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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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Constitutional Law

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> [t]he first inquiry under the "plain error rule" codified in Rule 52(a) of the West Virginia Rules of Criminal Procedure is whether "error" in fact has been committed. Deviation from a rule of law is error unless it is waived. Waiver is the intentional relinquishment or abandonment of a known right. When there has been such a knowing waiver, there is no error and the inquiry as to the effect of the deviation from a rule of law need not be determined.[587]

G. *Cumulative Error Doctrine*

Application of the cumulative error doctrine in civil litigation was addressed in *Tennant v. Marion Health Care Foundation, Inc.*[588] The opinion held that "[t]he cumulative error doctrine may be applied in a civil case when it is apparent that justice requires a reversal of a judgment because the presence of several seemingly inconsequential errors has made any resulting judgment inherently unreliable."[589]

XXI. CONSTITUTIONAL LAW

A. *Free Speech Clause*

The case of *In re Hey*[590] provided Justice Cleckley with an opportunity to construe the constitutional right of free speech for judicial officials:

> A judge may not be disciplined consistent with the First Amendment to the United States Constitution or with Section 7 of Article III of the West Virginia Constitution for his remarks during a radio interview in which he discussed his own disciplinary proceeding, criticized a member of his investigative panel, and stated his intention to take some reactive and lawful measure against the panel member.[591]

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587 *Id.* at Syl. Pt. 6.

588 459 S.E.2d 374 (W. Va. 1995).

589 *Id.* at Syl. Pt. 8.

590 452 S.E.2d 24 (W. Va. 1994).

591 *Id.* at Syl. Pt. 4.

The decision in *Hey* went on to clarify the right of judicial officials to free speech and the right of the state to encroach upon that freedom. Justice Cleckley held that "[t]he State may accomplish its legitimate interests and restrain the public expression of its judges through narrowly tailored limitations where those interests outweigh the judges' free speech interests."[592]

Governmental infringement upon the right to run for political office was addressed in the context of the state constitution in *State ex rel. Billings v. City of Point Pleasant*.[593] The opinion initially ruled as a general matter that "[t]he West Virginia Constitution confers a fundamental right to run for public office, which the State cannot restrict unless the restriction is necessary to accomplish a legitimate and compelling governmental interest."[594] The opinion then held that

> [r]estrictions that limit an individual's ability to select and change his or her party affiliation implicate the speech and associational freedoms guaranteed by the First Amendment to the United States Constitution and by Sections 7 and 16 of Article III of the West Virginia Constitution. Such restrictions cannot be imposed on these rights unless the restrictions are necessary to accomplish a legitimate and compelling governmental interest and there is no less restrictive means of satisfying such interest.[595]

Justice Cleckley then applied the constitutional legitimate and compelling governmental interest test to the specific statute at issue in the case:

> The provision in W. Va. Code, 3-5-7(b)(6) (1991), which effectively disqualifies from running for political office individuals who change their political party affiliation within sixty days of filing their announcements of candidacy, is necessary to accomplish the compelling governmental interest in preserving the integrity of the political process, promoting party stability, and avoiding voter confusion. The provision, therefore, does not violate either the fundamental right of candidacy or the right to change

592 *Id.* at Syl. Pt. 2

593 460 S.E.2d 436 (W. Va. 1995).

594 *Id.* at Syl. Pt. 2.

595 *Id.* at Syl. Pt. 3.

political party affiliations.[596]

B. Due Process Clause

In *State ex rel. Roy Allen S. v. Stone*[597] it was succinctly held that "[i]n determining whether a law violates the Due Process Clause in Section 10 of Article III of the West Virginia Constitution, the first step is to determine whether the challenged provision implicates a liberty or property interest."[598] The decision next addressed the constitutional interest of an unwed biological father to his child:

> Although an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so. When an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the Due Process Clause in Section 10 of Article III of the West Virginia Constitution.[599]

The voluntariness of a defendant's confession was argued on due process grounds in *State v. Honaker*.[600] In ruling on this matter Justice Cleckley deemed it necessary to overrule precedent on a specific issue. The opinion held that "[p]olice involvement must be evident before a statement is considered involuntary under the West Virginia Due Process Clause. To the extent that *State v. Sanders*, 161 W. Va. 399, 242 S.E.2d 554 (1978), and *State v. Muegge*, 178 W. Va. 439, 360 S.E.2d 216 (1987), hold otherwise, they are expressly overruled."[601] The opinion clarified the limit of constitutional due process considerations in relation to police conduct and the peculiar characteristics of a defendant:

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596 *Id.* at Syl. Pt. 4.

597 474 S.E.2d 554 (W. Va. 1996).

598 *Id.* at Syl. Pt. 1.

599 *Id.* at Syl. Pt. 2.

600 454 S.E.2d 96 (W. Va. 1994).

601 *Id.* at Syl. Pt. 4.

> Police involvement is a prerequisite for finding a confession involuntary. Under the West Virginia Constitution, the voluntariness of a confession for due process purposes turns solely on the constitutional acceptability of the specific police conduct at issue. While the personal characteristics of a defendant may be considered in determining the admissibility of a confession under Rules 401 through 403 of the West Virginia Rules of Evidence, personal characteristics such as the mental condition or the subjective state of mind of a defendant by themselves and apart from their relation to official or police involvement are not significant in deciding the voluntariness question.[602]

Constitutional due process was an issue in the case of *Board of Education of County of Mercer v. Wirt*.[603] That case involved the question of a pre-termination hearing for a tenured educational employee. Justice Cleckley created a qualified right to such a pre-termination hearing:

> Under W. Va. Code, 18A-2-8 (1990), due process requires a pre-termination hearing of a tenured employee under W. Va. Code, 18A-2-6 (1989). It is not necessary for a pre-termination hearing to be a full adversarial evidentiary hearing; however, an employee is entitled to a written notice of the charges, an explanation of the evidence, and an opportunity to respond prior to a Board of Education's decision to terminate the employee. If an employee presents a danger to students or others at work and there is no reasonable way to abate the danger, a pre-termination hearing is not required.[604]

The case of *Abshire v. Cline*[605] examined constitutional due process in the context of a driver's license. The opinion made clear at the outset that "[a] driver's license is a property interest and such interest is entitled to protection under the Due Process Clause of the West Virginia Constitution."[606] The opinion then announced

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602 *Id.* at Syl. Pt. 3.

603 453 S.E.2d 402 (W. Va. 1994).

604 *Id.* at Syl. Pt. 3.

605 455 S.E.2d 549 (W. Va. 1995).

606 *Id.* at Syl. Pt. 1.

the constitutional limit placed upon revocation of a driver's license without a hearing taking place:

> On its face, a requirement by the Department of Motor Vehicles that a request for a continuance must be received at least five days prior to a scheduled hearing is not an unconstitutional or unreasonable rule. However, when a request is made and, by no fault of the licensee or his or her counsel, the request is not received by the Department of Motor Vehicles at least five days prior to the hearing, the rule may not be applied to deny the licensee the opportunity to demonstrate a "good cause" reason for continuing the hearing.[607]

In *State v. Guthrie*,[608] Justice Cleckley held that

> [a]n appellate court is obligated to see that the guarantee of a fair trial under Section 10 of Article III of the West Virginia Constitution is honored. Thus, only where there is a high probability that an error of due process proportion did not contribute to the criminal conviction will an appellate court affirm. High probability requires that an appellate court possess a sure conviction that the error did not prejudice the defendant.[609]

The case of *West Virginia Human Rights Commission v. Garretson*[610] called upon Justice Cleckley to address due process rights in the context of litigating a discrimination claim. The opinion held initially that

> [i]ndividuals who timely file discrimination complaints with the West Virginia Human Rights Commission have a property interest in their claims for relief, and their property interest cannot be extinguished except upon a finding on the merits of their claims or upon a showing of good cause related to the complainants' actions

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607 *Id.* at Syl. Pt. 2.

608 461 S.E.2d 163 (W. Va. 1995).

609 *Id.* at Syl. Pt. 11.

610 468 S.E.2d 733 (W. Va. 1996).

or failure to act.[611]

The opinion went on to hold that

> [d]ismissal of a Fair Housing Act claim, which had been timely and properly filed with the Human Rights Commission, because of that agency's failure to timely remove the case to circuit court as provided in W. Va. Code 5-11A-13(o)(1) (1992), would deprive the complainant of his property interest in the right to redress of discrimination and to a decision on the merits of his charge and would thus violate the Due Process Clause in Article III, § 10 of the West Virginia Constitution.[612]

In *Tennant v. Marion Health Care Foundation, Inc.*,[613] the West Virginia Supreme Court of Appeals considered the effect, on a trial, of an appearance of judicial impropriety:

> A claim of an appearance of impropriety does not rise to the level of a fundamental defect in due process requiring a new trial. Absent a showing of bias or prejudice, a new trial is unwarranted when (1) there has been a full trial on the merits, (2) there is no obvious error during the original proceedings, (3) the record shows it is extremely unlikely the prejudice could have affected the trial, and (4) the failure to disclose facts leading to a disqualification motion was inadvertent.[614]

C. *Article IV, Section 8*

The state officer salary provision found in Article IV, section 8 of the state constitution was the subject in *State ex rel. West Virginia Board of Education v. Gainer*.[615] The case addressed the issue of whether the legislature or the state board of education had authority to set the salary of the state superintendent of schools.

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611 *Id.* at Syl. Pt. 2.

612 *Id.* at Syl. Pt. 3.

613 459 S.E.2d 374 (W. Va. 1995).

614 *Id.* at Syl. Pt. 3.

615 452 S.E.2d 733 (W. Va. 1994).

In deciding that the authority rested with the legislature, Justice Cleckley wrote that "[t]he legislature, in cases not provided for in th[e] Constitution, shall prescribe, by general laws, the terms of office, powers, duties and compensation of all public officers and agents, and the manner in which they shall be elected, appointed and removed."[616]

D. Article VIII, Section 3

In *State ex rel. Frazier v. Meadows*,[617] a bright line was set out as to which organ of government had authority to resolve problems involving court personnel. The opinion held as a general matter:

> The Judicial Reorganization Amendment provides a hierarchy to be used in resolving administrative conflicts and problems. Under the Amendment, the Judiciary, not the executive branch, is vested with the authority to resolve any substantial, genuine, and irreconcilable administrative conflicts regarding court personnel.[618]

The opinion then addressed the specific issue of a court's bailiff. Justice Cleckley wrote that "[a] sheriff's right to initially select a court's bailiff may not obstruct a court's inherent power to control the administration of justice and conduct orderly judicial proceedings."[619]

E. Grand Jury Clause

In *State v. Adams*,[620] Justice Cleckley affirmed the constitutional guarantee that "[a] defendant has a right under the Grand Jury Clause of Section 4 of Article III of the West Virginia Constitution to be tried only on felony offenses for which a grand jury has returned an indictment."[621]

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616 *Id.* Syllabus.

617 454 S.E.2d 65 (W. Va. 1994).

618 *Id.* at Syl. Pt. 3.

619 *Id.* at Syl. Pt. 4.

620 456 S.E.2d 4 (W. Va. 1995).

621 *Id.* at Syl. Pt. 1.

F. Search and Seizure Clause

An investigatory stop of a suspect by police was the constitutional subject in *State v. Jones*.[622] Justice Cleckley elaborated upon this area:

> If the police merely question a suspect on the street without detaining him against his will, Section 6 of Article III of the West Virginia Constitution is not implicated and no justification for the officer's conduct need be shown. At the point where a reasonable person believes he is being detained and is not free to leave, then a stop has occurred and Section 6 of Article III is triggered, requiring that the officer have reasonable suspicion that criminal activity is afoot. If the nature and duration of the detention arise to the level of a full-scale arrest or its equivalent, probable cause must be shown. Thus, the police cannot seize an individual, take him involuntarily to a police station, and detain him for interrogation purposes while lacking probable cause to make an arrest.[623]

G. Confrontation Clause

In *State v. Mason*,[624] Justice Cleckley elaborated upon the constitutional right of a criminal defendant to cross-examine an adverse witness. The opinion began by holding generally that

> [t]he mission of the Confrontation Clause found in the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution is to advance a practical concern for the accuracy of the truth-determining process in criminal trials, and the touchstone is whether there has been a satisfactory basis for evaluating the truth of the prior statement. An essential purpose of the Confrontation Clause is to ensure an opportunity for cross-examination. In exercising this right, an accused may cross-examine a witness to reveal possible biases,

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622 456 S.E.2d 459 (W. Va. 1995).

623 *Id.* at Syl. Pt. 2.

624 460 S.E.2d 36 (W. Va. 1995).

prejudices, or motives.[625]

Mason next focused upon the admissibility of a third-party confession during the trial of a defendant. Justice Cleckley held that

> [a]bsent a showing of particularized guarantees of trustworthiness, the admission of a third-party confession implicating a defendant violates the Confrontation Clause found in the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution. The burden is squarely upon the prosecution to establish the challenged evidence is so trustworthy that adversarial testing would add little to its reliability. Furthermore, unless an affirmative reason arising from the circumstances in which the statement was made provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement.[626]

The decision in *Mason* qualified its position on hearsay statements. Justice Cleckley wrote that "[f]or purposes of the Confrontation Clause found in the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution, no independent inquiry into reliability is required when the evidence falls within a firmly rooted hearsay exception."[627] *Mason* then held that

> [e]ven if the hearsay does not fit within an established exception, its admissibility is not barred by the Confrontation Clause found in the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution if, considered apart from any corroborating evidence, there is a showing of particularized guarantees of trustworthiness. Consideration should be given to the totality of the circumstances that surround the making of the statement and that render the declarant particularly worthy of belief – so worthy of belief that the test of cross-examination would be a work of supererogation. The

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625 *Id.* at Syl. Pt. 1.

626 *Id.* at Syl. Pt. 9.

627 *Id.* at Syl. Pt. 6.

> guarantees of trustworthiness must be at least as reliable as evidence admitted under a firmly rooted hearsay exception. An affirmative reason, arising from the circumstances in which the statement was made, is necessary to rebut the presumption of unreliability and exclusion under the Confrontation Clause.[628]

The decision concluded by holding that

> [a] trial court specifically must examine whether the circumstances existing at the time a declarant gives a statement make the statement particularly worthy of belief so that the test of cross-examination would have been a work of supererogation. As no mechanical test prevails, the character of the guarantees of trustworthiness must be weighed.[629]

H. Jury Clause

In *State v. Phillips*,[630] Justice Cleckley narrowed the reach of a claim of denial of an impartial jury in a criminal proceeding. The opinion held,

> [a] trial court's failure to remove a biased juror from a jury panel does not violate a defendant's right to a trial by an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Section 14 of Article III of the West Virginia Constitution. In order to succeed in a claim that his or her constitutional right to an impartial jury was violated, a defendant must affirmatively show prejudice.[631]

I. Article XII, Section 1

Justice Cleckley articulated a constitutional rebuttable presumption of free public education in *Randolph County Board of Education v. Adams*.[632] The opinion

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628 *Id.* at Syl. Pt. 10.

629 *Id.* at Syl. Pt. 11.

630 461 S.E.2d 75 (W. Va. 1995).

631 *Id.* at Syl. Pt. 7.

632 467 S.E.2d 150 (W. Va. 1995).

found in no uncertain terms that

> [w]hatever items are deemed necessary to accomplish the goals of a school system and are in fact an integral fundamental part of the elementary and secondary education must be provided free of charge to all students in order to comply with the constitutional mandate of a free school system pursuant to Section 1 of Article XII of the West Virginia Constitution.[633]

It was then held that

> Section 1 of Article XII of the West Virginia Constitution creates a strong presumption in favor of making everything that is deemed a necessary component to public education cost-free. When a board of education seeks to charge parents for their children's participation in public education, the board bears a heavy burden in rebutting this constitutionally based presumption.[634]

J. Double Jeopardy Clause

The court said in *State v. Sears*[635] that "[t]he purpose of the Double Jeopardy Clause is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments."[636] Justice Cleckley also held that "[u]nder *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L. ED. 306 (1932), if two statutes contain identical elements of proof, the presumption is that double jeopardy principles have been violated unless there is a clear and definite statement of intent by the Legislature that cumulative punishment is permissible."[637]

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633 *Id.* at Syl. Pt. 7.

634 *Id.* at Syl. Pt. 3.

635 468 S.E.2d 324 (W. Va. 1996).

636 *Id.* at Syl. Pt. 3.

637 *Id.* at Syl. Pt. 5.

K. Article XIV, Section 2

Justice Cleckley addressed the issue of properly amending the state constitution in *State ex rel. Cooper v. Caperton*:[638]

> The procedures set forth in Section 2 of Article XIV of the West Virginia Constitution are designed to achieve two goals: (1) to ensure, through the endorsement of a legislative supermajority and the support of a majority of those voting in a statewide referendum, that constitutional amendments reflect a true and broad based political consensus; and (2) to guarantee that such a referendum may be held only after the Legislature has taken steps to inform the electorate fully and accurately about the proposed amendment.[639]

The opinion then set out the general requirements for bringing about an amendment to the state constitution:

> No amendment to the West Virginia Constitution can be effected without: (1) the duly recorded concurrence of two-thirds of the members in each house; (2) the submission of the proposed amendment to the people; (3) the amendment's ratification by a majority of those voting in a statewide referendum; (4) the fulfillment of the legislative duty to inform the people about the proposed amendment through at least substantial compliance with the directives of Section 2 of Article XIV of the West Virginia Constitution and in a manner sufficient to permit the voters to make up their minds; and (5) an absence of evidence that the State's voter education mislead or confused the voters if not in strict compliance with Article XIV.[640]

The decision then addressed the specific issue of publication requirements in bringing about an amendment to the state constitution. "Section 2 of Article XIV of the West Virginia Constitution requires the Legislature to cause the full text of a proposed amendment to be published in a newspaper in each of the State's counties having a newspaper and any departures from that requirement shall be

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638 470 S.E.2d 162 (W. Va. 1996).

639 *Id.* at Syl. Pt. 3.

640 *Id.* at Syl. Pt. 4.

strictly reviewed."[641] The opinion concluded that

> [w]hen the State fails to publish the full text of a proposed amendment in a newspaper in each county but instead publishes a summary of the amendment, the results of a referendum on the amendment will not be set aside if: (1) the summary fully, fairly, and accurately describes the amendment; (2) the summary is, in fact, more understandable than the actual text of the amendment; (3) the summary was adopted by the Legislature; (4) there was no probative evidence that the summary mislead voters or reasonably could be read to have had a misleading effect; and (5) there was no probative evidence that publication of the full text of the amendment would have made any difference in the outcome of the referendum.[642]

XXII. CONCLUSION

As a dedicated member of the West Virginia Supreme Court of Appeals, Justice Cleckley enriched the jurisprudence of our state. This article has attempted to honor him for the vision he brought to the court. The task that now confronts the Bar and Judiciary of our state, is that of seizing Justice Cleckley's vision as we litigate into the twenty-first century. Thank you, dear friend.

641 *Id.* at Syl. Pt. 6.

642 *Id.* at Syl. Pt. 5.