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Issue 5 *Issue 5, A Tribute to Franklin D. Cleckley: A Compendium of Essential Legal Principles From His Opinions as a Justice on the West Virginia Supreme Court of Appeals*

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Criminal Procedure

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> A witness should give responsive answers to questions of counsel, and answers that are not responsive may be stricken on motion of the examining party especially if the unresponsive answer contains inadmissible evidence. Unresponsive answers, or those that are responsive but broader than the question, should not be viewed as the responsibility of the questioner. On the other hand, a responsive answer, one that is reasonably within the scope of the question, even though prejudicial, should not be stricken as unresponsive.[89]

III. CRIMINAL PROCEDURE

A. Interrogating a Suspect

The decision in *State v. Farley*[90] confronted the issue of effectively invoking *Miranda* rights. Justice Cleckley held that "[t]o assert the Miranda right to terminate police interrogation, the words or conduct must be explicitly clear that the suspect wishes to terminate all questioning and not merely a desire not to comment on or answer a particular question."[91] *Farley* creates a new test for trial courts to use in determining whether a confession is valid. In overruling precedent, Justice Cleckley wrote in *Farley* that

> [r]epresentations or promises made to a defendant by one in authority do not necessarily invalidate a subsequent confession. In determining the voluntariness of a confession, the trial court must assess the totality of all the surrounding circumstances. No one factor is determinative. To the extent that *State v. Parsons* is inconsistent with this standard, it is overruled.[92]

In *State v. Bradshaw*,[93] Justice Cleckley further refined the focus trial courts must have in evaluating a confession. *Bradshaw* held that "[w]hen evaluating the voluntariness of a confession, a determination must be made as to whether the

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89 *Id.* at Syl. Pt. 4.

90 452 S.E.2d 50 (W. Va. 1994).

91 *Id.* at Syl. Pt. 5.

92 *Id.* at Syl. Pt. 7 (citation omitted).

93 457 S.E.2d 456 (W. Va. 1995).

defendant knowingly and intelligently waived his constitutional rights and whether the confession was the product of an essentially free and unconstrained choice by its maker."[94]

Bradshaw also addressed invocation of *Miranda* rights outside the context of custodial interrogation. The opinion initially held, "[t]o the extent that any of our prior cases could be read to allow a defendant to invoke his *Miranda* rights outside the context of custodial interrogation, the decisions are no longer of precedential value."[95] Justice Cleckley went on to hold that "[w]here police have given *Miranda* warnings outside the context of custodial interrogation, these warnings must be repeated once custodial interrogation begins. Absent an effective waiver of these rights, interrogation must cease."[96]

In *State v. Potter*,[97] Justice Cleckley held that

> [a] defendant, in order to assert his or her right to counsel during a police interrogation, must make some affirmative indication that he or she desires to speak with an attorney or wishes to have counsel appointed. Absent such an affirmative showing by the defendant, the right to counsel is deemed waived.[98]

Potter also found that

> [w]hen a suspect willingly goes to the police station for questioning at the request of the investigating officer, and the suspect responds that he or she wishes to give a statement despite the officer's warnings regarding the severity of the allegations against the suspect, such statement is admissible as a voluntary confession, unless the suspect can show that he or she was in custody or that the statement was not voluntary.[99]

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94 *Id.* at Syl. Pt. 7.

95 *Id.* at Syl. Pt. 3.

96 *Id.* at Syl. Pt. 4.

97 478 S.E.2d 742 (W. Va. 1996).

98 *Id.* at Syl. Pt. 1.

99 *Id.* at Syl. Pt. 2.

B. Venue

In *State v. Derr*,[100] the issue of changing venue was addressed. The specific question involved a trial court's analysis of whether a change of venue is appropriate due to the prior media coverage of a case. Justice Cleckley ruled that "[o]ne of the inquiries on a motion for a change of venue should not be whether the community remembered or heard the facts of the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt or innocence of the defendant."[101]

C. Automobile Stop

In *State v. Stuart*,[102] the West Virginia Supreme Court of Appeals was concerned with the extent to which law enforcement agents would be permitted to make investigatory stops of automobiles. Justice Cleckley fashioned a reasonable suspicion standard. The opinion stated that "[p]olice officers may stop a vehicle to investigate if they have an articulable reasonable suspicion that the vehicle is subject to seizure or a person in the vehicle has committed, is committing, or is about to commit a crime. To the extent *State v. Meadows* holds otherwise, it is overruled."[103]

The opinion in *Stuart* also determined that "[a] police officer may rely upon an anonymous call if subsequent police work or other facts support its reliability and, thereby, it is sufficiently corroborated to justify the investigatory stop under the reasonable-suspicion standard."[104] Finally, Justice Cleckley advised trial courts that "[w]hen evaluating whether or not particular facts establish reasonable suspicion, one must examine the totality of the circumstances, which includes both the quantity and quality of the information known by the police."[105]

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100 451 S.E.2d 731 (W. Va. 1994).

101 *Id.* at Syl. Pt. 3.

102 452 S.E.2d 886 (W. Va. 1994).

103 *Id.* at Syl. Pt. 1 (citation omitted).

104 *Id.* at Syl. Pt. 4.

105 *Id.* at Syl. Pt. 2.

D. Jury Questions During Deliberation

A definitive statement on the procedure to be followed by trial courts in responding to questions propounded by juries during deliberations was set out in *State v. Allen*.[106] *State v. Allen* held, "[t]he proper method of responding to a written jury inquiry during the deliberations period in a criminal case, as we stated in *State v. Smith* is for the judge to reconvene the jury and to give further instructions, if necessary, in the presence of the defendant and counsel in the courtroom."[107]

E. Discovery Violations

The decision in *State ex rel. Rusen v. Hill*[108] set out principles to guide trial courts in addressing discovery violations. The opinion held that "[i]n exercising discretion pursuant to Rule 16(d)(2) of the West Virginia Rules of Criminal Procedure, a circuit court is not required to find actual prejudice to be justified in sanctioning a party for pretrial discovery violations. Prejudice may be presumed from repeated discovery violations necessitating numerous continuances and delays."[109] The decision stated, "[a] circuit court may choose dismissal for egregious and repeated violations where lesser sanctions such as a continuance would be disruptive to the administration of justice or where the lesser sanctions cannot provide the same degree of assurance that the prejudice to the defendant will be dissipated."[110]

F. Indictment

Justice Cleckley took the opportunity in *State v. Adams*[111] to loosen the rigid formality surrounding the altering of an indictment:

> To the extent that *State v. McGraw* stands for the proposition that "any" change to an indictment, whether it be form or substance,

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106 455 S.E.2d 541 (W. Va. 1994).

107 *Id.* at Syl. Pt. 3 (citation omitted).

108 454 S.E.2d 427 (W. Va. 1994).

109 *Id.* at Syl. Pt. 4.

110 *Id.* at Syl. Pt. 3.

111 456 S.E.2d 4 (W. Va. 1995).

> requires resubmission to the grand jury for its approval, it is hereby expressly modified. An indictment may be amended by the circuit court, provided the amendment is not substantial, is sufficiently definite and certain, does not take the defendant by surprise, and any evidence the defendant had before the amendment is equally available after the amendment.[112]

Adams made clear that the wholesale altering of an indictment by a circuit court was not permitted. The opinion drew a bright line in holding that

> [a]ny substantial amendment, direct or indirect, of an indictment must be resubmitted to the grand jury. An 'amendment of form' which does not require resubmission of an indictment to the grand jury occurs when the defendant is not misled in any sense, is not subjected to any added burden of proof, and is not otherwise prejudiced.[113]

G. Plea Agreement

The case of *State v. Sugg*[114] provided Justice Cleckley the opportunity to clarify the type of discussion permitted by a trial court in reviewing a plea agreement. *State v. Sugg* said, "Rule 11 of the West Virginia Rules of Criminal Procedure requires that a judge explore a plea agreement once disclosed in open court; however, it does not license discussion of a hypothetical agreement that he may prefer."[115]

The focus in *State ex rel. Brewer v. Starcher*[116] involved several concerns when entering a plea agreement. Justice Cleckley noted at the outset that "[t]here is no absolute right under either the West Virginia or the United States Constitutions to plea bargain. Therefore, a circuit court does not have to accept every constitutionally valid guilty plea merely because a defendant wishes so to

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112 *Id.* at Syl. Pt. 2.

113 *Id.* at Syl. Pt. 3.

114 456 S.E.2d 469 (W. Va. 1995).

115 *Id.* at Syl. Pt. 8.

116 465 S.E.2d 185 (W. Va. 1995).

plead."[117] The opinion further held that

> [a]lthough the parties in criminal proceedings have broad discretion in negotiating the terms and conditions of a plea agreement, this discretion must be permissible under the West Virginia Rules of Criminal Procedure. Similarly, the decision whether to accept or reject a plea agreement is vested almost exclusively with the circuit court.[118]

Brewer also discussed the authority of the trial court in a Type C binding plea agreement:

> Once a circuit court unconditionally accepts on the record a plea agreement under Rule 11(e)(1)(C) of the West Virginia Rules of Criminal Procedure, the circuit court is without authority to vacate the plea and order reinstatement of the original charge. Furthermore, after a defendant is sentenced on the record in open court, unilateral modification of the sentencing decision by the circuit court is not an option contemplated within Rule 11(e)(1)(C).[119]

Justice Cleckley also stated that "[a] circuit court has no authority to vacate or modify, *sua sponte*, a validly accepted guilty plea under Rule 11(e)(1)(C) of the West Virginia Rules of Criminal Procedure because of subsequent events that do not impugn the validity of the original plea agreement."[120]

The opinion in *Brewer* also examined issues involving the allegations of a breach of a plea agreement. Justice Cleckley specifically addressed the issue of fraud in plea negotiations:

> If proven, a charge of fraud or misrepresentation poses a serious threat to the integrity of judicial proceedings. Therefore, the "fraud exception" is adopted as a necessary rule to enhance the administration of justice. This exception is aimed at penalizing

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117 *Id.* at Syl. Pt. 2.

118 *Id.* at Syl. Pt. 3.

119 *Id.* at Syl. Pt. 4.

120 *Id.* at Syl. Pt. 5.

> deceitful behavior engaged in during the negotiating of a plea agreement, in its presentation to the court, or in its execution by the defendant.[121]

The opinion stated that "[t]here are two possible remedies for a broken plea agreement--specific performance of the plea agreement or permitting the defendant to withdraw his plea. A major factor in choosing the appropriate remedy is the prejudice caused to the defendant."[122] *Brewer* concluded with a statement regarding the harmless error provision in Rule 11:

> As provided by Rule 11(h) of the West Virginia Rules of Criminal Procedure, a violation of Rule 11 does not necessarily require automatic reversal or vacatur. Rather, when a defendant claims that a circuit court failed to comply with Rule 11, a straightforward, two-step harmless error analysis must be conducted: (1) Did the circuit court in fact vary from the procedures required by Rule 11, and (2) if so, did such variance affect substantial rights of the defendant?[123]

H. Subpoena

The issue of an improperly issued subpoena was addressed in *State ex rel. Doe v. Troisi.*[124] Writing for the West Virginia Supreme Court of Appeals, Justice Cleckley held that "[i]f it is apparent that a subpoena was issued for improper reasons, a circuit court has the discretion and inherent authority to require a prosecutor to make a preliminary showing of relevance and the inability to obtain the disputed material from another source."[125]

I. Closing Arguments

Justice Cleckley discussed remarks by counsel during closing argument in

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121 *Id.* at Syl. Pt. 6.

122 *State ex rel. Brewer*, 465 S.E.2d at 189 Syl. Pt. 8.

123 *Id.* at Syl. Pt. 7.

124 459 S.E.2d 139 (W. Va. 1995).

125 *Id.* at Syl. Pt. 4.

State v. Guthrie.[126] The opinion held initially that "[o]utside the context of cases involving a recommendation of mercy, it is improper for either party to refer to the sentencing possibilities of the trial court should certain verdicts be found or to refer to the ability of the trial court to place a defendant on probation."[127] Justice Cleckley went on to hold,

> [t]he jury's sole function in a criminal case is to pass on whether a defendant is guilty as charged based on the evidence presented at trial and the law as given by the jury instructions. The applicable punishments for the lesser-included offenses are not elements of the crime; therefore, the question of what punishment a defendant could receive if convicted is not a proper matter for closing argument. To the extent the decision in *State v. Myers* is inconsistent with our holding, it is expressly overruled.[128]

Justice Cleckley addressed the issue of improper comments by a prosecutor during closing argument in *State v. Sugg.*[129] Justice Cleckley wrote that "[a] judgment of conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice."[130] The opinion identified factors to be considered in evaluating the harm done by improper prosecutorial comments:

> Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous

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126 461 S.E.2d 163 (W. Va. 1995).

127 *Id.* at Syl. Pt. 7.

128 *Id.* at Syl. Pt. 8 (citation omitted).

129 456 S.E.2d 469 (W. Va. 1995).

130 *Id.* at Syl. Pt. 5.

matters.[131]

J. Discovery

The case of *State v. Roy*[132] allowed Justice Cleckley to establish principles involving criminal discovery of confidential information. The opinion noted that "Rule 16(a)(1)(D) of the West Virginia Rules of Criminal Procedure allows discovery of all results or reports of physical or mental examinations which are material to the defense or are to be used as evidence in the prosecution's case-in-chief."[133] The opinion then reviewed policy considerations justifying the protection of certain information from general disclosure:

> The public policy consideration which underlies the statutes preventing disclosure of confidential information held by counselors, social workers, psychologists, and/or psychiatrists is to enhance communications and effective treatment and diagnosis by protecting the patient/client from the embarrassment and humiliation that might be caused by the disclosure of information imparted during the course of consultation. Considering the existence and strength of these protections established by the Legislature, the only issue left for a trial court is whether a criminal defendant is entitled to judicial inspection of confidentially protected communications *in camera* and thereafter to their release if the inspection indicates their relevancy.[134]

Roy concluded by listing the factors that must be established to allow an in camera inspection of confidential information:

> Before any *in camera* inspection of statutorily protected communications can be justified, a defendant must show both relevancy and a legitimate need for access to the communications. This preliminary showing is not met by bald and unilluminating allegations that the protected communications *could be* relevant or

131 *Id.* at Syl. Pt. 6.

132 460 S.E.2d 277 (W. Va. 1995).

133 *Id.* at Syl. Pt. 1.

134 *Id.* at Syl. Pt. 2.

> that the very circumstances of the communications indicate they are *likely* to be relevant or material to the case. Similarly, an assertion that inspection of the communications is needed only for a possible attack on credibility is also rejected. On the other hand, if a defendant can establish by credible evidence that the protected communications are likely to be useful to his defense, the trial judge should review the communications *in camera*.[135]

The issue of discovery was again addressed in *State v. Crabtree*.[136] In that opinion Justice Cleckley held,

> Rule 16(a)(1)(C) of the West Virginia Rules of Criminal Procedure requires that upon the request of the defendant the State shall permit the defendant to inspect tangible objects that are material to the preparation of the defendant's defense. The right of inspection under this rule includes the right to have the defendant's own expert examine the tangible evidence that the State contends was used or possessed by the defendant at the time of the commission of the crime.[137]

Crabtree further stated,

> [a] criminal defendant who desires to analyze an article or substance in the possession or control of the State under Rule 16 of the West Virginia Rules of Criminal Procedure should file a motion setting forth the circumstances of the proposed analysis, the identity of the expert who will conduct such analysis, and the expert's qualifications and scientific background. The trial court may then, in its discretion, provide for appropriate safeguards, including, where necessary, the performance of such tests at the State laboratory under the supervision of the State's analyst.[138]

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135 *Id.* at Syl. Pt. 3.

136 482 S.E.2d 605 (W. Va. 1996).

137 *Id.* at Syl. Pt. 7.

138 *Id.* at Syl. Pt. 8.

K. Search Warrant

The case of *State v. Lacy*[139] provided some discussion regarding search warrants:

> A search warrant must particularly describe the place to be searched and the things or persons to be seized. In determining whether a specific warrant meets the particularity requirement, a circuit court must inquire whether an executing officer reading the description in the warrant would reasonably know what items are to be seized. In circumstances where detailed particularity is impossible, generic language is permissible if it particularizes the types of items to be seized. When a warrant is the authority for the search, the executing officer must act within the confines of the warrant.[140]

The opinion cautioned that "[p]olice may not use an initially lawful search as a pretext and means to conduct a broad warrantless search."[141]

L. Jury Instructions

In *State v. Guthrie*,[142] the court ruled that

> [t]here should be only one standard of proof in criminal cases and that is proof beyond a reasonable doubt. Once a proper instruction is given advising the jury as to the State's heavy burden under the guilt beyond a reasonable doubt standard, an additional instruction on circumstantial evidence is no longer required even if the State relies wholly on circumstantial evidence.[143]

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139 468 S.E.2d 719 (W. Va. 1996).

140 *Id.* at Syl. Pt. 3.

141 *Id.* at Syl. Pt. 4.

142 461 S.E.2d 163 (W. Va. 1995).

143 *Id.* at Syl. Pt. 2.

In *State v. Miller*,[144] a specific type of jury instruction was addressed:

> In instructing a jury as to the inference of malice, a trial court must prohibit the jury from finding any inference of malice from the use of a weapon until the jury is satisfied that the defendant did in fact use a deadly weapon. If the jury believes, however, there was legal justification, excuse, or provocation, the inference of malice does not arise and malice must be established beyond a reasonable doubt independently without the aid of the inference. If requested by a defendant, the trial court must instruct the jury that the defendant has no obligation to offer evidence on the subject and the jury may not draw any inference from the defendant's silence.[145]

M. Selecting a Jury

In *State v. Phillips*[146] Justice Cleckley wrote about the use of peremptory strikes by a defendant to remove a juror that should have been removed for cause by the trial court. The opinion held,

> [t]he language of W. Va. Code, 62-3-3 (1949), grants a defendant the specific right to reserve his or her peremptory challenges until an unbiased jury panel is assembled. Consequently, if a defendant validly challenges a prospective juror for cause and the trial court fails to remove the juror, reversible error results even if a defendant subsequently uses his peremptory challenge to correct the trial court's error.[147]

Justice Cleckley identified the test for jury bias in *State v. Miller*:[148]

> The relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant. Even though a juror

144 476 S.E.2d 535 (W. Va. 1996).

145 *Id.* at Syl. Pt. 7.

146 461 S.E.2d 75 (W. Va. 1995).

147 *Id.* at Syl. Pt. 8.

148 476 S.E.2d 535 (W. Va. 1996).

> swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror's protestation of impartiality should not be credited if the other facts in the record indicate to the contrary.[149]

State v. Miller also stated that "[a]ctual bias can be shown either by a juror's own admission of bias or by proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed."[150] *Miller* concluded by holding,

> [t]he challenging party bears the burden of persuading the trial court that the juror is partial and subject to being excused for cause. An appellate court only should interfere with a trial court's discretionary ruling on a juror's qualification to serve because of bias only when it is left with a clear and definite impression that a prospective juror would be unable faithfully and impartially to apply the law.[151]

N. Warrantless Search of Premises

The case of *State v. Lacy*[152] set forth guidelines for a warrantless search of a premise:

> Law enforcement officials may interfere with an individual's Fourth Amendment interests with less than probable cause and without a warrant if the intrusion is only minimal and is justified for law enforcement purposes. To determine whether the intrusion complained of was minimal, a circuit court must examine separately the interests implicated when the police feel a search for weapons is necessary to keep the premises safe during the search and the privacy interests of the defendant to be free of an unreasonable search and seizure of his or her residence. Only when law enforcement officers face a circumstance, such as a need to

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149 *Id.* at Syl. Pt. 4.

150 *Id.* at Syl. Pt. 5.

151 *Id.* at Syl. Pt. 6.

152 468 S.E.2d 719 (W. Va. 1996).

> protect the safety of those on the premises, and a reasonable belief that links the sought after information with the perceived danger is it constitutional to conduct a limited search of private premises without a warrant.[153]

The opinion continued by holding,

> [n]either a showing of exigent circumstances nor probable cause is required to justify a protective sweep for weapons as long as a two-part test is satisfied: An officer must show there are specific articulable facts indicating danger and this suspicion of danger to the officer or others must be reasonable. If these two elements are satisfied, an officer is entitled to take protective precautions and search in a limited fashion for weapons.[154]

Justice Cleckley explained the focus of an inquiry into the reasonableness of a police officer's conduct:

> The existence of a reasonable belief should be analyzed from the perspective of the police officers at the scene; an inquiring court should not ask what the police could have done but whether they had, at the time, a reasonable belief that there was a need to act without a warrant.[155]

The opinion concluded with a statement on the meaning of protective search:

> A protective search is defined as a quick and limited search of premises for weapons once an officer has individualized suspicion that a dangerous weapon is present and poses a threat to the well-being of himself and others. This cursory visual inspection is limited to the area where the suspected weapon could be contained and must end once the weapon is found and secured.[156]

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153 *Id.* at Syl. Pt. 5.

154 *Id.* at Syl. Pt. 6.

155 *Id.* at Syl. Pt. 7.

156 *Id.* at Syl. Pt. 8.

O. Bifurcation of Trial and Sentence

Justice Cleckley broke tradition in *State v. LaRock*[157] when he held that "[a] trial court has discretionary authority to bifurcate a trial and sentencing in any case where a jury is required to make a finding as to mercy."[158] The opinion set out guidelines for bifurcation:

> The burden of persuasion is placed upon the shoulders of the party moving for bifurcation. A trial judge may insist on an explanation from the moving party as to why bifurcation is needed. If the explanation reveals that the integrity of the adversarial process which depends upon the truth-determining function of the trial process would be harmed in a unitary trial, it would be entirely consistent with a trial court's authority to grant the bifurcation motion.[159]

Justice Cleckley went further by stating,

> [a]lthough it virtually is impossible to outline all factors that should be considered by the trial court, the court should consider when a motion for bifurcation is made: (a) whether limiting instructions to the jury would be effective; (b) whether a party desires to introduce evidence solely for sentencing purposes but not on the merits; (c) whether evidence would be admissible on sentencing but would not be admissible on the merits or vice versa; (d) whether either party can demonstrate unfair prejudice or disadvantage by bifurcation; (e) whether a unitary trial would cause the parties to forego introducing relevant evidence for sentencing purposes; and (f) whether bifurcation unreasonably would lengthen the trial.[160]

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157 470 S.E.2d 613 (W. Va. 1996).

158 *Id.* at Syl. Pt. 4.

159 *Id.* at Syl. Pt. 5.

160 *Id.* at Syl. Pt. 6.

P. Retroactivity of Procedural Rule

In *State v. Blake*,[161] the specific issue of retroactivity relating to a new constitutional rule of criminal procedure was addressed:

> The criteria to be used in deciding the retroactivity of new constitutional rules of criminal procedure are: (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. Thus, a judicial decision in a criminal case is to be given prospective application only if: (a) It established a new principle of law; (b) its retroactive application would retard its operation; and (c) its retroactive application would produce inequitable results.[162]

IV. CRIMINAL LAW

A. First Degree Murder

First degree murder was thoroughly discussed in *State v. Guthrie*.[163] The focus of that case was the elements of premeditation and deliberation. As a general statement, Justice Cleckley held that "[a]lthough premeditation and deliberation are not measured by any particular period of time, there must be some period between the formation of the intent to kill and the actual killing, which indicates the killing is by prior calculation and design. This means there must be an opportunity for some reflection on the intention to kill after it is formed."[164] The opinion further elaborated,

> [i]n criminal cases where the State seeks a conviction of first degree murder based on premeditation and deliberation, a trial court should instruct the jury that murder in the first degree consists of an intentional, deliberate, and premeditated killing

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161 478 S.E.2d 550 (W. Va. 1996).

162 *Id.* at Syl. Pt. 5.

163 461 S.E.2d 163 (W. Va. 1995).

164 *Id.* at Syl. Pt. 5.