Md. Court of Appeals might reconsider ’05 felony-murder decision

By: Steve Lash Daily Record Legal Affairs Writer May 26, 2016

ANNAPOLIS — Maryland’s top court might reconsider its controversial 2005 decision permitting a first-degree assault to be a predicate offense for second-degree felony murder if the victim dies.

Court of Appeals Chief Judge Mary Ellen Barbera has asked lawyers to reargue a case to determine if the judges should overturn a controversial 11-year-old opinion in a criminal law case. (Maximilian Franz/The Daily Record)

On its own motion, the Court of Appeals this week ordered attorneys for the state and an accused killer to reargue a case heard earlier this year but this time address whether the court should reconsider its 11-year-old ruling in *Roary v. State*.

Neither Assistant Maryland Attorney General Daniel J. Jawor nor John N. Sharifi, a criminal-defense attorney, had urged the high court to reassess the Roary decision during their argument in January.

That argument specifically addressed whether Tyshon Leteek Jones’ constitutional right against being placed on trial twice for the same crime would be violated if he is tried for second-degree felony murder after the jury failed to reach a verdict on the predicate offense of first-degree assault.

A Montgomery County Circuit Court judge had answered no but the intermediate Court of Special Appeals said the defendant’s right against double jeopardy would be violated, prompting the state to seek review by the high court.

In *Roary*, the Court of Appeals held 4-3 that a felonious, first-degree assault – one “dangerous to human life” – can lead to a charge of second-degree felony murder if the victim dies regardless of whether the defendant delivered the deadly blow. The dissenting judges voiced concern that “an accomplice who may not have inflicted the harm personally, had no knowledge that the

ultimate perpetrator had a deadly weapon, and had no intent to commit murder" could nevertheless be convicted of murder.

Clayton Greene Jr., who wrote the majority opinion in *Roary*, is the only member of the Court of Appeals from the opinion who is still an active judge on the high court.

Byron L. Warnken, author of a treatise on Maryland criminal procedure, called it "legitimate" for the high court to use the Jones' case to reconsider its "very close decision" in *Roary*, as both cases address the application of first-degree assault to second-degree felony murder.

"There is nothing wrong with the court, on its own motion, to address what is germane," said Warnken, a University of Baltimore School of Law professor. "I think they have selected the right case to re-examine where *Roary* took us."

Warnken added he is not surprised that the court's order came four months after the judges heard arguments in Jones' case.

"The more they talked about it they got into these issues, which are legitimate issues," Warnken said.

Double Jeopardy Clause

Jones was among five men accused in the beating, robbery and shooting death of Julian Kelly shortly before midnight on Aug. 20, 2010, in Montgomery County. Specifically, he was charged with first-degree murder, second-degree murder with intent to cause grievous bodily injury, armed robbery, robbery and use of a handgun in a crime of violence.

The circuit court jury was unable to reach a verdict on the handgun charge, a first-degree assault, but acquitted Jones on all other charges. The state moved for a retrial on the handgun charge, as well as moving forward with a charge of second-degree felony murder, which Judge David A. Boynton granted.

But the Court of Special Appeals reversed in a reported opinion in April 2015, saying Jones' acquittal of second-degree murder with intent to cause grievous bodily injury prevents him from being tried for second-degree felony under the Double Jeopardy Clause – a conclusion the state has challenged and which has led the high court to perhaps reconsider its *Roary* decision.

In its order, the Court of Appeals gave the state until July 5 and the defense until Aug. 4 to submit their respective positions on whether the court should reconsider its holding in *Roary*. The high court has scheduled arguments for Sept. 9.

The Office of Maryland Attorney General Brian E. Frosh and Sharifi, Jones' attorney, declined to comment on the court's order as the case remains pending.

Sharifi is a Rockville solo practitioner.

The Court of Appeals is expected to render its decision by Aug. 31, 2017 in the case, *State of Maryland v. Tyshon Leteek Jones*, No. 52 September Term 2015.