

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: DECEMBER 22, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2005-SC-0493-OA

DATE 1-12-06 EIA Grant, D.C.

MATTHEW ISERAL

PETITIONER

V.

APPEAL FROM McCREARY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
00-CR-00038

HON. JERRY D. WINCHESTER,
McCREARY CIRCUIT COURT

RESPONDENT

AND

COMMONWEALTH OF KENTUCKY

REAL PARTY IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Petitioner, Matthew Iseral, petitions this Court for a writ to prohibit the Honorable Jerry D. Winchester from submitting the death penalty as a punishment at his resentencing hearing in the McCreary Circuit Court. For the reasons set forth herein, we deny Petitioner's petition.

A McCreary Circuit Court jury found Petitioner guilty of murder and first-degree rape. Although the Commonwealth sought imposition of the death penalty, the jury recommended a fifty-year sentence for the murder and twenty years for the rape. The trial court followed the jury's recommendation and entered judgment of concurrent

sentences totaling fifty-five years. This Court affirmed Petitioner's convictions, but remanded for a new sentencing phase because the trial judge made prejudicial comments to the jury during penalty deliberations. 2001-SC-0602-MR.

In Petitioner's second sentencing hearing, the Commonwealth announced its intention to seek the death penalty. Alleging constitutional double jeopardy protection, Petitioner moved the trial court to preclude the death penalty at the second proceeding. The McCreary Circuit Court denied Petitioner's motion, citing this Court's decision in Commonwealth v. Eldred, 973 S.W.2d 43 (Ky. 1998). Iseral now petitions this Court for a writ prohibiting enforcement of the trial court's order.

It is a long standing rule in Kentucky that a writ of prohibition "is an 'extraordinary remedy' that Kentucky courts 'have always been cautious and conservative both in entertaining petitions for and in granting such relief.'" Newell Enterprises, Inc. v. Bowling, 158 S.W.3d 750, 754 (Ky. 2005) (quoting Bender v. Eaton, 343 S.W.2d 799, 800 (Ky. 1961)). This Court has stated that "double jeopardy is an appropriate subject for a writ of prohibition, [but] it is not mandatory that it be addressed in that context." St. Clair v. Roark, 10 S.W.3d 482, 485 (Ky. 2000). St. Clair further held,

The court in which the petition is filed may, in its discretion, address the merits of the issue within the context of the petition for the writ, or may decline to do so on grounds that there is an adequate remedy by appeal. Neither approach is mandatory and the exercise of discretion may well depend on the significance of the issue as framed by the facts of the particular case.

Id.

We choose to address the merits of the petition because the issue is easily disposed. Petitioner argues that this Court should overrule Eldred in light of recent United States Supreme Court decisions in Apprendi v. New Jersey, 530 U.S. 466, 120

S.Ct. 2348, 147 L.Ed.2d 435 (2000); Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); and Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). We disagree.

In Salinas v. Payne, 169 S.W.3d 536, 539 (Ky. 2005), this Court recently held that Apprendi and its progeny do not overrule Eldred. Salinas stated, “[a]n ‘implied acquittal’ of the death penalty occurs only where the jury or reviewing court affirmatively finds that the Commonwealth has failed to prove the *existence* of an aggravating circumstance.” Id. (emphasis in original).

In the case at bar, neither the jury nor this Court found that the Commonwealth failed to meet its burden. The verdict forms only required an affirmative finding of aggravating circumstances for a death sentence, life imprisonment without parole, or life imprisonment without possibility of parole for 25 years. KRS 532.025(3). The jury had other penalties to choose from that did not require an affirmative finding of an aggravating factor. As the trial court found in its order, the jury was not required to make an independent finding of aggravating circumstances and then select a penalty. Accordingly, it cannot be presumed as a matter of law that the Commonwealth failed to prove the existence of an aggravating factor in this case. Consequently, Petitioner does not face the risk of double jeopardy.

We find the trial court properly denied Iseral's motion to preclude the death penalty. The Commonwealth is not precluded from again seeking the death penalty at Petitioner's resentencing hearing.

The order of the McCreary Circuit Court is affirmed.

All concur.

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