. Miller cited a document published by the National Center on PTSD entitled "PTSD and Criminal Behavior". Tr. Vol. III., pp. 764 and 765. Feeling the need to always be on guard can cause veterans to misinterpret benign situations as threatening and cause them to respond in a self protective way. Tr. Vol. III., P. 765, lines 4-7. Flournoy was hyper vigilant. He had installed video cameras on his home. He had monitors in his attic and hundreds of cassette recordings of activity around the front of his home. Tr. Vol. II., pp. 358-359. Crimes that are directly linked to traumatic stressors usually have certain characteristics. Often the defendant has no criminal history and cannot offer a coherent explanation for the behavior. Flournoy had no criminal history and told the police that he didn't know why he did what he did. Tr. Vol. III., pp. 765-766. There may be amnesia surrounding part of the crime. Flournoy was unable to remember most of what happened and reconstructed the events for himself. The individual may report there are numerous stressors prior to the crime. There was

an “intensely conflicted interpersonal relationship between Flournoy and West involving sex, forgery, deception, fraud and embezzlement. Flournoy carried a gun in his pocket at times for fear of West or of her associates. Tr. Vol. III., p. 766. Miller accepted the validity of the VA diagnosis of PTSD made in Flournoy’s case. He stated further that the diagnosis was predictive of the behavior of Flournoy. When West provoked him, Flournoy saw red. One of the criteria for PTSD is that those afflicted sometimes enter dis associative states. They lose track of space and time. Tr. Vol. III., p 769, lines 12-21. Miller continued that persons who become dis associative can still relate memories. They may even appear to be normal to a casual observer. TR. Vol. III., p. 770, lines 13-17. As a result of his psychiatric diagnosis and conflict in his relationship with West, Flournoy was provoked into an emotionally charged state resulting in a spontaneous act of violence. Tr. Vol. III., p. 775, lines 1-5. Flournoy had no intent to kill. Tr. Vol. III., p. 779, lines 2-7. Flournoy exhibited all of the criteria consistent with a DSM-IV diagnosis of Post Traumatic Stress Disorder by history and by testing. Tr. Vol. III., p. 798, lines 15-24. Flournoy had suicidal thoughts on more than one occasion and made plans to carry them out. Tr. Vol. IV, p. 983.

The trial court considered the instructions offered by the parties at the conclusion of the evidence. Defendant’s instruction No. 6 is an insanity instruction. The trial judge declined to give the instruction, finding insufficient evidence to justify giving the instruction. Tr. Vol. V., p. 1410. The defense

objected. Tr. Vol. V., p. 1410. The trial judge announced his intention to give State's Instructions Nos. 2 and 4, which instructed the jury that it could infer malice, intent, premeditation and deliberation from the defendant's use of a deadly weapon, and that Flournoy intended to kill West if it was an immediate and necessary consequence of his act. Tr. Vol. V., pp. 1446-1447 and Tr. Vol. VI., p. 1522. The defense timely objected to the instructions. Tr. Vol. V., pp. 1446-1447. The trial judge instructed the jury that Flournoy would not be eligible for parole if the jury convicted him of first degree murder unless the jury recommended mercy, but the trial court failed to instruct the jury concerning how it might decide whether to recommend mercy. Tr. Vol. VI., p. 1525. The jury returned a verdict without a recommendation of mercy. Tr. Vol. VI., p. 1604, lines 11-17. The trial judge permitted the jury to take note pads and their notes into the jury room but no instruction was given concerning the use of the notes by the jury. Tr. Vol. VI., p. 1605, lines 11-16.

SUMMARY OF ARGUMENT

It was an abuse of discretion and error for the trial court to permit the jury to hear the confession of Flournoy because Flournoy was denied the right to appear before a Magistrate without unreasonable delay as required by statute. A

delay occasioned only by the desire of the police to obtain a confession is an unreasonable delay. Flournoy's only remedy was for the court to deny the State the use of the confession against him at his trial. He was denied that remedy and a new trial must be awarded.

The trial court abused its discretion by refusing insanity instructions thereby preventing Flournoy from getting his theory of defense before the jury.

The trial court abused its discretion when it failed to instruct the jury on the matter of mercy. The jury may have acted arbitrarily and in consideration of constitutionally impermissible reasons, like race or gender, when reaching that decision.

The trial court allowed the jury to take notes throughout the trial but failed to instruct the jury about the use of the notes. The jury should have been instructed that the note of another juror is not a substitute for the memory of a juror and when a conflict occurred the juror was to rely upon his or her own recollection rather than the notes of another juror. In the absence of such instruction, one or more jurors may have surrendered his or her convictions concerning the existence or non existence of a fact and relied upon the note of another juror, thereby depriving Flournoy of a trial by twelve jurors.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is requested and necessary because the decisional process will be aided by argument. There are novel issues presented in the appeal. Consequently, it is not a proper one for a memorandum decision.

ARGUMENT

I.

THE CONFESSION

The standard of review for whether a particular confession was obtained as a result of delay in presentment before a magistrate is de novo. Findings of fact on the ultimate question of admissibility are reviewed by using a deferential standard of clearly erroneous. State v. Hosea, 199 W. Va. 62, 483 S.E.2d 62 (1996).

The events preceding Flournoy's confession are recited on pages 8, 9, and 10 of this Brief. The detective who took the confession admits that, as far as he is concerned, he had to get a confession before taking Flournoy to see a Magistrate because it is part of the process. Tr. Vol. I, p. 60, lines 1-10. The rule enunciated in State v. DeWeese, 213 W. Va. 339, 582 S. E. 2d 786 (2003)

is that a statement obtained from the accused in violation of the prompt presentment rule cannot be introduced against the accused at trial. Syl Pt.1.

The crucial and determinative fact in DeWeese, as with Flournoy, was that he was not taken before a magistrate because the police wanted to obtain a statement from him. Unlike Deweese, Flournoy was subjected to arrest without warrant after an investigation lasting no more than two minutes. Probable cause must exist prior to the seizure of persons. U. S. Const. amend. IV; W. Va. Const. art. 3, section 6. W. Va. Code, section 62-1-5 is an elaboration of due process guarantees and its provisions are mandatory. “The disposition of persons accused of crime is prescribed by law, not by the caprice of executive and judicial authorities”. Rogers V. Albers, 208 W. Va. 473, 541 S. E. 2d 563 (2000).

Assuming that adequate probable cause existed to make an arrest, Flournoy still should have been presented to a magistrate. See Syl Pt. 2, State v. Humphrey, 177 W. Va. 264, 351 S. E.2d 613 (1986) and Syl Pt. 4, State v. Rush, 219 W. Va. 717, 639 S. E. 2d. 809 (2006). In the two most recent cases decided by this court, there were delays between confession and presentment. The court correctly held that those delays were not occasioned by the desire to get a confession because the confessions had been made already. State v. McCartney, 228 W. Va. 315, 719 E. E. 2d 785 (2011) and State v. Holcomb, 223 W. Va. 843, 679 S. E.2d 675 (2009). Flournoy does not complain about the delay between confession and presentment.

The reason for the delay could not be clearer. It was occasioned by the desire to get a confession. Flournoy had already been processed and photographed by the police well prior to 1:09 A. M. when the questioning began. An abuse of discretion occurred when the trial court allowed the jury to hear the confession.

II

INSANITY

The defense requested instructions on the matter of sanity. The court refused to so instruct the jury. Specifically, instruction No. 5 would have told the jury that:

There exists in the trial of an accused a presumption that the accused was sane at the time of the alleged commission of the alleged offense. If, however, any evidence introduced by the accused or the state fairly raises doubt about the issue of the accused's sanity at that time, the presumption of sanity ceases to exist and the state then has the burden to establish the sanity of the accused beyond a reasonable. If the whole proof upon the issue leaves the jury with a reasonable doubt as to the accused's sanity at that time, the jury must accord him the benefit of the doubt and acquit him. Tr. Vol. V., pp. 1404-05.

The defense also offered Instruction No. 6 as follows:

One of the issues to be determined by you in this case is whether or not the defendant was sane or insane at the time of the alleged offense was committed. A person is not responsible for criminal conduct if the time of such conduct as a result of mental disease or defect he lacks the capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. If you believe from the evidence beyond a reasonable doubt that the defendant committed all of the elements of the alleged offense, but have a reasonable doubt as to whether or not the

defendant, at the time of the commission of the act, was suffering from a mental disease or defect causing him to lack the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law, you should find him not guilty by reason of insanity. Tr. Vol. V., p. 1408.

A third instruction, No. 8, concerning insanity was also offered. It would have advised the jury concerning the disposition of the defendant if he were found not guilty by reason of insanity. Tr. Vol. V., p. 1412.

The standard of review for the refusal of the trial court to give an instruction is whether or not the court abused its discretion. State v. Guthrie, 194 W. Va. 657, 461 S. E.2d (1995), but the refusal of a jury instruction where the rejection is based upon insufficient evidence is entitled to plenary review. State v. LaRock, 196 W. Va. 294, 470 S. E. 2d 613 (1996).

The facts supporting Flournoys' insanity defense can be found on pages 10, 11 and 12 of this brief.

In State v. McCoy, 219 W. Va. 130, 632 S. E. 2d 70 (2006), the defense called two psychologists, one of whom testified that McCoy suffered from Post Traumatic Stress Disorder and that at the time of the shooting, McCoy was not in touch with reality. The trial court gave insanity instructions but refused to give self defense instructions on the grounds that the two defenses were not consistent. In this case, Dr. Miller, a forensic psychiatrist, accepted the diagnosis of Post Traumatic Stress Disorder made by the Veteran's Administration in

treating Flournoy. He opined that Flournoy was in a dis associative state when he shot West. Tr. Vol. III., p. 769. Two expert witnesses employed by the state disagreed with Miller. Credibility determinations are the province of the jury. McCoy, supra, head note 6. Flournoy was entitled to an instruction on any recognized defense when he presented any evidence supporting the defense regardless of the weakness or strength of that evidence. McCoy, supra, head note 7, citing State v. Headley, 210 W. Va. 524, 529, 558 S. E.2d 324, 329 (2001). In State v. Shingleton, 222 W. Va. 647, 671 S. E.2d 478 (2008), a later case distinguishable on the facts, this Court held that there was no evidence (emphasis added) to support giving a self defense instruction and so it was proper for the trial court to refuse it. The defendant Shingleton, seemingly motivated by homophobia, badly beat and robbed Ayers, a gay man, for merely touching the top of his leg. This Court concluded that “The evidence at trial, including photographs of Ayers taken in his apartment, reveals that Ayers sustained a brutal beating, rendering the proposition that the appellant was entitled to have the jury instructed upon a theory of self defense difficult to sustain”. State v. Shingleton, supra.

Flournoy presented evidence of insanity. The jury could have rejected his defense but he was entitled under the law to have his defense considered by the jury. The jury should have been instructed by the trial court and it was error for the court to refuse to instruct the jury and such error is not subject to a harmless error

analysis. Flournoy was entitled to a specific instruction on his theory of defense rather than an abstract or general one. State v. LaRock, 196 W. Va. 294, 470 S. E.2d 613 (1996).

III

NO MERCY DETERMINATION

The trial court provided no guidance to the jury concerning whether to give Flournoy mercy. W. Va. Code, Section 62-3-15 (1994), provides in part that:

...If the person indicted for murder is found by the jury guilty thereof, and if the jury find in their verdict that he or she is guilty of murder of the first degree, or if the person indicted for murder pleads guilty of 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 [Sections 62-12-1, et seq.], 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 not be eligible for parole until he or she has served fifteen years:

Juries in West Virginia have been given unfettered discretion to make such decisions, and it is error for the court to instruct a jury concerning that exercise. State v. Triplett, 187 W. Va. 760, 421 S. E.2d 511 (1992), State v. Miller, 178 W. Va. 618, 363 S. E.2d 504 (1987).

The requirements of due process ban cruel and unusual punishment.

Weems v. United States, 21 U. S. 349, 378-382, 30 S. Ct. 544, 553-555, 54 L. Ed 793 (1909). A death penalty inflicted on one defendant is unusual if it discriminates against him by reason of race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices. Quoting from Furman v. Georgia, 408 U. S. 238, 92 S. Ct. 2726, 33 L. Ed.2d 346 (1972). Any penalty, a fine, imprisonment or the death penalty can be unfairly or unjustly applied. The vice is not the penalty but the process by which it is inflicted. It is unfair to inflict unequal penalties on equally guilty parties, or on innocent parties, regardless of the penalty. Quoting from Furman, supra. In West Virginia, life without mercy is a parallel degree of punishment to the death penalty. State v. Finley, 219 W. Va. 747, 639 S. E.2d 839 (2007). The evil remedied by Furman, supra, and its progeny was to eliminate arbitrariness from death penalty decisions by requiring states to adopt statutory schemes establishing neutral criteria. The same sort of discretion now provided by W. Va. Code, Section 62-3-15, was once provided to juries in death penalty cases in West Virginia before abolition of that penalty in this state. Juries were given unfettered discretion to refuse mercy for a person convicted of a crime punishable by death. Pyles v. Boles, 148 W. Va. 465, 135 S. E.2d 692 (1964). Such a statutory scheme would not have survived post Furman, supra.

In West Virginia, juries have unfettered discretion to deny mercy for a person convicted for first degree murder. The legislature has failed to enact

guidelines to guarantee that a jury will not consider the race, religion, wealth, social position or class of a person subject to a life sentence. Consequently, a jury in West Virginia may act arbitrarily. The jury may subject equally guilty persons to unequal penalties for any impermissible reason or because the person is simply unpopular.

A statute that permits such a result is unconstitutional. Furman v. Georgia, 408 U. S. 238, 92 S. Ct. 2726, 33 L. Ed.2d 346 (1972).

IV.

USE OF NOTES

The trial court did not instruct the jury on the use of notes and the court permitted the jury to take the notes into the jury room for use during deliberations. The ultimate decision concerning jury note taking lies within the sound discretion of the trial court. State v. Triplett, 187 W. Va. 760, 412 S. E.2d 511 (1992). Note taking is allowed because it may be a good tool for refreshing recollection and may help focus the concentration of jurors on the proceeding. The jury must be instructed, though, to give precedence to each of their independent recollections rather than the notes; that a juror should not be influenced by another juror who has taken notes; that the jury should not allow themselves to be distracted from the proceedings by note taking; and, that the jurors should not

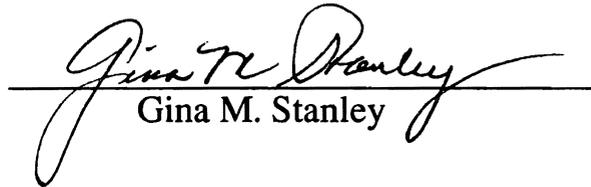
disclose the contents of their notes to anyone other than another juror. Triplett, supra. quoting United States v. MacLean, 578 F.2d 64 (3d Cir. 1978). The trial judge exercised the discretion provided to allow note taking and the use of notes during deliberations, but he failed to fulfill his duty to give proper instructions to the jury about the use of notes and note taking. His failure in this regard constitutes an abuse of that discretion.

CONCLUSION

Levon Flournoy was not presented to a magistrate after he was arrested because the police wanted to get his confession first. Under such circumstances the confession should not have been admitted as evidence. The trial court prevented Flournoy from getting his defense to the jury when the court refused his insanity instructions. Flournoy might have received mercy if the law allowed the jury to be properly instructed concerning what it should consider when deciding that matter. Flournoy may have received a verdict by less than all of the jurors if any of them surrendered their recollections to a juror who took notes or more notes. The effect was that Flournoy failed to received a fair trial. His conviction should be set aside and a new trial should be ordered.

CERTIFICATE

The undersigned certifies that she did deliver a copy of the brief and Volume I of the Appendix to Thomas W. Rodd, Assistant Attorney General, at his office located at 812 Quarrier Street, 6th Floor, Charleston, WV 25301, on the 25th day of April, 2012, the other five volumes of the Appendix having been previously delivered to him at the same address on Friday, March 23, 2012.


Gina M. Stanley