THE CAPITOL LETTER

A Publication of Public Defender Services
Criminal Law Research Center

Volume 3, Issue 5
Nov/Dec 2015

From the Executive Director……

BITS and PIECES. The following stream flows from my consciousness:

(1) I apologize for the length of the newsletter. However, Public Defender Services is statutorily mandated to "prepare, supplement and disseminate indices and digests of the West Virginia supreme court of appeals." W. Va. Code §29A-21-7(a)(4). The Supreme Court now prepares its own digests. However, I believe that a paragraph outlining a holding or the mere recitation of syllabus points provides no instruction or guidance for an attorney. Accordingly, a summary of the case is necessary. With the advent of memorandum decisions and the declaration that decisions will be issued in every appeal, the summary of the decisions becomes labor intensive. So, necessity dictates the length if meaningful summaries are provided. The newsletter is sustained reading, therefore, and not just a momentary distraction.

(2) The West Virginia Indigent Defense Annual Conference will be held on the dates of June 23, 2016, and June 24, 2016. Nationally renowned speakers have been secured. The conference promises to be informative, entertaining, and an inexpensive means of obtaining continuing legal education credits.

(3) A legislative wind-up will be published by the month's end.

(4) The Indigent Defense Commission is considering the issue of an increase in the rates of compensation for panel attorneys and is further considering the certification requirements for panel attorneys and public defenders.

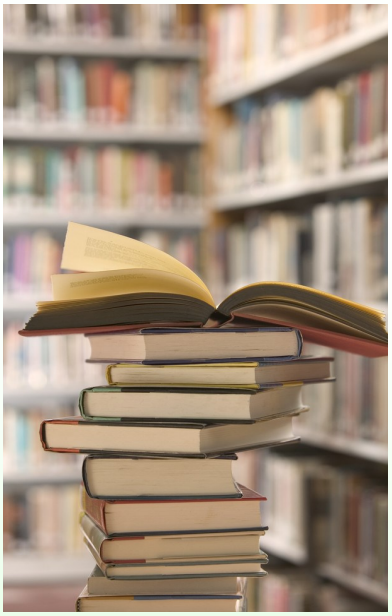
(5) Changes to the agency's online voucher preparation program are being tested. When implemented, attorneys will not enter the time in tenths of an hour, but, instead, will enter the time period for performance of the services and the system will calculate the tenths of an hour entry. Attorneys will be able to generate daily reports of all time entered. The agency will be able to review vouchers more meaningfully when seemingly excessive hours are reported. Some guidelines will have to be revised to accommodate this method of entering time.

(6) Kudos Korner is a new feature of the newsletter intended to shine the light on notable achievements of panel attorneys and public defenders.

AADvice: ***AADvice is a regular feature representing contributions from the legal counsel comprising the agency's Appellate Advocacy Division.***

Confidential informants often play a key role in drug prosecutions because they are direct participants in the alleged crime. However, informants often have criminal records and motives for cooperating with the State that draw the believability and reliability of their testimony into question. The Sixth Amendment requires defense counsel to subject informants and the State's case in general to "the crucible of meaningful adversarial testing" in order to provide effective assistance of counsel. *U.S. v. Cronic,* 466 U.S. 648, 656-57, 104 S.Ct. 2039, 2046-47 (1984); U.S. Const., Amend. VI. Adversarial testing is primarily accomplished by cross-examination, which should expose an informant's "biases, prejudices, and ulterior motives as they may relate directly to issues or personalities in the case at hand." *Davis v. Alaska,* 415 U.S. 308, 315-17, 94 S.Ct. 1105, 1110 (1974). Although defense counsel in drug cases are constitutionally required to effectively cross-examine informants, it is impossible to adequately prepare for a cross-examination if an informant's identity and related impeachment material is withheld by the State.

Generally, there is a common law privilege accorded to the government against the disclosure of an informant's identity. Syllabus Point 1, *State v. Haverty,* 165 W.Va. 164, 267 S.E.2d 727 (1980). Despite this privilege, disclosure may be required "[w]here the informant directly participates in the crime, or is a material witness to it … particularly where, in a drug-related crime, he is the only witness to the transaction other than the defendant and the buyer." *Id.;* Syllabus Point 5, *State v. Walls,* 170 W.Va. 419, 294 S.E.2d 272 (1982). When there is a dispute regarding the disclosure of an informant's identity, trial courts may allow the State to withhold the identity of an informant, but only if the State files a motion for protective order and the court balances the interests of the parties. W.Va.R.Cr.P. Rule 16(d)(1); Syllabus Point 3, *State v. Tamez,* 169 W.Va. 382, 290 S.E.2d 14 (1982) ("The trial court shall balance the need of the State for non-disclosure in the promotion of law enforcement with the consequences of non-disclosure upon the defendant's ability to receive a fair trial.").



Absent a motion for protective order seeking non-disclosure of an informant's identity and an order granting the same, it is improper for the State to refuse to disclose the identity of an informant. W.Va.R.Cr.P. Rule 16(d)(1); Syllabus Point 3, *State v. Tamez; State ex rel. State v. Alsop,* 227 W.Va. 276, 706 S.E.2d 470 (2009) (per curiam) (State improperly withheld informant's identity because it did not file a motion for protective order and did not ask the trial court to conduct the *Tamez* balancing test). The procedures for a protective order application are clearly stated in Rule 16(d)(1), and the State cannot refuse to disclose an informant's identity without an individual application *in each case* that explains the reasons that informant identity should be withheld. Further, the State must disclose an informant's identity and impeachment information, e.g., his or her criminal record and compensation for cooperation, prior to entry of a guilty plea. Syllabus Point 4, *Buffey v. Ballard,* No. 14-0642, 2015 WL 7103326 (W.Va. Nov. 10, 2015); *Brady v, Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963).

AADvice #2: ***Does a divergence exist between the State's Supreme Court and the Fourth Circuit Court of Appeals on the issue of an overnight guest's reasonable expectation of privacy?***

Congratulations to the Federal Public Defender [FPD] for the Southern District of West Virginia for winning a Fourth Amendment case in the United States Court of Appeals for the Fourth Circuit. *See U.S. v. Kenneth Rush,* No. 14-4695, 2015 WL 9269763 (4th Cir. Dec. 21, 2015). Attorneys from our Appellate Division assisted with the FPD's preparation for oral arguments by acting as justices in a moot court conducted at the Robert C. Byrd Courthouse in Charleston.

With respect to the case, police became involved when Marquita Wills called the Charleston Metropolitan Drug Enforcement Network Team (MDENT) to request that they remove the defendant Rush from her apartment. Wills suspected that Rush, who had been staying with her for the previous two nights, was dealing drugs from her apartment. Wills signed a consent to search the

apartment and further indicated that she was afraid of Rush because his family had a history of violence, but she did not indicate that he had committed any crimes against her or threatened her. Wills did not indicate that she had asked Rush to leave the apartment. Police immediately went to Wills' apartment, opened the door with the key, and entered the residence where they found Rush. Rush inquired why police were in the apartment and Rush was informed that they had a warrant to search the apartment, even though that was not true. Sergeant William Winkler testified that he lied about having a search warrant to protect Ms. Wills, but the Fourth Circuit Court of Appeals found that this lie unlawfully impaired Rush's right to object to the search under the Fourth Amendment.

Notably, the U.S. Attorney never argued that Rush had no expectation of privacy in the apartment and thus had no standing to challenge the illegal search. Fourth Amendment jurisprudence is clear that, as an invited overnight guest, Rush had an objectively reasonable expectation of privacy in the apartment protecting him against unreasonable governmental intrusion. *See Minnesota v. Olson,* 495 U.S. 91 (1990) (status as an overnight guest alone justifies a reasonable expectation of privacy). Moreover, Rush was never notified that Wills no longer wanted him in the apartment, so he had a reasonable expectation of privacy when Government agents entered the apartment. *See U.S. v. McCarthy,* 77 F.3d 522, 535 (1st Cir. 1996) (guest's expectation of privacy became illegitimate when host revoked invitation). It was conceded, therefore, that Rush had standing to object to the search, but Rush had not chance to object due to the lie about the existence of a search warrant.

On the other hand, the Supreme Court of Appeals of West Virginia has allowed the fruits of an illegal search to be admitted into evidence in very similar circumstances. The State's Supreme Court has ruled, recently, that, under the Fourth Amendment, "unwelcome" overnight guests do not have standing to challenge illegal searches. Syllabus Point 4, *State v. Dorsey,* 234 W.Va. 15 (2014), *cert. denied,* 135 S.Ct. 1004 (2015). This is the rule of *Dorsey* even if the guest does not have actual notice that his invitation has been rescinded. Under *Dorsey,* a guest may be found to have overstayed his welcome without any objective facts proving revocation of the invitation other than a co-occupant's testimony in circumstances in which the testimony might be self-serving.

Dorsey and *Rush* both involve hosts that decided that their overnight guests were unwelcome. In both cases, neither guest was aware that they had become unwelcome until police arrived at their door. Since objectivity is supposed to control a court's determination of the reasonableness of an expectation of privacy, the better rule is that which is followed by Federal Circuit Courts of Appeal across the nation and by the parties in *Rush:* once a host grants a guest permission to stay, that permission extends until the guest is actually notified that he is no longer welcome. A divergence seemingly exists between the state court's and the federal court's application of the Fourth Amendment protections in these circumstances.

AADvice #3: *Amendments to the Rules of Appellate Procedure.*

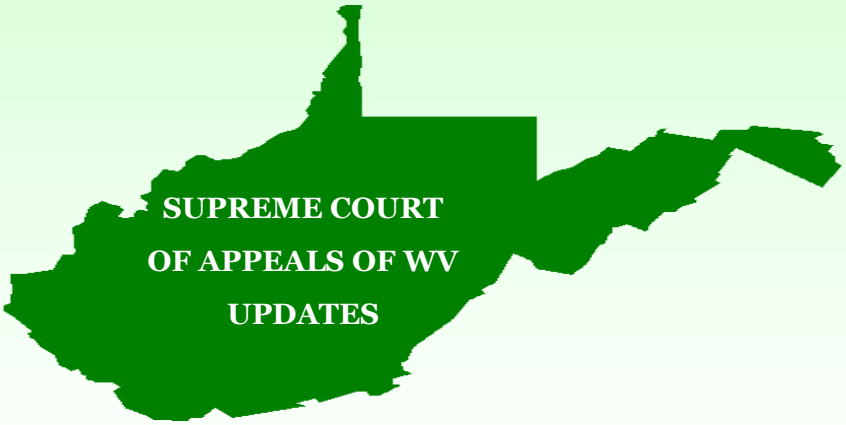
Effective January 1, 2016, the West Virginia Supreme Court substantively amended the Rules of Appellate Procedure in three areas. First, amendments to Rules 3, 10, and Appendix A of the notice of intent to appeal address the dilemma court-appointed attorneys face when a client wishes to file an apparently frivolous appeal. The new procedure for filing potentially frivolous appeals is intended to replace the method described in *Anders v. California,* 386 U.S. 738 (1967). Second, Rule 4 has been amended to prohibit *pro se* filings by represented parties, except under extraordinary circumstances as described in Rule 10. Third, Rule 11 now requires all abuse and neglect appeals to have transcripts included as a part of the appendix record.

AADvice #4: *We are ready to assist you with your Appeal.*

The Appellate Advocacy Division of Public Defender Services ("AAD") stands ready to assist panel attorneys and public defenders in their preparation of matters for appeal. From pretrial consultation to legal research to brainstorming sessions to moot courts, the AAD will gladly take your call and discuss with you the assistance you might need to advance the appeal of a compelling legal issue. The following correspondence was received from an attorney for whom the AAD held a brainstorming session in advance of a recent appellate argument: "I am writing to thank you and your staff for taking the time to work with me in preparation for an appellate argument before the Supreme Court of Appeals of West Virginia. Though I thought my brief addressed the errors that the State alleged, your staff brought out additional points that my brief did not necessarily cover. Additionally, you and your staff

provided me with insight on other lines of questioning that the Court may delve into, which it did. I am greatly appreciative of the time you and your staff took to work with me. Though I was unable to return to participate in an actual moot court session with you and your staff, I feel the insight that you folks provided me was greatly helpful in my argument today."

If you need assistance, do not hesitate to ask. The AAD, whose director is Crystal L. Walden, can be reached by email at Crystal.L.Walden@wv.gov or by phone at (304) 558-3905.



IT IS SO ORDERED ….

In *Buffey v. Ballard,* 782 S.E.2d 204 (W. Va. 2015), the defendant had been imprisoned as a result of 2002 guilty plea to two counts of sexual assault and one count of robbery. The matter was before the Supreme Court of Appeals of West Virginia on appeal from the lower court's denial of a petition for writ of habeas corpus. The case generated substantial national attention, including editorials from the New York Times and also resulted in the filing of a brief by *amici curiae*, consisting of former federal and state prosecutors. Justice Workman wrote the majority's opinion.

The circumstances arose from the invasion of the home of an eighty-three year old widow and mother of a local police officer that netted the robber nine dollars and ended in the sexual assault of the widow. Subsequently, the victim described the assailant as a "while male 'in the 25 [-year-old] area.'"

Subsequently, Buffey, a nineteen year old, was arrested for "three non-violent, breaking and entering offenses at businesses" in the downtown area. During the resulting interrogation, questions were asked and answered about the robbery and sexual assault. Buffey admitted breaking into an old lady's house, but the details he provided were entirely inconsistent with the victim's recounting of the crime. Buffey further denied any assault. And Buffey recanted his story as the interrogation progressed. Indeed, Buffey later informed his counsel that he had an alibi.

The timeline becomes significant. On January 22, 2002, the State Police Lab begins testing the DNA material from the rape kit. On January 29, 2002, Buffey's counsel compels the production of information related to the sexual assault. On January 30, 2002, a plea agreement was presented to Buffey which had a time limit. On February 6, 2002, Buffey signed the plea agreement. By February 8, 2002, the Lab analyst determines the DNA material does not match Buffey's DNA. On February 11, 2002, Buffey gave an allocution in which he admitted to the charges. On April 5, 2002, the Lab concludes from the retesting that Buffey "is excluded as the donor of the seminal fluid…." On April 29, 2002, the pre-sentence investigation was completed and a notation is made that Buffey admitted to the burglaries but denied the sexual assault. On May 21, 2002, the plea hearing is resumed and Buffey is sentenced. On July 12, 2002, the lab report is mailed to the police department at which the victim's son was employed.

At no time were the results of the lab testing divulged to Buffey or his counsel. Indeed, Buffey did not yet know the results when he filed, *pro se*, his first petition for a writ of habeas corpus proclaiming his innocence. The subsequently appointed counsel's investigation resulted in the discovery that the DNA testing report had been issued in April, 2002, and the petition was amended to include this fact.

The resulting omnibus hearing resulted in testimony that Buffey could not be "100%" excluded as a "potential, minor contributor" to the seminal fluids without the identification and genetic material of the primary contributor. The petition was denied and the Supreme Court denied the petition for an appeal.

Seven years later, Buffey's most recent counsel obtained additional testing under the provisions of W. Va. Code §15-2B-14, enacted in 2014, and obtained new details in the reporting "by employing newly-developed testing methods." This testing concluded that Buffey was neither a primary or secondary source of the seminal fluid. Moreover, submission of the results into the national database identified the source as a current inmate in a West Virginia prison who at the time of the commission of the crime was "sixteen years old …, lived a few blocks from …[the victim], had a history of sexual violence, and had been …[the victim's] paper boy."

Nonetheless, the second petition for a writ of habeas corpus was denied. Testimony existed that Buffey and the actual source of the DNA knew each other both socially and engaged in joint criminal ventures. The circuit court reasoned that the DNA evidence did not "unequivocally determine whether or not [Buffey] was actually present [at the crime scene] and a participant in the various activities giving rise to the … criminal charges." The lower court also disregarded the claim that the prosecution knew about the initial reports as early as February, 2002, during the initial testing, yet never disclosed the results.

Notably, Buffey pled guilty and his allocution admitted the commission of the crimes, and, in return, charges of burglaries of various businesses were dismissed even though Buffey had effectively admitted the charges. The editor presumes the fact that Buffey could have been convicted of these charges and sentenced to a similar period as the current sentence might have influenced the lower court's consideration of the matter.

The Supreme Court of Appeals opined, however, that the failure of the state to disclose the potentially exculpatory evidence mandated relief for Buffey. Accordingly, the other grounds for relief founded on ineffective assistance of counsel and an actual claim of innocence were not determined.

Essentially, the Supreme Court found a violation of *Brady v. Maryland,* 373 U.S. 83 (1963). The compelling issue to be decided is whether *Brady*, directed toward trial behavior, also imposed a "duty to disclose exculpatory evidence at the plea bargaining stage."

In a footnote, the Supreme Court remarked, "a substantial majority of criminal cases are resolved by guilty pleas; thus, plea bargaining is 'not some adjunct to the criminal justice system; it *is* the criminal justice system.'" (Quoting *Missouri v. Frye,* 132 S.Ct. 1399, 1407 (2012) and adding the emphasis.) The Supreme Court further noted that "ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." (quoting *Lafler v. Cooper,* 132 S.Ct. 1376, 1384 (2012) which held that a Sixth Amendment right to counsel extends to the plea bargaining process).

The Supreme Court noted that the United States Supreme Court had not imposed an obligation to disclose "impeachment evidence" before entering into a binding plea agreement. The Supreme Court also took note that the United States Supreme Court expressly distinguished such evidence from "exculpatory evidence" as not "critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant." Based upon this indication of the federal court's predilection and based upon its review of available precedent, the Supreme Court of Appeals of West Virginia found that "a defendant is constitutionally entitled to exculpatory evidence during the plea negotiation stage." And a review of the evidence led to the conclusion that a *Brady* violation occurred, especially when the knowledge of the state police lab was imputed to the prosecutor's office.

Res judicata did not bar relief, based upon the denial of the original petition. The new DNA testing and the fact that the prosecuting attorney's office had knowledge of the prior DNA testing constituted newly discovered evidence, which is an exception to the res judicata bar.

Accordingly, Buffey is now entitled to withdraw his guilty plea and stand trial on the charges.

Justice Loughry concurred in a manner which indicates that the decision to grant relief should not be based on perceptions of innocence or guilt, as seemingly argued by the state in its briefing, but upon the necessary role of the prosecutor in such matters and the need to preserve integrity in the process. Accordingly, if a *Brady* violation occurred, it is irrelevant whether guilt would be established otherwise and relief must be granted.

PUBLISHED OPINIONS:

In my Expert Opinion, You Get What you Pay for.

In the published opinion, *State v. Wakefield,* 236 W. Va. 445, 781 S.E.2d 222 (2015), the Supreme Court of Appeals confirmed the defendant's conviction on two counts of sexual assault in the second degree and two counts of sexual assault in the third degree for which the effective sentence was ten to twenty-five years imprisonment.

The defendant was a 56 year old police officer with the Department of Homeland Security who lived in Pennsylvania and worked in Virginia. Rather than commute every day, the defendant would stay in bunk rooms at his work site except for a period of time during which renovations were being made. During that time, he stayed in a guest room of a co-worker. And, eventually, the defendant regularly stayed at his co-worker's residence, which was located in Jefferson County.

The defendant spent an evening with the co-worker and the co-worker's female acquaintance, which consisted of drinking and eating at various locations in the Eastern Panhandle. The female acquaintance then testified that, around 1:00 a.m., "she recalled the … [defendant] asking her and … [the co-worker] if they were ready to leave, that she grabbed her phone, keys and purse, 'and I remember walking out the door, and that is the last thing I remember.'" The female acquaintance then testified that "her next memory was when '[she] woke up [in the co-worker's house] and [the defendant] was attempting to have sex with [her].'" During the time that the defendant performed oral sex and had vaginal intercourse with her, the female acquaintance "tried very hard to make [herself] move and [she] couldn't." Her general description of the circumstances was that "[i]t was like being outside your body watching everything happen, but you can feel everything, you can feel every little touch, but at the same time not being able to do anything to make it stop." The female acquaintance then testified that the next morning she was disoriented and that "she felt different than if she had a hangover."

The co-worker confronted the defendant, who did not deny the allegations of sexual assault but who first stated that he could not remember what happened and then made statements such as "I might as well eat my gun."

The first issue on appeal arises out of the State's introduction of testimony by an expert witness who opined that the female acquaintance had been subject to "GHB intoxication." The defense counsel objected to the testimony on the grounds that the witness was "simply a self-proclaimed expert" and that her testimony "constituted 'junk science.'"

Agreement existed that passage of time between the event and testing meant that the detection of an administration of GHB would not be possible, because "research has shown that living people not exposed to GHB were known to show up to ten micrograms of GHB per milliliter in their urine." The female acquaintance's testing had resulted in a finding of 9.5 micrograms of GHB per milliliter in her urine.

The State's expert witness was a former Los Angeles police officer who testified that the symptoms described by the female acquaintance, in the absence of other detectable drugs, meant that she had been administered a dose of GHB. On appeal, the defendant argued that the opinion should not have been admitted into evidence because it was based solely on her observations over a period of time as an officer and "there was no testing of her conclusion, no testimony concerning her peer reviewed articles, no testimony of the potential role of error and no information on how this theory had been accepted into the scientific community."

The Supreme Court noted the evolution of cases in which the "liberal thrust" was for the admission of such testimony rather than exclusion, with "disputes as to the strength of an expert's credentials, mere differences in the methodology, or lack of textual authority for the opinion" going "to weight and to the admissibility of … [expert's] testimony."

The Supreme Court noted that a *Daubert* hearing had been held and that the expert had established a lengthy career in dealing with, describing, and documenting the effects of drugs in facilitating sexual assault and had attained an "international" reputation as an expert in the field. Accordingly, the Supreme Court found that the circuit court had not abused its discretion in admitting the

expert testimony.

The second issue on appeal concerned the circuit court's ruling that the defendant could not question his co-worker, as a State's witness, on "what activity if any took place immediately prior to [the purported victim] going into the house where she was allegedly assaulted." Specifically, the co-worker testified that in the car on the way to his house, the female acquaintance was trying to get him into the back seat with her, which finally occurred. When defense counsel inquired about what then happened, the prosecutor objected that the inquiry was barred by the rape shield statute. The circuit court initially disagreed stating that the inquiry was more illustrative of the purported victim's state of mind and degree of intoxication rather than her reputation. However, the prosecution continued to argue that the defense counsel intended to elicit testimony about a sexual encounter between the co-worker and his acquaintance, which is barred by the rape shield statute. The defense counsel countered stating that this was not the intent of the question, but if such activity did occur, then was it not relevant to the capacity of the purported victim to consent at a time during which she claimed she had no memory?

The twist for the appeal was that the circuit court permitted the inquiry with the admonition "that is not a license for you to, depending upon what this witness' response may be to some of these questions, to ask inflammatory follow up questions or questions which may attempt to sort of link some kind of comment upon a connection or sort of salacious connection or anything of that nature." On appeal, the defendant contended that, "as a result of the circuit court's admonishment, a weak record was made about what happened in the back seat." Essentially, the defendant argues his counsel was limited in cross-examining the witness when nonresponsive answers were given. Specifically, the defendant asserts that if the counsel could have explored the occurrence of any consensual activity in the backseat of the truck that evening, it would explain all the forensic evidence.

The Supreme Court of Appeals found that the only limitation placed on counsel by the circuit court was "how … to frame the questions." A review of the testimony does show that the defense counsel did not press the witness on what happened while the witness and the female acquaintance were in the truck after the defendant parked and left the truck at the co-worker's residence. The Supreme Court opined, however, that "to the extent that … [the defendant] had specific questions that he believed he could not ask Mr. Carper given the circuit court's ruling, … [the defendant] should have made a proffer on the record during trial so that this Court would have opportunity to review the alleged excluded questions on appeal." In the end, the Supreme Court found that this issue was not properly preserved.

The third issue on appeal was the asserted violation of the Double Jeopardy clause by the circuit court when it permitted the jury to consider both second degree sexual assault, based on the victim being "physically helpless," and third degree sexual assault, based on the victim being "mentally incapacitated … because she was involuntarily intoxicated."

The defendant argued that, in the circumstances of this case, the same act was used to prove both physical helplessness and mental incapacity; that is, the administration of a drug was the act underlying both charges. The defendant further argued that the requirement of physical helplessness related to actual physical incapacity that existed before the assault, i.e., a coma, stroke, etc.

Interestingly, the State argued that, even if it was a violation of double jeopardy, the sentences were structured in such a way that the error was harmless. The Supreme Court rejected this analysis, recognizing that four convictions rather than two convictions had significance. For example, the eligibility for parole for multiple offenses might be adversely effected or a recidivist statute might be implicated for future offenses. Accordingly the Supreme Court believed the "potential error by the circuit court on this issue must be substantively evaluated."

The Supreme Court found that the requirement of proof differed in the two statutes and, therefore, double jeopardy did not exist. Restated, if one set of circumstances could result in both mental incapacity and physical helplessness, then both offenses of second degree sexual assault and third degree sexual assault can be charged.

Finally, a juror informed the bailiff after the testimony of a witness that a person mentioned by the witness was known to the juror. The bailiff reported this to the Court, who was informed by the prosecution that the identified person was not to be a witness. The

defendant presented this as a Confrontation Clause issue. The Supreme Court noted that no objection had been lodged nor had a motion for a mistrial been made at the time that the disclosure was made by the lower court and found the error to be waived.

Justice Ketchum dissented. The Justice believed the expert should not have been qualified to give the opinion that she did "because it was based on mere subjective belief [and] unsupported speculation." Moreover, the Justice believed that the prosecution's objection to the line of questioning by invoking the rape shield law was "frivolous." The Justice opined that the case law would have permitted the inquiry into sexual activity in the back seat of the truck because it tended "to prove that someone other than the defendant was the source of semen, injury, or other physical evidence." *See* W Va. Rule of Evid. 412. Simply, "our rape shield law did not bar evidence of a victim's sex with a third person that is 'substantive exculpatory evidence of [the defendant's] innocence.'" The Justice would have granted a new trial.

Why Not Just Wear a Shirt that Says, "Show me no Mercy"?

In *State v. Jenner,* 236 W. Va. 406, 780 S.E.2d 762 (2015), the defendant was convicted of the offenses of first degree murder, without a recommendation for mercy, attempted murder, and malicious wounding. Using a rifle, the defendant allegedly shot and killed his aunt and then shot and wounded his uncle, shooting from the driveway of the relatives' home. Hours later, the defendant was found by the police walking on a roadway and muddied from his apparent traversal through the swamp near the relatives' property. The defendant subsequently made several conflicting statements about the ownership of a rifle and eventually admitted to shooting his uncle, but claiming it was in self-defense. He led the police to the place at which he had disposed of the rifle. The motive was the defendant's anger over being thrown out of the uncle's and aunt's residence two years earlier.

Evidence at trial established a timeline during which the defendant had traveled from Tennessee to an area near the uncle's residence. The defendant then purchased a rifle from a local Wal-Mart and practiced shooting the firearm in an indoor shooting range.

Further evidence in support of mercy was testimony by a sister that the defendant "is very loving, is both emotionally and financially supportive of her and her children," and she "never witnessed him displaying anger or demonstrating a propensity toward violence."

The prosecution countered this evidence with impact statements from the husband and son of the victim and by the introduction of a photograph and a video game. The photograph showed the defendant's t-shirt on the night of the shootings which depicted two skulls and crossbones and was emblazoned with the words: "May God have mercy on my enemies because I sure as hell won't." The video game was "Assassin's Creed Revelations." Included in the description on the back of the video game package was the line: "My blades have dispensed death and justice in equal measure." The jury did not recommend mercy.

In post-trial motions, the defendant alleged juror misconduct and was permitted to subpoena two jurors and one alternate juror to testify at the hearing. The testimony was that a juror had been spotted by the defendant's relatives taking smoking breaks with the defendant's uncle, who was the husband of the deceased and the victim of the malicious wounding charge. Moreover, testimony was proffered that a juror and the alternate juror had been discussing the verdict before final deliberations.

Upon hearing the testimony from the defendant's witnesses regarding this conduct, the lower court determined that the defendant had not presented "clear and convincing evidence" of any juror misconduct. The defendant was then barred from examining the subpoenaed jurors and alternate juror. The lower court found, simply, that the defendant's witnesses were biased and the testimony was not credible when stating that, during every break, the juror and the uncle were smoking and conversing. The defendant was sentenced accordingly.

Two grounds for the appeal were the admission of the photograph and the video game during the mercy phase of the trial and the failure to find juror misconduct.

The defendant argued that the photograph and the video game were so inflammatory that Rule 403 of the Rules of Evidence required the exclusion of the evidence. The Supreme Court noted that the evidence admissible in the mercy phase is much broader than the guilt phase and "necessarily encompasses evidence concerning the defendant's past, present and future, as well as evidence surrounding the nature of the crime committed by the defendant." The Supreme Court found no error admitting this evidence as, "given the ruthless nature of these crimes, the message on the t-shirt worn on the very night of these crimes was probative of the petitioner's character." Moreover, the defendant's own expert testified that the defendant "loses himself in the fantasy world of … video gaming" and, accordingly, the prosecution's admission of the video game was consistent with the defendant's own evidence. No error on this ground was found.

With respect to the alleged misconduct of the jurors related to the premature discussion of the verdict to be rendered, the defendant argued that the brevity of the deliberations supports the finding of misconduct. The Supreme Court found this argument was an "intrinsic challenge" to a verdict that the Court would not entertain. Moreover, the purported conversation between the juror and alternate juror could be explained in various ways and, therefore, the defendant's evidence was not "clear and convincing."

With respect to the private communications between a juror and a third party about the trial during its pendency, the Supreme Court reiterated the lower court's obligation to "conduct a hearing as soon as is practicable, with all parties present," and to make a "record … in order to fully consider any evidence of influence or prejudice." This is commonly referred to as a *Remmer* hearing. *See Remmer v. United States,* 347 U.S. 227, 230 (1954). Notably, the defendant had the burden to prove more than simply the "mere opportunity to influence a juror," but, instead, must present proof of an "improper event."

The Supreme Court noted that the defendant had provided the sworn, detailed testimony of two witnesses, "claiming to have seen the victim and a juror socializing with one another over the course of multiple days of trial." The Supreme Court was troubled, therefore, that the "circuit court rejected the allegations without hearing from any of the people who allegedly engaged in the conduct." In the opinion of the Supreme Court, this violated the rule that "requires a full consideration of the evidence pertaining to alleged juror misconduct." Without having heard the testimony of the involved jurors, the circuit court had not created a record which the Supreme Court could fully review.

The Supreme Court remanded the case for an additional hearing on the alleged misconduct which would permit the defendant to question the identified juror and the third parties with whom the alleged improper communications occurred. If the conduct is found to have occurred, the circuit court would then have to determine if prejudice resulted. If not, then the court's original denial of the post-trial motion would stand. The defendant's conviction was "conditionally" affirmed based on this limited remand.

I would have Stopped the Car Sooner if I had known you were Only concerned with the Cracked Windshield and not the Drugs in my Console.

In *State v. Noel,* 236 W. Va. 335, 779 S.E.2d 877 (2015), the Supreme Court of Appeals of West Virginia reversed a decision of the lower court and found that a search of the defendant's automobile was unlawful. Justice Davis wrote the primary opinion to which Justices Benjamin and Ketchum concurred, but filed separate opinions. Justice Loughry dissented.

The defendant was driving a car which had a cracked windshield. A patrolling officer attempted to pull over the defendant who then fled at a high rate of speed through streets of residences and a college campus. Eventually, the defendant pulled in front of a residence and attempted to flee on foot. When confronted, the defendant could not produce a driver's license. Moreover, the owner of the residence confirmed the identity of the defendant, but knew no discernible reason why defendant would claim to be visiting with her. Again, the defendant attempted to flee. The defendant was subsequently placed in handcuffs.

While standing next to the car in handcuffs, the defendant was described as constantly looking into the car at the center console through the open passenger door. The officer searched under the driver's seat and "discovered crack cocaine and methamphetamine."

On the way to the police station, the defendant asked the officer who ratted him out, which statement was suppressed.

A motion was made before trial on the resulting charges to suppress the evidence found during the search of the vehicle. The motion was denied. The defendant was convicted of fleeing in a vehicle and possession of controlled substances with the intent to distribute.

Two errors were asserted on appeal. First, the evidence obtained from the search of the car should have been suppressed. Second, the court should not have allowed the attorney to answer for the defendant regarding whether the defendant would or would not testify at the trial.

The Supreme Court of Appeals first noted that "probable cause" was not needed to stop the vehicle. The officer needed only to have "reasonable cause" to believe a safety standard was violated, which the cracked windshield provided. Accordingly, the stop of the vehicle was lawful contrary to the defendant's assertion in order for the officer to determine whether the vehicle was unsafe for driving. Moreover, the defendant's fleeing from the police officer with "reckless indifference" provided further justification for the stop as it constituted the active commission of a crime.

The Supreme Court reviewed federal precedent on the issue of the warrantless search and stated, "we now hold that … police may conduct a warrantless search of a vehicle incident to a recent occupant's arrest only if (1) the arrestee is unsecured and within reaching distance of the vehicle's passenger compartment at the time of the search or (2) it is reasonable to believe that the vehicle contains evidence of the offense of arrest." Moreover, it was emphasized that "this Court considers the circumstances justifying a search of a vehicle incident to a traffic stop to be quite narrow."

In the circumstances of this case, the defendant was secured and the police officer had no reason to believe that evidence could be found in the car to support the crime for which he was arrested, *i.e.,* fleeing with reckless indifference. The Court further emphasized that "furtive gestures," without more, is not sufficient to establish probable cause for the search of a vehicle.

The defendant was awarded a new trial. Having found that this ground resulted in the need for a new trial, the Supreme Court merely admonished the lower court to ensure that it obtained a "voluntary, knowing and intelligent" waiver by the defendant of the right to testify on his own behalf.

Justice Benjamin concurred with the result, but further addressed any contention, as expressed by Justice Loughry in a dissenting opinion, that an inventory search of the impounded vehicle would have been proper. The primary concern would be ascertaining whether the inventory search was proper rather than merely a "pretext concealing an investigatory police motive." The concurring opinion recites the absence of the necessary findings in this matter to have supported an inventory search. Specifically, "[t]o reiterate, our decision in [*State v. Perry,* 324 S.E.2d 354 (W. Va. 1984)] requires that the arrested driver ordinarily be given a reasonable opportunity to arrange to have the vehicle removed by means other than police impoundment [and] [i]f the vehicle is nonetheless impounded, then … an inventory search of a vehicle [is authorized] only when items of personal property are in plain view within." Neither condition was met in this matter in the opinion of Justice Benjamin.

Justice Loughry opined that under the "inevitable discovery doctrine," an inventory search would have revealed the drugs and an inventory search was permissible in the circumstances.

Justice Ketchum's concurrence was based on the discussion of an "automobile exception" to the warrant requirement that the Justice opined had not been raised in the case. Specifically, "police officers do not need a warrant to search an automobile if they have probable cause to believe it contains evidence of criminal activity." Moreover, "police officers may search for evidence of any crime, not just of the offense that provided the basis for the arrest." However, "the word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." Essentially, "a warrantless search of an automobile must be reasonable in light of the diminished expectation of privacy that a person may have in his automobile as weighed against any exigent circumstances that may exist in a particular case."

Why Should We Take a Sharp Left when It Comes to Your Constitutional Right?

In *State v. Davis*, -- W.Va. --, 782 S.E.2d 423 (2015), the Supreme Court of Appeals of West Virginia reversed the circuit court's ruling that the defendant was entitled to a preliminary hearing on a criminal matter that was dismissed by the magistrate upon the prosecution's motion. The prosecution indicated that it might seek an indictment in the matter.

The underlying circumstance was a complaint that the defendant had "arranged for a person who was cooperating with law enforcement to sell sixteen grams of marijuana to a third person." At the preliminary hearing, the prosecutor indicated that the defendant's claim of entrapment was being investigated and, therefore, the prosecutor asked for dismissal at that time, with the possibility that the matter might be presented to a grand jury in the future. The defense counsel objected, although an offer was made to waive the preliminary hearing if the defense counsel could have access to the state's file on the criminal charge. The offer was declined, and the motion to dismiss was granted.

A writ of mandamus was filed with the circuit court to require the magistrate "to hold a pre-indictment hearing for the [respondent] so that [s]he may be able to protect [her] rights" and to obtain a "standing order requiring every magistrate in the county to ensure that the right to a preliminary hearing is observed in every criminal case." The writ was granted, with the circuit court ruling that "the State may move to dismiss a criminal charge 'altogether,' but it has no right to seek the dismissal of a felony charge in order to directly present the matter to a grand jury, gain a tactical advantage over a defendant, or merely circumvent a defendant's right to a preliminary hearing." The order was stayed pending the appeal of the matter.

The Supreme Court of Appeals began its analysis with the acknowledgment that "a preliminary hearing is not a federal constitutional mandate, and that there is nothing in our State C*onstitution* which would give an independent state constitutional right to a preliminary hearing." The focus then turned to statutory and judicial rules.

Notably, the applicable statute and rules provide that "if the offense is to be presented for indictment, a defendant is entitled to a preliminary examination unless waived."

The Supreme Court reiterated its precedent that "where the State proceeds … to arrest the accused for an offense which must be brought before the grand jury, the defendant is entitled to a preliminary hearing under W. Va. Code, 62-1-8 (1965). If, however, the State elects to indict him without a preliminary hearing or before one can be held, the preliminary hearing is not required." The reasoning is that the grand jury's determination of probable cause eliminates the need for the magistrate to make the determination.

The Supreme Court noted that the preliminary hearing was not about pretrial discovery but, instead, concerned the court's jurisdiction over the defendant for either incarceration or release on conditions. When the charge was dismissed, the defendant was not subject to the court's jurisdiction and, therefore, a preliminary hearing served no purpose other than the defendant wanting to "obtain information from the State for purposes of defending against a possible future indictment." The Supreme Court opined that a review of the governing statutes on the procedure of filing a complaint and obtaining an arrest warrant makes clear that "a preliminary hearing is only required when there is a pending criminal complaint." While the Supreme Court had never expressly addressed the issue of whether the dismissal of charges obviated the need for a preliminary hearing, the Supreme Court wryly noted that "most defendants are not likely to object to the dismissal of their criminal charges."

The Supreme Court held, therefore, that "where a criminal complaint initiated pursuant to West Virginia Code § 62-1-1 has been dismissed, the right to a preliminary hearing arising under West Virginia Code § 62-1-8 no longer exists." Moreover, the Supreme Court confirmed that "a preliminary hearing is not a prerequisite for a grand jury indictment." Finally, the Supreme Court noted that the rules provide that "the discharge of a defendant shall not preclude the state from instituting a subsequent prosecution for the same offense," and, therefore, the dismissal of charges upon the state's motion should not preclude the refiling of the charges or the seeking of an indictment on the charges.

The Supreme Court acknowledged that the prosecutor's motive for dismissing charges might be improper, but held that it was the

magistrate's duty to rule on a motion to dismiss by determining whether "the dismissal is consonant with the public interest in the fair administration of justice." If an improper motive exists, the motion should be denied.

The circuit court's order granting the writ of mandamus was reversed.

The Local Court may Literally be the Last Court of Resort for the Local Resort.

In *State v. Hedrick,* 236 W. Va. 217, 778 S.E.2d 666 (2015), Justice Ketchum wrote the opinion for the Court. The defendant had been convicted of two counts of sexual abuse in the first degree. The charges arose out of the defendant's forcible touching of the buttocks and breasts of a twenty-five year old female employee. The defendant began serving his consecutive sentences and was granted release on parole. The original sentence included a twenty-five year period of supervised release that commenced when the defendant was discharged from parole.

The defendant owned the public vacation facility, Smoke Hole Caverns and Resort. Two handwritten conditions of his supervised release precluded the defendant from employment at the resort "in any capacity" and barred the defendant from the property, including the gift shop. The defendant's appeal was from the circuit court's denial of his motion to strike the two conditions. Notably, the circuit court imposed the conditions with the finding that the defendant was "one of the most hated people in Grant County" and the defendant's "presence at the Resort could have a negative impact on the business." Defendant's ex-wife was also an owner and operator of the Resort.

Additionally, the defendant was subject to a revocation of his supervised release for several matters that included the defendant's barring ingress to a farm owned by the defendant. Specifically, the defendant had locked the gate on his farm while staying at the farm, which the probation officers alleged needed to be unlocked "so that officers could determine his whereabouts." Notably, the defendant did have livestock and equipment on the property. The circuit court did not revoke the supervised release, but, without any hearing, did impose the additional condition banning the defendant from his farm, finding that that this did constitute "efforts to evade supervision." Other conditions were "clarified."

An interesting footnote in the decision included the apparently relevant information that the defendant's assets exceeded $7,000,000 in value. Presumably, the defendant did not have court appointed counsel or a public defender in the defense of the charges.

Another interesting footnote derived from the recitation that, upon his discharge from parole, the defendant "signed two forms pertaining to his supervised release." One form was the "Rules and Regulations Governing Probationers" and the second form was "Terms and Conditions of Supervised Release." The footnote states, "some of the conditions set forth in the two forms overlapped, such as the directive to remain gainfully employed and the prohibition against possession firearms." The editorial comment would concern the difficulty some persons on supervised release might have in consulting two documents regarding the multitude of conditions imposed on their release, some of which would be duplicated.

The primary contention regarding the two handwritten conditions relating to the defendant's ban from the Resort, of which he was an owner, was that the conditions had been "imposed outside the presence of counsel" and were simply unreasonable.

The Supreme Court reviewed the procedures governing supervised release, noting that the period of supervised release could be extended to the maximum period "consistent with the provisions of the West Virginia Rules of Criminal Procedure relating to the modification of probation." Notably, Rule 32.1 of the Rules governing modification of probation states, in part: "A hearing and assistance of counsel are required before the terms of probation can be modified." And the Supreme Court reviewed is decision in *Louk v. Haynes,* 223 S.E.2d 780 (W. Va. 1976), in which conditions on the defendant's probation had been imposed in the absence of the defendant's counsel. When probation was revoked for the violation of these conditions, the Supreme Court found the conditions to be "void as violative of procedural due process."

However, the Supreme Court refused to find the conditions in this matter to be void because the circuit court had heard the motion

to strike the conditions and, therefore, the defendant did have a proceeding in which to assert his rights. Nonetheless, the Supreme Court's discussion seemingly supports the extension of *Louk* to instances when conditions are imposed on supervised release without a hearing or representation by counsel.

The Supreme Court further found that the conditions were not unreasonable. The Resort was a "vacation facility open to the public" and the defendant was evaluated as "at least a moderate risk for recidivism and reoffending." Moreover, the circuit court had commented that it was "common knowledge in the county that … [the defendant] was a concern for the young girls that worked there as well as the other women." In short, the Supreme Court found that the defendant's "challenge to the two handwritten conditions prohibiting him from Smoke Hole Caverns and Resort must give way to protecting the public from future offenses." The Supreme Court cited to a federal decision, *United States v. Henson,* 22 Fed. Appx. 107 (4th Cir. 2001) which held, "a special condition of supervised release may restrict fundamental rights when the special condition is narrowly tailored and is directly related to deterring the defendant and protecting the public."

With respect to the conditions imposed after a hearing to revoke the defendant's supervised release, the Supreme Court focused on the banishment of the defendant from his 500 acre farm on which he raised cattle and dogs. The concern on the part of the Supreme Court was that no tie was made between the farm and the defendant's underlying convictions and no concern was shown for the "prospective maintenance of the farm." The Supreme Court found this restriction to be "highly restrictive and on the borderline of reasonable discretion." However, the Supreme Court did not eliminate the conditions as a matter of law, but, instead, remanded this "limited issue" to the circuit court.

Hey, Insurance Carriers are People too, Unless they are Geckos or an entity known as Mayhem or a Box going on a Date.

In *State v. Wasson,* 236 W. Va. 238, 778 S.E.2d 687 (2015), the Supreme Court considered whether a defendant could be ordered to pay restitution to an insurance carrier when the insurance carrier was not a direct victim of the criminal act.

The defendant pled guilty to burglary of a residence. The stolen items included an X-Box gaming console, X-Box games, jewelry, three televisions, and nine firearms. The homeowners had been compensated for their loss, in part, by the insurance carrier. The defendant was sentenced and an order of restitution was entered that required payment to the insurance carrier in the amount the insurance carrier paid to the homeowners to settle the loss claim.

The resolution of the issue required the interpretation of the provisions of the Victim Protection Act, codified at W. Va. Code §§61-11A-1, *et seq.* The statutory directive is that the court "shall order … that the defendant make restitution to any victim of the offense."

The defendant tried to distinguish the insurance carrier in this matter from other instances in which the insurance carrier had been ordered to be paid restitution. For example, the Supreme Court had upheld an order of restitution to the provider of fire insurance coverage in an arson. The defendant argued that this was distinguishable because the entire purpose of the arson was to collect the proceeds of the policy. The fire loss insurer was the direct victim. In this matter, the defendant stole the items for their intrinsic value and not for the purpose of making any claim of loss under an insurance policy. The defendant then pointed to a case in which the Supreme Court determined that "law enforcement authorities" were not "victims" under the Act such that restitution of the expenses of apprehending the victim could be recovered.

However, the Act does contain a provision that provides "the court may, in the interest of justice, order restitution to any person who has compensated the victim for loss to the extent the person paid the compensation." The defendant argued that the insurance carrier was not a "person" in this context. A general policy statement was made by the defendant's appellate counsel as follows: "[I]t is inherently unfair and contrary to the interests of justice to require an indigent defendant to pay restitution to an insurance company for a settlement paid pursuant to an insurance contract given that the insurance company assessed and assumed the risk, collected premiums therefor, and has an adequate remedy through subrogation."

The decisions of three states' highest courts were reviewed in which restitution was denied to insurance carriers, primarily because the governing statute expressly precluded restitution to third parties.

The decisions of three other states' highest courts were reviewed in which restitution was permitted to an insurance carrier. In these instances, the statute contained language evincing a broad discretion in the sentencing court to do justice on behalf of victims.

In the end, the Supreme Court believed the legislature intended a broad application of the West Virginia statute in order to assist victims and, therefore, "allowing trial courts to order defendants to make restitution directly to insurance companies further assists victims by relieving them from the burden associated with an insurer pursuing its own subrogation claim and the possibility of involvement in litigation to resolve such a claim." Moreover, "absolving defendants from the financial consequences of their crimes when their victims have insurance would not comport with the rehabilitative and punitive aspects of restitution." The Supreme Court stated that "restitution can aid an offender's rehabilitation by strengthening the individual's sense of responsibility" and the offender "may learn to consider more carefully the consequences of his or her actions."

The Supreme Court held, therefore, "pursuant to West Virginia Code § 61-11A-4(e), a court may order a defendant to make restitution to an insurance company to the extent the insurance company has compensated a victim for loss attributable to the defendant's criminal conduct."

To Preserve a Record for a Potential Habeas Corpus Proceeding based on Ineffective Assistance of Counsel, make Sure You Object if the Court Compliments you on the Trial Record.

In *Tex. S. v. Pszczolkowski*, 236 W. Va. 245, 778 S.E.2d 694 (2015), the Supreme Court affirmed the circuit court's denial of a petition for habeas corpus relief.

The petitioner had been indicted on one count of sexual assault in the first degree and one count of sexual abuse by a parent or guardian.

Prior to the trial on the charges, the petitioner's retained counsel had a motorcycle accident, resulting in a head injury. Subsequently, the attorney's law license was suspended and local attorneys were appointed to represent the attorney's clients. Three months' later, the attorney's law license was reinstated and, at the petitioner's request, the attorney was reinstated to the petitioner's case.

The underlying charges arose out of the petitioner's care of three step-children while the mother was at work. The four-year old stepdaughter told her mother one night that the petitioner had "put his pee pee in my mouth and peed and kept it there until I swallowed." The victim was taken to the hospital where a similar statement was made to the nurse, who then collected samples. Law enforcement then obtained the same statement and contacted the petitioner who after waiving his *Miranda* rights, gave a statement in which he alluded to his wife's traumatic brain injury from a car accident and stated his wife had been collecting his semen while he slept and forcing the daughter to drink it.

Forensic testing found the lip swabs to be positive for the presence of seminal fluid as was a sample collected from the pillow on which the victim had slept. However, no sperm cells could be found in the samples, meaning that either the male was sterile or had a vasectomy. Moreover, no Y chromosomes could be found, especially considering the lack of sperm cells, so no DNA analysis could be done. The seminal fluid could not be linked by forensic analysis to the petitioner.

A psychologist testified at the trial and gave an opinion that the four-year old stepdaughter had been sexually abused and that the child was not susceptible to suggestion.

A *Daubert* hearing was held regarding the expert testimony in the areas of psychology and professional counseling to be proffered on behalf of the defendant. The dispute was over an opinion that the petitioner did not "fit the profile of a sex offender." While the expert acknowledged that "there is no such thing as a sex offender profile," the expert was to opine that petitioner was at

"the low end of being a sexual offender."

The circuit court ruled that this opinion could not be proffered since it was contrary to the admitted scientific knowledge regarding the absence of a profile, but the court permitted the expert to testify that the prosecution's expert opinion regarding the victim was improperly based on only the mother's testimony.

The defendant was convicted and sentenced to consecutive terms of imprisonment of fifteen to thirty-five years and ten to twenty years.

Shortly after the trial, the petitioner's trial counsel committed suicide.

An appeal followed, which the court permitted on the issue of allowing the child's testimony through the statements of the mother and the treating nurse. The child was deemed to be unavailable for the trial because the then seven-year old child could not recall the events from when she was four-year's old. The Supreme Court affirmed the conviction in a memorandum decision.

This habeas proceeding was then prosecuted.

The first issue raised on appeal was the failure of the circuit court to have an omnibus hearing. The petitioner proffered that testimony would have been provided from an expert in forensic science, an expert in forensic psychology, and an expert on an attorney's professional responsibility and competency. The circuit court believed that it had been fully briefed, including the petitioner's seventy page submission. Moreover, the circuit court's twenty-eight page order set forth detailed findings of fact and "painstakingly addressed each and every claim for habeas relief." Accordingly, the Supreme Court did not intend to find an abuse of the circuit court's broad discretion in whether to have a hearing.

Moreover, the Supreme Court noted that all the experts identified by the petitioner were essentially tied to the competency of the original trial counsel in defending the case without such expert testimony and that the "primary purpose of an omnibus hearing is grounded in providing the Court with evidence from the most significant witness, the trial attorney, in order to give that individual the opportunity to explain the motive and reason behind his or her trial behavior." With the death of the trial counsel, the omnibus hearing lost its essential purpose.

The remainder of the Supreme Court's opinion dealt with the allegations of the ineffective assistance of the trial counsel.

The petitioner complained that the trial counsel failed to investigate and contest the forensic testing identifying seminal fluid from the lip swabs of the victim. The petitioner asserted the trial counsel should have requested additional forensic testing, retained a forensic expert, performed independent testing, should have cross-examined the prosecution's witnesses regarding the identification of seminal fluid, failed to understand the significance of the forensic evidence, and failed to offer any legal argument on the evidence.

Significantly, any additional testing of the swab would have consumed the evidence. The petitioner instructed counsel to object to the State's testing so that an expert for the petitioner could be retained. Subsequently, consent by trial counsel was given for the additional testing to be done by an independent lab that would be observed by the petitioner's expert. And, subsequently to that instruction, trial counsel informed the court that an expert would not be observing the testing, but an expert might be retained to challenge the results. The petitioner responded affirmatively to the circuit court's inquiries about his understanding of trial counsel's statements. In the end, trial counsel's strategy was to not challenge the finding of seminal fluid, but to emphasize through cross-examination that the fluid could not be linked to the petitioner.

Accordingly, the Supreme Court was not inclined to let the petitioner "embark on a journey filled with second-guessing a trial attorney's strategic decision in dealing with the investigation of forensic evidence, to the decisions made regarding experts, to the examination of witnesses, [and] to the arguments made in closing." And, oh by the way, the additional expert testimony would not have made any difference in the determination of guilt considering that the petitioner was the only adult in the house and the victim

told a consistent story to three different people after the incident.

Additional arguments of ineffective assistance were summarily disregarded.

In the final analysis, the petitioner was trying to tie the counsel's traumatic brain injury to the overall assertion that the petitioner's counsel was incompetent. However, the Supreme Court took note that, at the conclusion of trial, the trial court stated: "I want to compliment you all on your professionalism, and I think this case can go either way due to the good efforts put in by both the state and defense counsel [and] I think you both did an excellent job." Moreover, as a posthumous commendation to the trial counsel, the Supreme Court stated, "our review of the record comports with the trial court's observations." Accordingly, the petitioner's portrayal of a confused and muddled trial lawyer was not accurate.

Justice Benjamin concurred with the result, but noted the disagreement with the majority's reasoning about why an omnibus hearing was not necessary. Specifically, Justice Benjamin disagreed with the contention that the primary purpose of an omnibus hearing is to receive the trial counsel's testimony. Or, restated, Justice Benjamin felt that the unavailability of trial counsel should not be an automatic basis for denying the opportunity for a hearing since other witnesses on the "subject of trial strategy may be particularly probative, depending on the specific facts of those cases." However, the Justice did agree that, in the facts of this matter, no hearing was necessary.

I have Said It Once and I will Say it again – An Allocution is so much Better the Second Time around.

In *State v. Tex B.S.,* 236 W. Va. 261, 778 S.E.2d 710 (2015), the defendant appealed the entry of an order in the same proceeding from which the habeas corpus petition set forth in the preceding case emanated.

The defendant was first sentenced to an indeterminate term of twenty-five years to a hundred years for his conviction of first-degree sexual assault. The defendant filed a petition for habeas corpus relief asserting that the statute in place when the offense occurred imposed an indeterminate sentence of fifteen years to thirty-five years.

At a hearing, the circuit court determined that the matter was not properly a subject of a habeas corpus petition. Instead, the matter would be decided under Rule 35. Everyone acknowledged that the defendant had not been sentenced under the statute in place when the crime was committed.

The defendant then demanded a new sentencing hearing because he was being "resentenced." The circuit court refused the demand and corrected the sentence in a subsequent order without a hearing.

The issue on appeal was whether the circuit court abused its discretion in denying the request for a "*de novo* resentencing hearing." The thrust of the appeal was that the defendant "was not allowed to appear in person" because he appeared by videoconferencing during the hearing on the habeas corpus petition and that he further "was not allowed to present evidence, put on witnesses, or give allocution to the court."

The issue involved the interplay between (i) Rule 43(c)(4) of the West Virginia Rules of Criminal Procedure, giving the defendant the right to be present at an initial sentencing but not the right to be present at a "reduction" of sentence under Rule 35, which is expressly addressed in Rule 35(b), and (ii) Rule 35(a), which permits the correction of an illegal sentence at any time. Specifically, Rule 43 does not exclude, expressly, the hearing on a correction of a sentence under Rule 35(a) as a hearing at which the defendant need not be present.

In reviewing federal decisions on the issue, the recurring conclusion was, essentially, that "a remedial sentence reduction is not a critical stage of the proceedings; so, the defendant's presence is not required." Moreover, "there has already been a sentencing hearing at which the defendant had the opportunity to rebut evidence in the presentence investigation report and to present evidence in mitigation; the sentencing judge has made the necessary credibility determinations and exercised the necessary discretion to fashion a sentencing package which he has determined, in fact, is the appropriate penalty considering the defendant's conduct

and level of culpability." Essentially, nothing is gained by another hearing.

The Supreme Court held, therefore, that "we now make clear that in correcting an illegal sentence under Rule 35(a) of the West Virginia Rules of Criminal Procedure, a trial court has discretion to correct the sentence without holding a *de novo* resentencing hearing [and] [f]urther, under Rule 43(c)(4) of the West Virginia Rules of Criminal Procedure, a defendant need not be present at a Rule 35(a) proceeding to correct a sentence."

The Supreme Court affirmed the entry of the circuit court's order correcting the sentence.

"Hey," The Witness Responds to the Prosecutor, "I forget - Am I allowed to Say the Defendant Took a Polygraph Test. I'm not Allowed. Okay, let's move on."

In *State v. Tyler G.,* 236 W. Va. 152, 778 S.E.2d 601 (2015), the defendant appealed his conviction after a jury trial on three sexual offenses against an infant.

The mother of a less than two year-old child contracted HPV. The defendant believed that she contracted the disease from the defendant "because he was the only person with whom she was intimate at that time."

The mother took the child to a pediatrician for an apparent diaper rash. Eventually, the rash was diagnosed as genital warts in and around her anal cavity and the child was diagnosed with HPV.

A report was made to DHHR and the local police. A determination was made that only the petitioner and the child's biological father were males who had possible contact with the child.

During an interview at the police station, the defendant "stated that when he stayed the night at … [the mother's house] …, he accidentally touched … [the child], and that he was ashamed, embarrassed, upset that he did it." The defendant left the police station.

The defendant returned to the police station for a polygraph examination. Due to some noted inconsistencies, the defendant agreed to a post-examination interview. In the course of this interview, the defendant relayed a bizarre event that could have led to sexual contact with the child without his awareness. When asked if it was possible that he entered the child's rectum, the defendant's response was, "it was possible, but he didn't really recall for sure." When asked more directly "is there any possible way that the penis did enter the anus of the baby?," the defendant responded, simply, "yes." Again, the defendant left the police station.

The defendant was subsequently arrested, tried, and convicted.

The first issue on appeal was the denial of the motion to suppress "inculpatory" statements made to the police. The involuntariness of the statements was not attributed to any failure to give *Miranda* warnings or any physical coercion, but, instead, was related to his age of nineteen years, his tenth grade education, his limited ability to process information, his intimidation by the questioning, his being questioned for ten to twelve hours over two days, and his being questioned by six different police officers. Notably, the interviews were not recorded. In addition to claiming the statements were involuntary, the defendant denied making the statements.

The circuit court refused to believe that the officers had coordinated the extensive testimony regarding the defendant's answers and, moreover, believed the defendant had more intellectual acuity than he portrayed in his motion. The circuit court refused to suppress the statements.

The Supreme Court found no abuse of discretion.

The second issue on appeal concerned the sufficiency of the evidence.

The defendant argued that the evidence did not dispel the possibility that the child suffered from the HPV infection through contact with the mother, who was infected. The evidence was that the child still had diapers intact on the night in question and the mother had no knowledge of any unusual activity while present that night.

The medical testimony attributed the genital warts to sexual contact, however. The defendant had not allowed testing to determine if he was infected with HPV. And the investigators reported that the defendant indicated it was possible that he had penetrated the child's rectum.

The Supreme Court of Appeals of West Virginia found this to be sufficient evidence to sustain a conviction.

The third issue on appeal was the allegedly improper use of information from the defendant's juvenile record.

The Supreme Court reviewed its precedent that a court had no statutory authorization to permit use of otherwise confidential juvenile law enforcement records "in a criminal case as evidence in chief in the State's case." However, "the rule does not prohibit the use of juvenile records as a 'shield' – to rebut or impeach evidence that is presented by a criminal defendant." In this matter, the records were used to contradict the defendant's claim on direct testimony that he had learning difficulties in that the records showed that the defendant missed school, was often in trouble in school, and had good grades in some classes. Accordingly, the prosecution was asserting that it was not learning difficulties that resulted in the defendant's tenth grade education.

The Supreme Court did note that it was error for the prosecution not to obtain the records by means of a properly noticed motion before the court. However, the error was deemed to be harmless because the motion would have been granted in any event. But, "this is not to suggest that we approve of the State's failure to file a motion to have the record unsealed." Because the juvenile records were used solely for purposes of impeachment, the ground for appeal was denied.

The fourth issue on appeal related to the mention of the polygraph examination by one of the State's witnesses. The Supreme Court had previously held that the results of a polygraph examination were not admissible and that the defendant's refusal to take a polygraph was not admissible evidence. However, the Supreme Court had not expressly addressed whether it was proper to merely mention that the defendant had taken an examination although most jurisdictions precluded this evidence.

Accordingly, the Supreme Court took the opportunity to state: "We now hold that, it is well-settled that any reference to a criminal defendant's offer or refusal to take a polygraph examination, and the results of a polygraph examination, are inadmissible … [and] [l]ikewise, evidence that a defendant in a criminal case took a polygraph examination is also inadmissible." However, the Supreme Court also stated: "[W]e now expressly hold that, although polygraph-related evidence has been deemed inadmissible in this State, the improper admission of such evidence does not warrant a new trial." Instead, a harmless error analysis is to be made.

In this matter, the error was found to be harmless. The polygraph was mentioned when the investigating officer explained when he next met with the defendant during the investigation. The trial court immediately instructed the jury to disregard the evidence. And the error was unforeseen because the State had not solicited the information. With respect to whether a jury really would disregard the information and assume that the defendant failed the polygraph, the Supreme Court observed that "we normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be devastating to the defendant. " In light of the "strong admissible evidence of his guilt," the Supreme Court did not deem this passing reference to the polygraph as "devastating."

The conviction was affirmed.

Justice Ketchum dissented based upon the accumulation of three errors. First, the confession was not voluntary given the age of the defendant and the "lengthy grilling … to elicit a confession." Second, the unsealing of the juvenile records without a motion and notice to the defendant was error. Third, the convenient blurting out by the police officer that the defendant took a polygraph test was suspect. This accumulation of errors potentially resulted in the jury's disregard of the possibility that the child was infected by contact with the mother.

Oh "Mercy, Mercy Me" Those Photographs are Gruesome.

In *State v. Trail,* 236 W. Va. 167, 778 S.E.2d 616 (2015), the defendant appealed her conviction after a jury trial of murder in the first degree and the resulting imposition of a sentence of life without mercy.

Essentially, the evidence was that the defendant hired her nephew to kill her husband in order to collect on "various policies of life insurance."

An issue on appeal was purported misconduct by a juror. After the trial, the defendant's lawyer received information that a juror may have discussed the trial with a co-worker. The circuit court conducted the so-called *Remmer* hearing to consider the evidence of misconduct. The co-worker testified that she had asked the juror if she was on the defendant's jury. The co-worker had some interest in the matter because her daughter had been married to the defendant's son and the resulting relationship was not pleasant. The co-worker stated that the juror said she could not discuss the matter and the conversation ended.

The juror testified differently saying that the co-worker actually tried to influence her on the defendant's guilt, but she promptly left the break room. The contact consisted of a few seconds on one occasion. The juror stated that she did not share the encounter with any other juror.

Another co-worker testified that the juror informed her that she had initiated the contact and sought information regarding the defendant. She believed the juror had been influenced by the other co-worker's opinions regarding the defendant and her probable guilt.

The issue became whether the defendant was entitled to a presumption of prejudice because the interfering party was "interested." If the misconduct is induced by a "stranger," then the proof of prejudicial effect must be proven.

The Supreme Court held that, notwithstanding the co-worker's ill will toward the defendant, "our past cases clearly require a more direct connection to the litigants involved in the trial affected by the misconduct than exists in this instance." Generally, an "interested party" is considered to be "the plaintiff, the defendant, or an attorney representing one of them." So, the communication with the juror did not create a presumption of prejudice. Acknowledging "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote," the Supreme Court reviewed the record and found that the circuit court had not abused its discretion in light of the "advantage of observing the witnesses and making appropriate credibility determinations."

The next ground for appeal was the propriety of allowing autopsy and crime scene photographs to be admitted during the mercy phase of the trial. The defendant did not assert that the photographs were "gruesome" and, therefore, should not be admitted. Instead, the defendant argued that, because the photographs were deemed to be inadmissible during the guilt phase of the trial, the photographs should remain inadmissible during the mercy phase. Specifically, "bifurcation does not permit the circuit court to relax admissibility requirements during the mercy phase of trial to admit evidence that had been found to be inadmissible during the guilt phase."

The Supreme Court deemed the matter to be one of first impression and analyzed the issue as whether the "gruesome objection" should apply to the mercy phase in a bifurcated trial.

Notably, the Supreme Court's precedent establishes that "the type of evidence that is admissible in the mercy phase of a bifurcated first degree murder trial is much broader than the evidence admissible for purposes of determining a defendant's guilt or innocence." For example, evidence of the defendant's character becomes relevant and admissible.

The Supreme Court had previously stated "the nature of the crime committed" is a valid consideration for the grant of mercy. The Supreme Court noted that "particularly relevant in the context of gruesome photographs is their depiction of the nature of the crime committed." Accordingly, "we now expressly hold that, autopsy or crime scene photographs may be particularly relevant to depicting the nature of the crime committed by the defendant who has been found guilty of first degree murder [and] [e]ven if

deemed gruesome, the probative value of these photographs is greater at the mercy phase of a bifurcated trial than at the guilt phase of such trial."

Another ground for appeal was the reading of the "Slayer Statute" to the jury during the guilt phase of the trial. The defendant was attributed with the statements that she had foregone payment of any life insurance proceeds to her. Indeed, testimony was elicited that the defendant had not received any proceeds. The "Slayer Statute" was introduced, therefore, to establish that, if the defendant "was found to be guilty of participating in the murder of her husband, … [she] would be prohibited by law from receiving any proceeds from these policies." Essentially, the prosecutor argued that she was not giving up anything and, therefore, her refusing the proceeds did not imply she was innocent.

Another ground for appeal was the prosecutor's argument that a finding of "no mercy" would also atone for the defendant's involvement in the beating of another person by her brother with a claw hammer, for which the defendant was also convicted. However, the Supreme Court noted that it was the defense counsel who raised the issue of "atonement" and, therefore, the prosecutor's reference to atonement was not error.

Another ground for appeal was the prosecutor's statements in closing argument to the jury implying a motive for the murder in that the defendant's husband was looking at her bank accounts and her mismanagement of credit cards. The defense counsel objected that this was not supported by the evidence, but was stopped by the judge and asked to approach the bench. The prosecutor then stated that he would move on. Closing argument resumed without resolution of the objection. The failure to obtain a ruling resulted in the Supreme Court's determination that this error had not been properly preserved for the appeal.

Additionally, the defendant complained that a chart of all the life insurance policies on the victim was improperly given to the jury because it was misleading and inaccurate. However, the record contained no objection to the admission of the chart and, accordingly, the Supreme Court deemed the issue to be waived.

Finally, the defendant argued that the jury made improper credibility determinations, acknowledging essentially that the evidence was sufficient to convict her if it was believable. The Supreme Court summarily resolved this by stating, "such a review is not a legitimate function of this Court."

MEMORANDUM DECISIONS:

I Cannot Tell A Lie; I was Lying.

In the memorandum decision, *State v. Booker,* 2015WL7628831, the defendant was tried on the charge of misdemeanor domestic battery. The defense concentrated on the victim's recanting her claims of abuse during family court proceedings and in an affidavit. The victim testified at the trial, and her testimony was bolstered by an expert witness on the behavior of victims, especially "victims who feared their abusers." The jury found the defendant guilty of the charge.

Although a misdemeanor, the conviction constituted a third offense. The defendant was sentenced to a term of one to five years of imprisonment.

On appeal, the defendant attacked the indictment, stating that the grand jury was never informed that the defendant had recanted the events that gave rise to the indictment. The Supreme Court recited its previous holding that the court could not consider the evidence presented to the grand jury unless an allegation of willful, intentional fraud was made. The Supreme Court noted that the State was unaware of the recantation which had occurred in sealed family court proceedings. Accordingly, no willful or intentional deceit had occurred, and the trial court's denial of the motion to dismiss the indictment was proper.

The defendant further argued that the prosecutor improperly elicited from the expert witness a statement in front of the jury that the victim was afraid of the defendant. According to defendant's counsel, the elicitation of the statement was an "attempt to tip the battle of credibility in its favor." The credibility issues related to the victim's various recantations of the charges before finally

testifying against the defendant in the trial.

The Supreme Court found no misconduct by the prosecutor as the expert witness' statement was made in response to the question, "describe … the problems you had or encountered in working with [the victim]." The Supreme Court concluded that, "the State was entitled to ask the question and had no control over Ms. Burton's response thereto." This ignores the fact, however, that the prosecutor and the expert witness had surely rehearsed the questioning and, specifically, this question. Presumably, the response would have been anticipated, but no discussion about pretrial preparation was had. No misconduct was found.

I Kept the Evidence in My Basement Before Turning it in, Should I have Kept it in the Attic in a Box Marked "Evidentiary Memorabilia"?

In the memorandum decision, *State v. David M.*, 2015WL7628829, the issues concerned the admission of evidence regarding prior bad acts and the admission of DNA evidence. The defendant had been charged with one count of incest and one count of second degree sexual assault. The victim was a niece. The crimes occurred in 1982.

The prosecution proposed the use of acts allegedly committed by the defendant in the 1970(s). The prior acts involved the purported "systematic and routine pattern" of abuse of his several nieces and a nephew. Additional acts involved the defendant's forcing the nephew to do sexual acts with the nieces while he observed.

The defendant objected to the introduction of the evidence as "too remote in time" and "more prejudicial than probative." The trial court ruled that, if the acts constituted "sexually related violence," the evidence could be admitted to show "his lustful disposition toward young female relatives" and "proof of an opportunity."

The prosecution also wanted to introduce DNA evidence linking the defendant to the child born to the victim. The defendant objected stating that the "State failed to show a proper chain of custody." Principally, the investigator for the prosecutor's office had possession of the test swabs which he kept at his home before delivering to the laboratory. The trial court found that the investigator had "sole and exclusive possession of the evidentiary items while they were in his custody."

The Supreme Court found the ten year span between the prior acts and the charged acts did not affect the relevancy of the testimony. The Supreme Court opined that the time span fell within the rule that "remoteness goes to the weight to be accorded the evidence by the jury, rather than to admissibility." The Supreme Court further upheld the trial court's balancing test regarding the evidence and the finding that the evidence was more probative on the issue of lustful disposition than it was prejudicial.

The Supreme Court summarily upheld the admission of the DNA evidence finding that the defendant does not "allege or point to any evidence in the record to show that the evidence was not genuine or had been tampered with in any manner." Accordingly, the Supreme Court found no abuse of the trial court's discretion.

Notably, the Supreme Court in a final footnote alerted the parties to the appeal to "a potential discrepancy between the sentence imposed … and the sentence required by statute." Noting that it is the sentencing statute in effect at the time of the commission of the offense that controls unless the defendant elects otherwise, the Supreme Court stated that "the parties and circuit court may wish to address the issue pursuant to the circuit court's authority in Rule 35 of the West Virginia Rules of Criminal Procedure." As noted above, the crime had been committed in 1982 and only charged in 2012. The 1931 code provisions applied, therefore, not the more recent enactment.

Swimming Trunks have no Belt Loops or Loop Holes.

In the memorandum decision, *State v. Richard D., 2015WL7628835,* the defendant appealed the lower court's rejection of his plea agreement and the resulting conviction on one count of sexual abuse by a custodian and one count of first-degree sexual abuse. The charge arose out of the defendant's forcing an eight-year old girl, whom he babysat, to touch his penis. The defendant admitted to the touching, but attributed it to an accident facilitated by the fact that he was wearing swimming trunks.

A *nolo contendere* plea was negotiated with the prosecutor, but at the hearing the prosecutor represented that the family of the victim wanted "something much stronger" than the misdemeanor plea and "that he had not discussed the plea with the investigating officer directly." The plea was rejected, but the lower court stated "it would reconsider its ruling if the parties presented another plea agreement or returned with the investigating officer present."

The Supreme Court notes, at this point, "the record on appeal contains no objection to the circuit court's order rejecting his plea agreement, no motion for reconsideration thereof, and no discussion of a second plea agreement."

Trial ensued; the young girl testified; and the defendant was found guilty. At sentencing, the defendant sought an alternative sentence, "citing his record as a veteran and … no criminal history." The lower court sentenced the defendant to ten to twenty years and an extended period of twenty years of supervised release.

With respect to the issues on appeal, the Supreme Court reiterated that "West Virginia Rules of Criminal Procedure, Rule 11, gives a trial court discretion to refuse a plea bargain" and that "no constitutional right" exists to a plea bargain. It was noted, moreover, that the lower court had not foreclosed the possibility of a reconsideration of the agreement. The Supreme Court found sufficient the testimony of the child and the defendant's own admission to uphold the conviction. Finally, the Supreme Court emphasized that "a palpable abuse of discretion" must occur before the decision to deny probation will be overturned. Without discussion, the Supreme Court found no such abuse in this matter.

I'm a very Sick Person, oh, Wait a Minute ….

In the memorandum decision, *State v. J.N.*, 2015WL7628823, the defendant argued that the imposition of consecutive sentences was improper for his conviction on one count of sexual abuse by a custodian and one count of incest. Further, the defendant argued that incarceration was a cruel and unusual punishment considering his medical conditions.

The defendant pled guilty to two of eighteen counts relating to conduct with his granddaughters, both of whom were under the age of sixteen years. The resulting LS/CMI evaluation found "that petitioner had medium risk/need level with a twenty-three percent chance of recidivism." The prosecutor argued for lengthy incarceration for commission of the "heinous crimes" and the resulting sentence was consecutive prison terms of ten to twenty years and five to fifteen years.

Not surprisingly, the Supreme Court found no abuse of discretion in running the sentences consecutively, which is the default under the statutory provisions. However, the Supreme Court again addressed the LS/CMI, stating "circuit court judges do not have to use the results of the LS/CMI in their sentencing decisions, emphasizing that the use of the information in an LS/CMI assessment is 'entirely left to [the circuit judges'] discretion'" (quoting Justice Loughry's opinion in a concurrence in *State v. Rogers,* No. 14-0373). The paradox is that a negative report will almost certainly be used to support a harsh sentence, but a positive report does not have to be used to support a more lenient sentence.

With respect to the cruelty of incarceration, the petitioner reported in his presentence interview that "he has a steel plate in his head and has a history of back pain, several broken bones, and unspecified problems with his nasal passage … [and] continues to suffer from blindness in one eye, heart disease, diabetes, glaucoma, prostate cancer[,] and high blood pressure." The Supreme Court noted, however, that the defendant had no evidence that his medical needs were not being met. The argument that it was "unrealistic for the [Division] of Corrections to care for him adequately for the full length of his sentence" was deemed to be an "abstract proposition," the "decision of which would avail nothing in the determination of controverted rights of person or property." To rub salt in the alleged wounds, the Supreme Court also noted that "the record on appeal provides no evidentiary support for petitioner's medical conditions beyond his self-report to the probation officer."

If you remove the Seeds, The Fruit of the Poisonous Tree can make a Pretty Good Jam.

In the memorandum decision, *State v. Curran,* 2015WL7628702, the facts centered on an initial controlled buy of controlled substances from the defendant by a confidential informant who was equipped with electronic monitoring devices. No "electronic

intercept" warrant had been obtained under the provisions of the state's Wiretapping and Electronic Surveillance Act, W. Va. Code §§62-1D-1, *et seq.,* with respect to the controlled buy. Subsequent buys were done by timely obtained warrants, but the probable cause for the warrants was, or included, the initial warrantless controlled buy. Finally, a search warrant was obtained for the defendant's residence and, again, the application made reference to the initial controlled buy for which no warrant had been obtained. The lower court denied the resulting motion to suppress all evidence obtained from all the controlled buys and the search of defendant's residence, except for the audio recording of the initial controlled buy.

The defendant entered into a conditional guilty plea to one charge of delivery of a controlled substance.

The Supreme Court affirmed the lower court's reasoning that, while the audio recording could not be used due to the lack of a preceding electronic intercept warrant, the confidential informant's observations after being invited into the defendant's home could be used.

The defendant also attacked the sufficiency of the affidavits used to obtain subsequent warrants. The Supreme Court found that the "first-hand" information of the confidential informant, when read in a "common sense and realistic fashion" provided more than a "mere allegation of suspicion and belief." Essentially, the officers were outside the defendant's home after the informant was invited into the defendant's residence and when the confidential informant come out of the house, the informant did not have the money provided by the officers and had a quantity of drugs.

The defendant further argued that the familial relationship of the magistrate with a member of the law enforcement task force violated the right to a probable cause determination by an impartial magistrate, especially when it was the family member who "handled" the confidential informant. Moreover, the warrant that issued for search of the defendant's residence stated no grounds for probable cause except "see affidavit," which further attested in the defendant's opinion to a lack of independent judgment by the magistrate.

The Supreme Court summarily dismissed the grounds related to the familial relationship. The magistrate's brother "did not request the warrant and his name did not appear on any affidavit or the warrant itself." The Supreme Court reiterated its precedent that the familial relationship between a magistrate and a law enforcement official does not automatically disqualify the magistrate. And the Supreme Court found no error in simply referencing the affidavit in the statement of grounds for a probable cause determination.

Finally, the defendant contended that the identification testimony of the confidential information should have been suppressed. The circumstances were that the confidential informant was shown a photograph of the defendant on an officer's phone several hours before a controlled buy. The controlled buy was conducted. Subsequently, the confidential informant identified the defendant from a photo lineup before buying drugs in a second controlled buy. This identification was tied to the suggestive nature of being shown a picture of the defendant before the first controlled buy. The Supreme Court found that, in these circumstances, "there was no chance of misidentification," especially since the confidential informant had actually purchased drugs from the defendant.

The denial of the motion to suppress was affirmed.

Mi Compadre's Casa es Su Casa.

In the memorandum decision, *State v. Jarvis,* 2015WL7628838, the appeal was taken from a motion to suppress evidence obtained during a search of the defendant's home.

A fugitive was believed to be hiding in the defendant's residence. When police knocked on the door, the man who opened the door immediately bolted and ran to the back of the residence to where the owner apparently was. The police were then admitted by another person within the residence, who was not the owner. The person who bolted was, interestingly, not the person for whom the officers were searching. However, upon entering the home and seeking out the owner of the residence in the back of the house, the smell of methamphetamine was detected and a "methamphetamine lab in a bottle on a nightstand" was observed. The owner

and another individual then executed written permission forms for the officers to search the residence, resulting in the discovery of precursor material, marijuana, diazepam, and klonopin.

The lower court denied the defendant's motion to suppress, primarily based on the defendant's voluntary consent. A conditional plea was then signed.

The defendant argued on appeal that the officer's initial entry into the home was illegal, which made the subsequent consent ineffective.

The Supreme Court acknowledged its previous holdings that "in making a factual assessment concerning the existence of voluntary consent, the inquiry focuses upon whether the facts available to the officer at the moment of entry warrant a man of reasonable caution in the belief that the party had voluntarily authorized the officer's entry onto the premises." Pause was given to the issue of whether the person who admitted the officers had "common authority over the home such that he could authorize the officer's entry." The pause was only momentary as the Supreme Court quoted the United States Supreme Court's holding that a "warrantless entry is valid when based upon the consent of a third party whom the police, at the time of entry, reasonably believe to possess common authority over the premises, even if that third party does not possess such common authority." The appellate court found that the entry into the home was not illegal under this standard.

The final issue was whether threatening to make a person to wait "outside in the cold" while a warrant was obtained constituted a coercion of the defendant's consent to a search of the home. The Supreme Court did not find such a statement in the record of the matter, however, and determined "it is clear that no threats were used to obtain petitioner's consent to search the premises." It is not obvious from the decision, but it can be presumed that this fact had not been presented originally to the lower court or had not found its way into the appendix for the appeal.

The denial of the motion to suppress was affirmed.

If "Switching" is a Crime, My Mama's Al Capone.

In the memorandum decision, *State v. Hopkins,* 2015WL7628840, the defendant was convicted by a jury of the felony offense of child abuse by a parent resulting in bodily injury. The defendant was placed on a one year period of probation.

The incident underlying the offense was the defendant's disciplining of her eleven year old son by striking him with a "switch." The event purportedly left bruises on the son's back and several tender spots, which were reported by the son to the director of the son's daycare center. The son is described as a child with mental disabilities.

The defense was that the injuries to the son were caused by a go-cart accident that had not been mentioned in the defendant's original statements to the law enforcement personnel and child protective services. Two construction workers testified to witnessing the accident and stating that any back injuries might be related to the son's overturning the go-cart.

An issue on appeal was the consistent examination of the lead investigator and other witnesses by the prosecution regarding the fact that the defendant never mentioned the go-cart accident as a potential source of her son's injuries. The defense counsel objected to the first question regarding if anyone had informed the investigator about the go-cart accident as hearsay, which was overruled. The defense counsel did not object to the repetition of this questioning ending in the investigator's statement that, "if I was in the middle of a CPS investigation, a law enforcement investigation, and she [petitioner] knew that that's how he received these injuries, according to her from a go-cart wreck, I think that I would have informed CPS and law enforcement of that real quick."

The defense counsel cross-examined the investigator and asked, if "[defendant] told her lawyer about it and he chose not to do it [advise police or CPS of the go-cart accidents], then who's to blame?" When an objection to this question was sustained, the defense counsel then asked "for the jury to be instructed that the fact that [defendant] remained silent and didn't volunteer this should not be interpreted against her." The prosecution objected on the basis that the plaintiff had waived her right to remain silent by executing

an *Interview & Miranda Rights Form* prior to her original statement. The court sustained the objection, but proffered to give any instruction wanted by the defense counsel. No instruction was ever given.

The defendant was then similarly cross-examined on her failure to mention the go-cart accident to any law enforcement official. The defense counsel objected, stating that the client "had a right to remain silent [and] [s]he had counsel." The prosecution again asserted that the defendant had waived this right to which defense counsel's eloquent and concise reply was, "[o]h, come on." The defense counsel's objection was overruled.

The CPS worker similarly testified, to which no objections were interposed.

The Supreme Court of Appeals found that no constitutional violations occurred and were harmless in any event. The linchpin was that the defendant did not assert her right to remain silent. She spoke and her statement was admitted without objection. Accordingly, what was not said in the statement was properly commented upon or, because it was obvious that her story was not included in the statement, it was harmless commentary by the prosecutor upon the statement. Simply, if your client chooses to speak, what he or she chooses to say and not say becomes evidentiary.

The second issue was whether the investigating officer was impermissibly permitted to testify as an expert on what caused the injuries to the son's back. The Supreme Court found the lay opinion testimony to be proper because "his opinions were rationally based on his perception, were helpful to clearly understand his testimony or determine a fact in issue, and were not based on any scientific, technical or specialized knowledge." The Court also noted that many of the opinions were elicited by the defense counsel on cross-examination.

The final issue was the state's failure to call the son, who, again, was described as a "child with mental disabilities." The defendant wanted an instruction that the jury could infer the testimony to be favorable to her because the state chose not to call him. The Court readily dismissed this ground stating that the appellate counsel "has cited no law that requires the State to call witnesses just so petitioner could elicit testimony from them." Obviously, the defendant "had a mechanism to obtain the witness and chose not to do so." As a note, however, the defendant's parental rights had been terminated.

Other grounds were summarily disregarded and the conviction was affirmed.

I Missed the Relevance of the Phone Records; No, Wait a minute, I mean the Missing Phone Records were Relevant.

In the memorandum decision, *State v. Bragg,* 2015WL7628836, the defendant was convicted of drug offenses relating to the transportation into the state and subsequent sale of prescription drugs. The defendant was on parole at the time of the arrest and, pending his trial, was incarcerated due to the drug transaction and then revocation of his parole. The trial centered on a confidential informant's testimony that he called the defendant who agreed to transport drugs from South Carolina to the informant's house in Fayette County, West Virginia. When the defendant arrived at the house, the transaction was completed by and between a co-defendant and an undercover officer. The undercover officer testified that the defendant stood in "a defensive stance, just kind of like he was there to watch, to observe, make sure everything was – nothing happened." Upon completion of the transaction, the undercover officer shook everyone's hands and then the defendant and others were immediately arrested.

All the relevant evidence was found on the co-defendant. Indeed, the drugs were in a prescription bottle with the co-defendant's name on the label.

The defendant testified at trial, stating that he had not received any phone calls from the confidential informant and that he had not discussed selling pills with any co-defendant.

The defendant then argued for an instruction on "missing evidence," citing the State's failure to properly inspect the confidential informant's cellular phone records prior to trial or to present the records. The instruction was rejected and the jury returned its verdict of guilty.

The Court readily found sufficient evidence to find that the defendant was a principal in the transaction. Essentially, the defendant was present during the transaction and was described by the undercover officer as warily observing. With regard to the missing evidence argument, the Court articulated the assigned error as being "the circuit court allowed the CI to testify to cellular phone calls he made to petitioner …, when the State failed to inspect or test the cellular telephones recovered by police to provide them to petitioner for his inspection."

The Court first found that the issue was waived because the defense counsel never objected on this basis during the testimony of the confidential informant. The Court then found that the defendant had no authority for the proposition that the State was obligated to produce the cellular records. The defendant had not requested and been denied the records, so no discovery abuse occurred. As in *State v. Hopkins, supra*, the State is required to produce evidence to support the crime, but is not generally obligated to produce evidence that only the defendant may deem to be relevant.

The missing evidence argument was also disregarded for the reason that the evidence was not missing; it was simply not presented by the State and not requested by the defendant.

Finally, the Supreme Court affirmed, consistent with its prior decisions, that the defendant was not entitled to credit for time served once his incarceration was related to the revocation of parole for a prior conviction, unrelated to the current charges.

If I am an Officer of the Court, Is my Brain technically a Concealed Weapon?

In the memorandum decision, *Munoz v. Adams,* 2015WL7628822, the petitioner was pro se. The issue was the petitioner's request for the issuance of a writ of prohibition against the magistrate presiding over his DUI charges. After several continuances, the trial date for the DUI charge was set for a jury trial, but the jury was not called to appear due to the petitioner's stated intent to enter a plea. However, the petitioner balked at entering a plea, and the magistrate dismissed the charge without prejudice.

The charges were refiled as a "second offense" DUI. The defendant moved to dismiss the charges as outside the statute of limitations. The motion was denied by the magistrate.

The Supreme Court noted that a "statute of limitations" is not explicitly set forth in the governing statute, but that the controlling precedent is that, "a criminal trial in magistrate court must be commenced within one year of the [execution] of the criminal warrant and lack of good cause for delay beyond one year … should be presumed from a silent record." In the Supreme Court's opinion, the record was "clear" that the petitioner had moved three times for a continuance, and the statute specifically states that an exception is made where "the failure to try [the defendant] was caused by … a continuance on the motion of the accused."

And this is a punchline for the case. The petitioner claimed that the record did not contain any actual motions made by him for a continuance. The *pro se* petitioner was, in fact, a licensed attorney in the State of West Virginia and the magistrate testified in the circuit court that she had not reduced the oral requests for a continuance to writing because the petitioner was an "officer of the court" and it was her belief that "he could be trusted to proceed accordingly." The Supreme Court further noted that the record was silent "to any party other than the petitioner requesting a continuance." The state had not sought any continuances. Accordingly, the delay in the trial had to be solely attributed to the petitioner. The denial of the writ of prohibition was thereby affirmed.

I Want to Look Directly in Her Black Eye When She Accuses Me of Beating Her.

In the memorandum decision, *State v. Bazar,* 2015WL7628722, the defendant, who was convicted of a battery, claimed "his rights under the Confrontation Clause of the Sixth Amendment were violated, in that the victim in the matter did not testify."

The testifying officer had responded to a domestic violence call and found a woman with whom the defendant lived bleeding profusely from the side of her head and crying hysterically. The testifying officer then recounted the statements of the woman to him that the defendant had punched her. Other witnesses testified to the defendant's treatment of the woman on that evening, including their witnessing the defendant hitting her, pulling her hair, and knocking her into a doorway. A treating nurse testified that the

woman told her that her boyfriend had hit her and had choked her.

The jury convicted the defendant of unlawful assault and battery as a lesser included offense of malicious assault.

The Supreme Court restated the requirement that only "testimonial statements" cause the declarant to be a "witness" subject to the Confrontation Clause. The converse is that "non-testimonial statements by an unavailable declarant … are not precluded from use by the Confrontation Clause."

The Supreme Court found that the circumstances in which the officer had heard the woman's statement constituted non-testimonial statements because "the primary purpose of the statement is to enable police assistance to meet an ongoing emergency." The statements also were not hearsay because the prosecutor was careful to state why he asked the question as he asked them, which was to determine what steps the officer needed to take. The statements were not asserted, therefore, for the truth of the matter.

Similarly, the statements to the nurse were not testimonial in nature because the statements were made in the "midst of an ongoing medical emergency." However, the Supreme Court seemingly acknowledged that the statements were hearsay, but relied upon its precedent that "an error in admitting hearsay evidence is harmless where the same fact is proved by an eyewitness or other evidence clearly establishes the defendant's guilt."

Simply, the testimony of the other witnesses to the events of the evening was sufficient to convict the defendant, rendering the statements to both the officer and the nurse harmless.

A Paradox is where you can park Two Boats.

In the memorandum decision, *State v. Plymail,* 2015WL7628723, the defendant was sentenced to life imprisonment upon conviction of the second degree assault of a woman he had met at bar near the campus of Marshall University. The case was complicated by the admission that defendant and the alleged victim had engaged in consensual intercourse before the alleged circumstances of the assault. At the trial of the matter, the jury informed the judge that it was hung at a vote of "6-4-2." The judge asked for a show of hands by the jurors, admonishing the jurors to not say anything, about whether continued deliberations might result in a verdict. Three hands were raised. The judge returned the jury to its room for more deliberations. About forty-five minutes later, the jury had a verdict, which was guilty of second degree sexual assault.

Two previous felony convictions supported a recidivist information. The information provided to the defendant failed, apparently, to attach a copy of the indictment and conviction order for a burglary charge. Instead, two copies of an escape charge were attached. Eventually, defendant admitted to the two previous charges, and petitioner received his life sentence.

The first assignment of error was the fact that his appeal was not filed until twenty (20) years after his conviction in 1994. The Supreme Court recited its precedent that "the denial of the right of appeal constitutes a violation of due process which renders the sentence imposed by reason of the conviction void and unenforceable." However, the Supreme Court recited its additional precedent that "the appropriate remedy for denial of a timely appeal was not unconditional release, but such remedial steps as will permit the effective prosecution of the appeal."

The reality was that the defendant had at least eight counsel appointed to him and the State's counsel pointed out that "the withdrawal of these attorneys was due, in large part, to petitioner's accusatory, abrasive and belligerent attitude."

And thus comes the paradoxical ruling. Because the defendant's appeal had no merit, "there is no prejudice to petitioner for delay in the filing of his appeal."

The next assignment of error alleged that the lower court had coerced a verdict. Two prospective jurors indicated on Wednesday during jury selection that they would not be available for a trial on Friday and would not be available generally after that date. The jurors remained on the jury and the lower court advised the parties, counsel and the jury that "the case was going to take two days to try." When the case was submitted to the jury, the court informed the jury that the deliberations had to be finished that

evening and mentioned the possibility of an overnight sequestration. Apparently, the court stated in jest that "he would hate to have to put them in jail overnight to make sure that they would be there the next day", apparently referring to the fact that two jurors had other commitments the next day. The defendant felt that these comments combined with the judges' insistence on continued deliberations created a coercive atmosphere leading to his conviction.

The Supreme Court noted, however, that no such complaints had been made to the lower court at the time. And the Court refused to consider the matter as plain error because the Supreme Court did not believe the circumstances warranted the use of the plain error doctrine in order to "avoid a miscarriage of justice." Essentially, the paradox arises again. You were found guilty so the plain error doctrine would not avoid a miscarriage of justice.

The next assignment of error was based on the defendant's arraignment on the recidivist charge after the end of the term of court in which he was convicted. The defendant acknowledged that he requested a continuance of the matter when it was first brought before the court, to which the court replied, "I am willing to give you that time so long as we don't have any claim of a denial of a speedy trial." The defendant argued on appeal that the timing was jurisdictional and, therefore, the Supreme Court had to uphold his assignment of error. Instead, the Supreme Court treated this as an "invited error" by the defendant and, therefore, the jurisdictional issue could be ignored in order to "protect principles underlying notions of judicial economy and integrity by allocating appropriate responsibility for inducement of error."

The next assignment of error went to the defendant's election to not testify because of the prosecutor's threat to introduce evidence of other assaults and criminal acts on which the defendant had been indicted at the same time as the present charge. The defendant asserted that, in fact and as a matter of law, it would have been improper to use such evidence and, therefore, he was wrongfully dissuaded from testifying. The lower court had actually ruled that such matters might be admissible if the defendant opened the door. Because the court had not made a "grossly erroneous mis-statement … about the areas of conduct or criminal record that a defendant can be cross-examined about if he elects to testify," no reversible error existed. Again, the paradox is evident. I cannot tell you if this evidence would be admissible until you testify and you did not testify so I did not tell you incorrectly.

Significantly, Justice Davis and Justice Ketchum dissented from this decision, stating that the jury was, in fact, coerced by the judge's imposition of a "time limitation." The judge's admonition to the jury "to get it finished," and the judge's statement about "the possibility of overnight sequestration to secure their attendance, and he would hate to put them in jail overnight" were viewed as coercive, as evidenced by the speed of the deliberations and a verdict 52 minutes after informing the judge that they were hung.

Using a Smart Phone may not be the most Intelligent thing to do.

In the memorandum decision, *State v. White,* 2015WL7628721, the issues arose out of the defendant's conviction on two counts of first degree felony murder after introduction of evidence establishing that the defendant was a drug dealer and not adverse to violence. The underlying facts were that two men entered a "known drug house," and, after shots were heard, the two men left, with one person limping. Inside the house, law enforcement personnel found one dead person and one seriously injured person, who subsequently died. Around this time, the defendant entered a hospital seeking treatment for a bullet wound to his abdomen.

The defendant's accomplice was apprehended and questioned. The vehicle in which the men had arrived at the drug house was found near the scene and was determined to be registered in the name of the defendant's girlfriend. In the car, a gun was found which had the defendant's prints and blood.

Also, the accomplice's phone was found in the drug house and the defendant's phone was found in an area around the house together with the keys for the vehicle. Phone calls between the accomplice's phone and the defendant's cell phone were discovered that corresponded with the time period before and during the events. Text messages from the defendant's phone were also obtained.

The prosecutor gave notice that he intended to use as Rule 404(b) evidence "call logs" setting forth the communications between

the alleged accomplice and the defendant and the text messages found on the defendant's phone. The text messages regarded the distribution and sale of drugs, except that the last message threatened overt violence against another person. The defendant was purportedly the sender of the text messages. The trial court permitted the admission of the evidence as proving the defendant's intent and/or motive, holding that "I think that kind of goes to [defendant's] business plan … of how [defendant] did business as a drug dealer, which seems to very neatly fit into [the State's] theory that [defendant and defendant's accomplice] went [to the drug house] to further their business and get more drugs with a possible use of violence."

The evidence was admitted at trial, but the Court did not give a limiting instruction, nor did defense counsel ask for an instruction. In instructing the jury, however, a limiting instruction regarding the evidence was given. The defendant did not testify.

During deliberations, the jury asked a question regarding "which phone related to the call logs, and which related to the text messages." The court identified the phone to which the call logs related as the accomplice's phone, but the court could not connect the text messages to a phone. The foreman commented, "So it's all the same phone?", to which the judge replied, "[I] can't really tell you more."

With respect to whether the text messages were properly admitted, the Supreme Court of Appeals found that the evidence of other drug transactions was properly admitted to show motive and intent, i.e., "to enhance … [the defendant's] illegal 'business' by robbing a known drug house." The Supreme Court did not find this evidence to be more prejudicial than probative, because the evidence was obviously prejudicial but its probative value was not proven to be "substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

The Supreme Court characterized the defendant's further issue as a belief that the admission of the Rule 404(b) evidence was error because the jury's question related to this evidence and resulted in a verdict shortly after the question was answered. The Supreme Court found this argument "speculative" and further found it to be harmless even if it was error to admit the text messages.

Finally, the Supreme Court addressed the failure of the court to give a limiting instruction at the time of the admission of the Rule 404(b) evidence. While error was committed, the Supreme Court found it to be harmless. The significance of the harmless error analysis is that it included the failure of the defense counsel to move for the limiting instruction, even though the requirement has been imposed by case law upon the court to give such an instruction. But, again, it is significant, perhaps for habeas corpus relief, that the failure to give the instruction was deemed harmless, in part, due to defense counsel's failure to move for the instruction.

Why So Serious?

In the memorandum decision, *Plumley v. Mayfield,* 2015WL7628694, the Supreme Court affirmed the circuit court's order granting the respondent's petition for a writ of habeas corpus.

The underlying circumstances involved a scuffle between two women at an apartment complex which the defendant, who was one of the combatant's boyfriend, was trying to quell. In the ensuing scrum involving the wrestlers, the boyfriend and the law enforcement personnel, the respondent became physically entwined with the law enforcement personnel and was arrested on the misdemeanor charge of "obstructing an officer." This would be a second offense due to a previous incident. The undisputed fact is that neither law enforcement officer was injured. It also came to light that the respondent's girlfriend was pregnant, thus accounting for his attempt to aid and protect his girlfriend.

The original charge was dismissed on the prosecutor's motion and, nineteen days later, the respondent was charged with two felony counts of battery on a police officer. Apparently, the upgrade in charges was the result of the respondent's refusal to make a deal in which he would plead guilty to attempted murder in an unrelated matter.

At the trial of the matter, the respondent was not permitted to testify that he had been originally charged with the misdemeanor offense and the prosecution was permitted to introduce as Rule 404(b) evidence the previous conviction for battery on a police

officer.

The result was a jury conviction resulting in the respondent's incarceration for a term of life imprisonment as a recidivist, involving the offense of wanton endangerment involving a firearm and possession with intent to deliver a Schedule I controlled substance.

The habeas court granted the respondent a new trial on the finding that it was improper to deny the respondent the opportunity to cross-examine the officers with the fact that, initially, he was charged with the "relatively minor misdemeanor offense" and on the further finding that it was improper to admit as Rule 404(b) evidence the previous conviction for battery on a police officer. The conviction for battery on a police officer, second offense, was vacated as was his sentencing as a "lifetime habitual offender."

Notably, the felony offense with which the respondent was charged required that the physical contact with the law enforcement personnel had to be "of an insulting or provoking nature." The underlying question is why the respondent's actions became "insulting or provoking" nineteen days after the misdemeanor offense was dismissed by the prosecution.

The Supreme Court agreed that the Confrontation Clause's protections had been vitiated by the circuit court's refusal to permit cross-examination of the officers on why their first assessment of the seriousness of the offense changed. As the Supreme Court noted, "the officers were not only the key witnesses against respondent, they were also the victims of the alleged battery [and] [a]s such, the credibility of their testimony was critical to the State's case." Accordingly, "given this fact, respondent was entitled to impeach the officers with evidence of their decision, at the time of the altercation, to charge respondent with a much lesser offense." And, even more notably, the Supreme Court found "this line of questioning would have been particularly significant given that the battery charge was determined by the sentencing court to be a violent crime that carried capital sentencing implications for respondent." The constitutional error was not harmless beyond a reasonable doubt because "allowing the jury to consider the officers' testimony in this regard would have afforded the jury the opportunity to fully assess the credibility of the officers, within whose discretion the initial charging decision was made, and would not have infringed upon the prosecuting attorney's decision to charge respondent with battery."

The State had argued that the cross-examination would have been inappropriate as it would have exceeded the scope of the direct examination. The Supreme Court noted that the argument had no merit because "cross-examination to impeach is not, in general, limited to matters brought out on the direct examination."

The Supreme Court did not discuss, therefore, the propriety of the admission into evidence of the prior conviction to show intent, motive or knowledge under Rule 404(b).

Justice Loughery dissented and would have reversed the circuit court's order because both grounds were improper grounds to reverse on a habeas corpus petition. An interesting point in the dissent is that the officers did not dismiss the charges and did not obtain the indictment on the more serious charges – the prosecutor did.

You Cannot Beat Beating Charges By Beating the Same Drum.

In the memorandum decision, *State v. Stewart,* 2015WL7628700, the defendant and two other individuals beat up another individual who was accompanying them on an abandoned mission to buy drugs. Purportedly, the defendant took money from the victim's wallet.

A common trial pattern emerges. The investigating officer recounts the statements given to him by the alleged accomplices. The objection of hearsay is overruled on the grounds that the testimony is not proffered for the truth of the matter, but, instead, was presented "to explain the chronology of actions that he [the investigating officer] took in the investigation." The statements the investigating officer recounted was that all three of them, including the defendant, "engaged in the beating in some part." The investigating officer was then recalled later to again testify about the accomplice's statement implicating the defendant in the robbery in order to impeach the accomplice's testimony.

An interesting twist in this matter is that the accomplices' trial testimony aided defendant, even though they had entered pleas of guilty to the charges. The female accomplice testified that she was in an alcoholic and drug-induced haze during that period and could not remember anything. The other accomplice assumed complete responsibility for the beating, contrary to his statements to the police.

As an editor's note, the prosecution did not need to elicit the officer's statement as a "chronology," but could have waited and used the statements to impeach the witnesses. Nonetheless, the prosecutor chose to elicit it during the case-in-chief, perhaps because the prosecution needed to call the accomplices as witnesses and it would be difficult for the prosecutor to impeach his or her own witness subsequently.

The prosecution did seek to impeach the female accomplice by having the driver of the transportation van, who was not on the witness list, recount that he heard the female accomplice state her love for the defendant and state, "I got your back."

During cross-examination of the other accomplice, the prosecutor had the accomplice recount a separate trial in which another beating was involved and in which he took the stand and "professed" the defendant's innocence of that beating as well. The prosecutor made known during this questioning that the defendant had been found guilty of this other matter notwithstanding the accomplice's testimony by stating "the jury didn't believe you either, did they?" An objection was lodged to the solicitation of a reference to the prior conviction, but no limiting or cautionary instruction was given.

And, in closing, the prosecution referenced the statements of the female accomplice as substantive proof of a conspiracy and referenced the guilty pleas of the accomplices as evidence of the defendant's guilt. No objections were interposed during the prosecutor's closing argument.

The first and prominent argument on appeal was that the reference to the guilty pleas constituted reversible error, notwithstanding the court's instruction limiting the use of the pleas to the determination of credibility of the witnesses and not the guilt of the defendant. The Supreme Court found that the limiting instruction precluded any error.

The prosecutor's remarks in closing were not found to constitute plain error, and the Supreme Court noted that the reference to the prior convictions was simply use of evidence that had been admitted to refute the defense theory that the defendant had no part in the beating.

Another ground for error was the testimony by the investigating officer about the statements made to him. The defendant argued that the explanation given for eliciting the testimony was "a mere pretext to get otherwise admissible hearsay before the jury." The Supreme Court found that the officer's next statement about getting a "warrant" substantiated the use of the statements as part of the chronology of the investigation.

Plain error was not found in using the statement of the accomplice that she loved the defendant and had his back. In context, the prosecutor was attacking the witness' credibility.

Finally, the eliciting of the information about the defendant's prior conviction for a beating in conspiracy with the same individuals was found to be proper 404(b) evidence to "demonstrate a specific plan or course of action on behalf of [defendant] and also to show that there was no mistake on his part, that there was no instance of a heat-of-passion incident." The Court noted that a pretrial hearing had been held on the matter and that limiting instructions had been requested and given. Interestingly, no discussion was had regarding the prejudicial effect of using an identical set of facts in another case to prove guilt in this case.

The conviction of the defendant was affirmed.

The First Initial of your Name is not a Code name – It's an Identifier!!!! (summary provided by "D.")

In the memorandum decision, *State* v. *Messer,* 2015WL7628699, the defendant was convicted of several counts of burglary, one count of second degree robbery, and one count of conspiracy.

The allegations were that the defendant and his co-conspirator had robbed one home, but, in doing so, the defendant's co-conspirator was cut so severely that it required stitches. At the hospital, the investigating officer questioned the defendant and his alleged co-conspirator about the recent robbery. After treatment and questioning, the defendant and his co-conspirator then went to another residence and robbed another home, wearing ski masks and using a gun to force a safe to be opened. The victims were able to identify the co-conspirator by his voice.

Shortly into the investigation, the co-conspirator called to confess, implicating the defendant in the commission of the crimes.

At trial, the co-conspirator changed his testimony and attempted to exonerate the defendant.

Without any actual eyewitness testimony, with the co-conspirator's recanted statement, and with only the defendant's identification in the course of the crime as "J," which is the first letter of his first name "James," the defendant was convicted of all the burglary charges and the lesser included offense of second degree robbery.

The Supreme Court first found that the delay in the trial of the defendant was attributable to the withdrawal of defendant's first two court-appointed counsel and not to any failure on the part of the court or the prosecution. Accordingly, the defendant had not been denied a trial without unreasonable delay. Moreover, defendant had failed to articulate any actual prejudice.

A focus on the appeal was the sufficiency of the evidence. The defendant put forth that the only evidence of his complicity in the crimes was the "false" statement by his purported co-conspirator, who recanted at trial. Because the precedent requires "no evidence" before a jury verdict will be set aside, the Supreme Court pointed to the fact that the co-conspirator had implicated the defendant and that the defendant's first initial was spoken during the commission of the crime and that the defendant had knowledge of the location of certain stolen items in the victims' homes. So, "some" evidence existed and "sufficiency" was satisfied.

The Supreme Court also found that no *Brady* violation occurred because the prosecutor withheld medical reports until trial showing that the defendant was in the hospital until several minutes before the second robbery occurred, thus clearing him, and the prosecutor further withheld 911 tapes for the time that the second robbery was reported because the tapes were destroyed routinely after one year. The Supreme Court noted that the defendant did receive the medical records for his co-conspirator, but the records were not exculpatory because the time relied upon by the defendant was merely the time of a final entry and other evidence existed that the defendant and the person being treated had left earlier. The Supreme Court further found that the 911 tapes were not suppressed by the prosecutor and the exculpatory value was simply speculative. The Supreme Court further noted that the defendant's "quarrels with his initially-appointed counsel resulted in a large amount of time" passing, during which the tapes could have been requested.

The defendant also objected to the fact that his co-conspirator was required to testify in orange prison attire. While the Supreme Court noted that this is not a constitutional right, it is desirable for a witness to not be so attired. However, the burden is placed on the defendant to move that the incarcerated witness be permitted to testify in civilian clothes and the judge must then "set forth on the record the reasons for denying said motion." The defense counsel had not carried this burden. Also, the defendant's questioning of the witness required disclosure of his conviction and incarceration and, therefore, the jury knew of his status notwithstanding the witness' prison attire.

The remaining nineteen assignments of error were summarily dismissed.

Five out of Five Pleas are the result of Committing the Criminal Acts; Five out of Five Requests to Withdraw Pleas are Due to Being Sentenced for Committing the Criminal Acts.

In the memorandum decision, *Christopher S. v. Plumley,* 2015WL7628693, the denial of the petitioner's habeas corpus writ was affirmed. For his convictions on five counts of sex offenses, the petitioner was sentenced, in effect, to twenty-five to fifty-five years in prison.

The petitioner pled guilty to the charges upon which he was sentenced. At the plea hearing, the petitioner answered all the

inquiries regarding his decision to enter into a plea, including his acknowledgment of his attorney's effective representation. However, by sentencing, the petitioner was trying to retain another counsel and to withdraw his plea. The court refused, pointing to the petitioner's acknowledgments at the plea hearing.

The petitioner alleged ineffective assistance of counsel in his petition for habeas corpus relief and further alleged his guilty plea was involuntarily made and his motion to withdraw the plea should have been granted.

Several grounds were presented for the ineffective assistance of counsel, including the following that should serve as guidelines for public defenders: (i) the attorney met with petitioner twice prior to trial while petitioner was in jail, with the last of the two meetings being held on the day before commencement of the trial; (ii) the attorney failed to timely plea bargain by waiting until the night before trial was to begin; (iii) the attorney failed to subpoena witnesses to trial; (iv) the attorney failed to adequately prepare for sentencing by waiting until the day before sentencing to meet with petitioner, resulting in no witnesses being available to speak for petitioner; (v) the attorney failed to request an evaluation for petitioner to be considered for probation; and (vi) the attorney failed to present mitigating evidence at sentencing.

The Supreme Court's view on the ineffective assistance claim is best reflected in the following statement: "[G]iven the heinous nature of the petitioner's offenses, it was not ineffective for … [the attorney] to forgo an argument for probation at the sentencing hearing, and instead to hope for concurrent sentences." The objective evaluation of the attorney's performance was that it was not deficient.

With respect to the involuntariness of the plea, the Supreme Court reiterated its precedent that "a criminal defendant can knowingly and intelligently waive his constitutional rights, and when such knowing and intelligent waiver is conclusively demonstrated on the record, the matter is *res judicata* in subsequent actions in *habeas corpus*." The proper colloquy was performed by the sentencing court, and, accordingly, the guilty plea would not be revisited.

The denial of the petition for a writ of habeas corpus was affirmed.

The Devil's in the Details, unless you are the Devil, then Details do not Matter.

In the memorandum decision, *State v. Michael Austin S.,* 2015WL7304499, the issue was the defendant's motion to delete the "sentencing provision placing him on supervised release for a term of fifty years." The defendant was convicted of sex offenses arising out of the victimization of his stepdaughters. The State agreed to the entry of a *Kennedy* plea in consideration for which the State would not file for a recidivist enhancement based on prior convictions of the offenses of armed robbery, aggravated robbery, and engaging in a fraudulent scheme. The defendant agreed to serve three consecutive one to three year sentences and to waive parole eligibility.

In the course of the colloquy, discussion centered upon the requirements for convicted sex offenders, *i.e.,* the registration requirements and the imposition of a period of supervised release. At one point, the defendant acknowledged that he had seen the terms and conditions of the supervised release, thus relieving the court of the obligation to read all the pages for the record. During sentencing, the court admonished the defendant, "if you violate the terms and conditions of this you can be returned to prison for up to 50 years."

The documentation of the plea in an order did not mention supervised release, but the sentencing order set forth the terms and conditions of a fifty year term of supervised release. Another order entitled "Order of Terms and Conditions of Probation" was subsequently entered and "recounted once more that the petitioner had been placed on extended probation at the completion of your sentence for fifty (50) years." No appeals were taken from any of the orders.

One year later, the defendant filed, *pro se*, a motion for correction of sentence asserting that the crimes of which he was convicted did not invoke the provisions on supervised release.

The lower court ruled "the defendant is correct that … supervised release is not part of the requirements for pleading guilty to Attempt to Commit a Felony charges." However, the lower court noted that a finding was that the crimes were "sexually motivated" and that the court would not have accepted the plea but for the requirement of registration and supervised release. An appeal followed for which counsel was appointed.

The Supreme Court of Appeals found that the circuit court did not need to deconstruct its order to justify the imposition of the period of supervised release. Instead, the appellate court found that the motion to correct the sentence was untimely when made two years after the imposition of the sentence notwithstanding the defendant's "protestations of ignorance." The essence of the affirmance of the denial of the motion was that "having received all of the benefits from the agreement he negotiated and agreed to, the petitioner ought not now be heard to complain of his bargain." In summary, "his time to object was at the time of his sentencing, not some two years later."

In short, the petitioner may have agreed to a term of his sentence that was not legally mandated, but having so agreed in a negotiated plea, he could not complain about the bargained term when the time came to fulfill the agreement.

Prompt Presentment Requires Defendant's Immediate Resentment, not Passive Contentment, so Don't Have a Cup of Coffee at the Police Station.

In the memorandum decision, *State v. Hubbard,* 2015WL7025873, the defendant received a sentence of life imprisonment without mercy upon his conviction of first degree murder by a jury without a recommendation of mercy. The issue on appeal was the admission of the defendant's statement into evidence after the defendant asserted that law enforcement personnel had violated the prompt presentment provisions of the state code.

The allegation was that the defendant and a high school friend "devised a plan" to kill the high school friend's husband. Subsequently, the husband was shot, beaten with the gun, and shot, again, in the head. The defendant fled and hid in a camper in the woods. The high school friend confessed and the defendant was subsequently apprehended at the site of the camper. During transportation to the state police detachment, the defendant indicated he wanted to make a statement. After arriving at the detachment and being fed and given something to drink, the defendant proceeded to make two statements – one not recorded and one recorded. An acknowledgment of his Miranda rights and a waiver were signed by the defendant. About five hours after arriving at the detachment, the defendant was taken before a magistrate.

During pretrial motions, the defendant raised the issue of a violation of the requirement of a prompt presentment, but the suppression of his statement was denied. The defendant testified and mirrored the statements he had earlier given.

The Supreme Court of Appeals of West Virginia found no violation of the prompt presentment rule in the matter because the evidence established the defendant wanted to make a statement and so no coercion existed upon the defendant to give the statement. Moreover, the Supreme Court put forth the proposition in a footnote that "when Petitioner voluntarily testified at trial he essentially negated or waived any error that he maintained occurred as a result of his allegation that the prompt presentment statute was violated." The facts of the case were that the defendant's testimony at trial was consistent with his previous statements. Accordingly, the "waiver" of the prompt presentment statute may not apply if the trial testimony is different from the initial statement; however, this distinction is not made in the decision.

How Many Times Do I have to Tell you – You're Not Getting Out!

In the memorandum decision, *Richard M. v. Plumley, 2015WL6954985,* the petitioner's second petition for a writ of habeas corpus had been denied by the lower court. The petitioner stood convicted of sexual molestation charges involving the granddaughter of his girlfriend. The sentence was concurrent terms of imprisonment of ten to twenty years.

The petitioner was advised by privately retained counsel that he should not file a petition for appeal as no non-frivolous grounds for appeal existed. The petitioner was further advised that his claims of ineffective assistance of trial counsel should be pursued in a

petition for habeas corpus. The petitioner purportedly agreed with counsel's advice and did not file a petition for appeal.

The first petition for habeas corpus relief was denied. In the course of the hearing, the court continually admonished the petitioner that if grounds for the petition were not presented, the grounds would be waived and the decision would be res judicata as to such claims. The petitioner affirmed on the record that all the grounds for the petition had been raised. The record contained the cautionary inquiries of the court which were also memorialized in the final order denying the petition. The Supreme Court denied the resulting appeal, but informed petitioner that claims regarding his habeas counsel's effectiveness should be raised in a separate petition.

The second petition alleged that the habeas counsel had been ineffective. However, the grounds for the *pro se* petition seemingly included grounds for an appeal and grounds that could have been asserted in the first petition. Specifically, habeas counsel was criticized by petitioner for not raising issues of the trial counsel's ineffectiveness in failing to claim petitioner was not promptly presented before a magistrate and that certain jury instructions were erroneous. Again, no appeal had been taken by petitioner. The circuit court found the claims about the trial counsel's ineffectiveness were without merit and, therefore, the habeas counsel was not ineffective in failing to raise these issues in the omnibus hearing. The second petition was denied.

On appeal of this denial, the petitioner raised the issue that he was coerced into not filing an appeal. The Supreme Court found that the record supported a knowing and voluntary waiver by petitioner, which only now the petitioner regretted. Overall, the Supreme Court found that the petitioner was not presenting any new arguments and affirmed the denial of the petition.

The reason this case is summarized is that it demonstrates the advisability of memorializing the reasons for not filing an appeal on behalf of a client. The counsel's correspondence gave the Supreme Court sufficient confidence that the counsel was not ineffective. Moreover, the record at the omnibus hearing contained the petitioner's own affirmation to the court that all grounds had been raised, thus insulating habeas counsel from any claims regarding effectiveness of representation. A practitioner should adopt these safeguards.

He's Horsed Around Enough, It is Obviously Not His First Rodeo.

In the memorandum decision, *State v. Morris,* 2015WL6143401, the defendant appealed his conviction on two counts of delivery of a controlled substance, resulting in two concurrent terms of imprisonment of one to fifteen years. Two grounds were raised.

First, the defendant argued that the lower court should have declared a mistrial when the state's confidential informant referenced multiple drug deals between her and the defendant during her trial testimony. As a result of pretrial motions, the court had ruled that the witness could testify to drug transactions preceding the controlled buys that gave rise to the indictment. The court found the transactions to be "intrinsic to the charges" because it established why the witness informed police she could buy drugs from the defendant and why she could be used by police to target the defendant. However, the court did rule that the witness should not talk about the number of such transactions, which exceeded fifty times. Specifically, the court ordered that "the State is directed not to illicit [sic in original] testimony from [the informant] regarding the number of times she purchased controlled substances from the defendant."

In establishing the preexisting relationship between the confidential informant and the defendant, the prosecution asked a question which was answered by the witness' detailing the places where she had dealt "times" with the defendant. An objection ensued, but "the substance of the conference was mostly deemed 'unclear' by the court reporter." Questioning resumed. On cross-examination, the witness responded to a question by stating, "Everybody in …[the city] that does drugs knows that he sells crack." A motion for mistrial was made and denied, but the jury was instructed, of course, to "disregard what she said here recently." Subsequently, the prosecution elicited a response that "nine times out of ten" the drugs would be wrapped in a lottery ticket, which again quantified the prior transactions to some extent.

The defendant argued on appeal that a mistrial should have been declared because it was apparent the prosecution wanted to

have the number of transactions brought out in the witnesses' testimony.

The Supreme Court denied this ground for appeal stating that the defense counsel never moved for a mistrial on any ground other than the statement that the defendant was a known drug dealer throughout the city which was promptly addressed by the instruction to disregard the answer. Accordingly, a mistrial on the grounds that the state had violated the order regarding eliciting the number of prior drug transactions was not made and no issue existed for the appellate court to review. Two lessons emerge. One, you should make sure the court reporter can hear the bench conference. Two, you should include in any motion for mistrial all reasons for a mistrial, not just the one that is immediately in front of you. The mere fact that you moved for a mistrial will not preserve the error if it is not articulated as a grounds for the motion.

The second ground for appeal was the assertion that the prosecution had improperly referred to the defendant's failure to testify in the closing argument. The prosecution made statements such as "the only evidence you have heard is…" and "there is not other evidence, that is, [defendant's] cell phone" and "there's not another good explanation that is reasonable for the presence of the crack cocaine on [the informant] when she returns [from meeting with the defendant]." Unfortunately, the defense counsel made no objections at the time of the statements in the closing. So, not surprisingly, "we deem this issue waived for appellate review purposes." Plain error was not considered. The teaching point is that, if the prosecutor makes a reference to the "lack" of evidence presented by the defense, objection should be made if the defendant has not testified and the statement is implicitly referencing the lack of testimony to contradict another person's story.

Obviously my Counsel was Ineffective – I, of all People, am Still in Prison.

In the memorandum decision, *Pendleton v. Ballard,* 2015WL6955134, the appeal was taken from the denial of a petition for writ of habeas corpus.

The petitioner was sentenced to life imprisonment, with mercy, for a robbery, kidnapping, and severe beating of the victim. The initial appeal and an appeal from the first habeas corpus proceeding were denied. The petition from which this appeal was taken concerned a claim that the habeas counsel had been ineffective.

Specifically, the petitioner argued that the habeas counsel should have presented as grounds for relief the violation of his right to a "speedy trial" and an improperly obtained indictment.

With respect to the speedy trial argument, the lower court determined that habeas counsel's decision to not raise the argument was a strategic decision, based on the apparent contradiction between this ground and the ground that the trial counsel's motion for continuance should have been granted because the counsel did not have sufficient time to prepare for trial. The Supreme Court agreed and would refrain "from engaging in hindsight or second-guessing of trial counsel's strategic decisions." The Supreme Court noted, in any event, that the purported delay was "pre-arraignment," which "does not count toward the running of the three-term rule and, therefore, does not violate our speedy trial statute."

The second criticism of counsel related to the fact that the grand jury was never provided the victim's statement which, in the petitioner's mind, had to be exculpatory. Interestingly, the petitioner did not know if the statement was actually withheld from the grand jury, but presumed it must have been if he were indicted. The petitioner had moved for a copy of the grand jury transcript, which was denied. The Supreme Court read the victim's statement and did not find that it exonerated the defendant as it contained the victim's affirmation that he believed the petitioner "must have been present." Accordingly, the trial court's opinion was affirmed.

The Court Decides to Wash its Hands of the Prisoner's claims Regarding his Soap Bars.

In the memorandum decision, *Delgado v. Ballard,* 2015WL6955016, the defendant filed a writ of habeas corpus alleging that prison officials "retaliated against him for filing inmate grievances and monetary claims regarding lost, destroyed, or damaged property." The trial court dismissed the petition.

The petition was dismissed for failure to state a claim because the claims "concern routine discipline, safety and security measures at … [Mount Olive; thus,] it would be legally inappropriate and unwise for the Court to substitute its judgment for that of … [Mount Olive] officials." Moreover, the lower court found that none of the claims "rise to the level of constitutional violations, and [petitioner] is clearly not entitled to the relief requested."

The allegations concerned the breaking of petitioner's bars of soup and opening of petitioner's shampoo bottles by correctional officers. As hiding places for contraband, the correctional facility routinely does this when searching a prisoner's cell. The Supreme Court agreed that this claim should be rejected.

The other allegation concerned the failure of the correctional facility to charge an inmate with stealing the petitioner's CD player. The petitioner alleged discrimination because he was Hispanic and the other inmate was white. The Supreme Court found that it was lack of evidence and not discrimination that motivated the lack of charges.

Finally, the petitioner argued he should not have been disciplined for giving the CD player to another inmate in violation of a disciplinary rule that inmates were not to engage in transfers of property, for profit or not for profit. The irony of the disciplinary action is that the allegation that the CD player was transferred improperly was based on the claim that the other inmate had stolen the CD player. However, this apparent paradox was not discussed. The petitioner alleged that the other inmate demanded the CD player and because of the other inmate's gang affiliation, the petitioner ceded the CD player. For this he was disciplined. The Supreme Court affirmed the disciplinary conviction.

The Court found no evidence of any retaliation for filing the grievances, especially considering that the petitioner had another action pending in circuit court and no further retaliation had been described for filing the civil action.

Damn it Jim! I am a disbarred Attorney, Not F. Lee Bailey!!!

In the memorandum decision, *State v. Meadows*, 2015WL6181490, the defendant was sentenced to a term of imprisonment of fifteen years to life upon his conviction of first-degree murder, for which the jury recommended mercy. The issue on the appeal involved Rule 404(b) evidence and the "constitutional" ineffectiveness of counsel.

The facts were essentially uncontested. The defendant owned a trailer which was occupied by the victim, who was living with the defendant's daughter. The defendant had apparently referred to the victim as a "freeloading son of bitch," specifically referring to the victim's habit of returning gifts to the defendant's grandson and pocketing the cash. One day, the defendant drove to the location of the trailer and shot the victim "at a distance" as he exited the trailer. The defendant then called 911 and remained at the scene. When questioned at the scene, the defendant was reported to have stated, that he "had four more subjects … to take care of…." In a subsequent statement after waiving his *Miranda* rights, the defendant indicated that he had once before entered the trailer and placed a gun to the head of the victim while he was sleeping, but did not shoot when he realized that the grandson was present in the trailer.

A plea agreement was reached for the offense of manslaughter. The defendant changed his mind, rejected the plea agreement, and moved for, and was granted, new counsel.

Trial commenced and the prosecutor's opening statement included the fact that the defendant had been in the trailer on the previous occasion with the intent to kill the victim. Defense counsel objected on the basis this was improper Rule 404(b) evidence and moved for a mistrial. The lower court overruled the objection. The defendant was subsequently convicted of first degree murder.

With respect to the admission of the evidence regarding the previous entry into the trailer with the intent to kill the victim, the Supreme Court did not discuss the admissibility of the evidence, but, instead, held that the admission of the evidence was, at most, harmless error considering the substantial evidence that the defendant killed the victim. The defendant's own statements provided the necessary animus toward the victim to support the first degree murder conviction.

The issue of the ineffective assistance of counsel was not considered as it was deemed to be more properly the subject of a petition for a writ of habeas corpus.

However, Justice Ketchum wrote a short dissent acknowledging that it was the "extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal," but "it is also the extremely rare case when counsel for a criminal defendant fails to give an opening statement, fails to properly argue 'heat of passion' or self-defense in a murder case under these facts, calls only the defendant and the defendant's grandson to testify on his behalf, *and has his law license annulled shortly after trial*." Justice Ketchum stated that a more vigorous defense on the "provocation" by the victim might have resulted in a potential verdict of manslaughter. Moreover, some physical provocation by the victim had been included in the record, but was not pursued by defense counsel at the trial. Accordingly, Justice Ketchum would have permitted argument on whether "defendant's trial counsel was per se ineffective."

Effective Assistance of Counsel Can Be a Sobering Topic.

In the memorandum decisions, *Foster v. Ballard,* 2015WL6756866, the appeal was taken from the denial of a habeas corpus petition for relief based upon the ineffective assistance of counsel.

The facts of the case related to an ongoing dispute and physical conflict between the petitioner and another individual which resulted in gunplay between the victim and a group of people including the defendant. The factual dispute was over who fired the first shot and whether the gunplay was simply the culmination of a plan to kill the individual with whom the petitioner had the confrontation or was self-defense in an ambush by the individual after an invitation to "talk things out." Two persons died in the gunplay. The petitioner denied shooting anyone, although he was in the midst of the gunplay.

The petitioner was convicted of two counts of second degree murder and was sentenced to consecutive forty-year terms of imprisonment.

At the omnibus hearing, the trial counsel "admitted to suffering from alcoholism during the time he represented the petition." With respect to the period of time encompassing the trial, the counsel admitted "he was drinking alcohol during the evenings of the petitioner's trial," but testified that "he never consumed alcohol during trial, nor was he intoxicated during trial."

The Supreme Court reviewed its precedent and reiterated that "as a result of the rules and presumptions established …, the cases in which a defendant may prevail on the ground of ineffective assistance of counsel are few and far between one another." Specifically, "the test of ineffectiveness has little or nothing to do with what the *best* lawyers would have done … [n]or is the test even what most good lawyers would have done." Instead, "we only ask whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue." In short, "we are not interested in grading lawyers' performances; we are interested in whether the adversarial process at the time, in fact, worked adequately."

The claim of ineffective assistance of counsel began with the allegations that trial counsel never conveyed a pretrial plea offer which required a conviction on one count of second degree murder and one count of voluntary manslaughter. The complicating factor is that, on the first day of trial, an offer was extended for a plea of guilty to a single count of second degree murder.

The Supreme Court rejected the contention that the petitioner would have accepted the pretrial plea offer of which he did not have knowledge when, as an uncontested fact, the petitioner rejected a more favorable plea offer on the first day of trial.

With respect to counsel's overall representation, the Supreme Court acknowledged the precedent that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." The petitioner believed that the defense counsel failed to interview and present a witness who would have testified that the victims were the aggressors and were under the influence of drugs. The Supreme Court noted that defense counsel had cross-examined various witnesses that "included identifying deficiencies in the police investigation and indicated the toxicology report that demonstrated the victims were under the influence of narcotics." The Supreme Court remarked that "we remain mindful that where a counsel's

performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense counsel would have so acted in the defense of an accused." The witness who was not interviewed had given statements and had testified in a co-defendant's trial and, accordingly, the trial counsel asserted he knew the substance of the witness' testimony. Moreover, the witness would have potentially contradicted the petitioner regarding from where the first shot came and would have placed a weapon in the petitioner's hand. The decision to not call the witness had some strategy behind it. The Supreme Court affirmed the circuit court's decision, therefore, to not view the counsel's decisions through the "lens of hindsight."

Further, the Supreme Court found no ineffective assistance in the counsel's "brief" closing in which the defense counsel did not address "intent, malice or concerted action." Instead, the Supreme Court found that the jury was properly instructed on these elements and the attorney's closing was a matter of tactics and strategy. Moreover, the petitioner could not show that, but for the brief argument, the result would have been different.

Finally, the Supreme Court took note that considering the undisputed circumstances, "it is clear that the adversarial process at the time … worked adequately, particularly where the petition was tried on two counts of first degree murder, but was convicted on the lesser included offense of two counts of second degree murder."

In short, "while the petitioner's trial might not have been perfect, given the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial."

Under the OJ Simpson Rule of Sentencing, You are Convicted of First Degree Robbery Without Use of a Firearm, but you will be Sentenced for Committing First Degree Robbery at Gunpoint.

In the memorandum decision, *State v. Fields,* 2015WL6181504, the defendant asserted that the circuit court abused its discretion in sentencing him to thirty years of imprisonment upon his guilty plea to first-degree robbery without the use of a firearm. The statutory sentence for the offense was a term of imprisonment of not less than ten years.

While the petitioner robbed a gas station at "gun point," the plea that was offered and taken was the lesser included offense of "robbery without the use of a firearm."

The defendant requested the "minimum sentence of ten years of imprisonment" and placement in an in-patient drug addiction treatment facility. The State recommended the minimum sentence of ten years of imprisonment. The circuit court imposed a thirty year sentence.

Because the sentencing for first degree robbery involves no statutory maximum limit, the constitutional prohibition against a disproportionate sentence can be applied. However, the Supreme Court did not find that the thirty year term shocked the conscience of the court or society. The recited facts supporting this conclusion, however, included the defendant's use of a gun, despite the offense being one that presumed no use of a firearm.

The sentencing order was confirmed.

Hey, I am Just a Not-so-innocent Bystander!!!

In the memorandum decision, *State v. Brown,* 2015WL6181476, the defendant was indicted on "six felony counts related to possession and delivery of controlled substances, including crack cocaine, hydrocodone, morphine and Alprazolam."

The investigation into the offenses began with the report about a stolen all-terrain vehicle which was found at the defendant's residence. The defendant claimed that the owner had run out of gas and simply left the ATV at that location. However, the key to the ATV was found on the defendant. Further investigation resulted in the conclusion that the ATV had not been stolen, but, instead, was traded for drugs.

A search warrant was obtained and, during the search, bags of narcotics were being thrown out of a rear window as the search

began. The defendant was found in the house and was in position to have thrown the bags out the window. Moreover, "they found a bag of pills, crack cocaine, white tablets, a gun, and a pair of jeans reportedly belonging to … [the defendant] that contained another bag of pills, more crack cocaine, prescription cough medicine, and hydrocodone."

The defendant was tried and convicted of delivery of a controlled substance and conspiracy.

On appeal, the defendant argues that the lower court should have granted the motion for a judgment of acquittal. The testimony at trial involving the drug transactions was given by an informant. The informant testified that the defendant was "just there" and "that the actual exchange of crack cocaine for the vehicle occurred between a woman and … [a] co-defendant." The argument was, therefore, that no testimony existed that the defendant had delivered or transferred any drugs.

As noted by the Supreme Court, the record reflected, however, that the informant "testified that they [defendant and his co-defendant] weighed [the crack cocaine] out and handed it to her." Considering the defendant's presence at the exchange, the defendant's possession of controlled substances when the house was later searched; the defendant's friendship with the co-defendant; and the defendant's possession of the key to the ATV, the Supreme Court found the evidence sufficient, "while mostly circumstantial," to support the "jury's verdict beyond a reasonable doubt on the counts of delivery of a controlled substance and conspiracy."

The denial of the motion for judgment of acquittal was affirmed.

If Hell's Angels can have Motorcycles, Why Can't God's Messengers have a Minivan?

In the memorandum decision, *State v. Farley,* 2015WL6181512, the defendant claimed that the police officer did not have reasonable suspicion necessary to warrant a traffic stop. The offense of conviction was the defendant's driving a "minivan with multi-colored lights lining the front, sides, and rear of the van" including "red, blue, green, purple, and orange stars were lit up and facing forward on the roof of the minivan." Essentially, the lights were placed around the windshield. In short, the defendant's van was "covered with various lights, slogans, and decorations."

The defendant had been pulled over and informed that she could not have the adorning lights on her van displayed. The defendant refused to turn off the lights. Under threat of arrest, the defendant turned off the lights and was given a citation.

Upon conviction of the citation and affirmation of the conviction by the circuit court, this appeal ensued.

The defendant argued the traffic stop was improper because the lights did not violate state law. However, the Supreme Court noted that "reasonable suspicion" is a "less demanding standard than probable cause." The Supreme Court found, therefore, "the police officer performing the traffic stop had the requisite reasonable suspicion to warrant a stop as he observed petitioner displaying forward-facing, multi-covered lights around the top of the windshield in violation of" state law.

The real crux of this sordid affair was the defendant's claim that the conviction violated her First Amendment rights in that "the use of multi-colored lights on her minivan is part of her art and necessary for her to display her political and religious messages." The principle underpinning her argument was that the "substantive evil of speech must be extremely high before utterances can be punished." Apparently, the defendant was arguing that the lights were necessary so that the political and religious slogans could be discerned. The Supreme Court found no evidence existed that the "lights on her minivan are of a serious nature." Moreover, the Supreme Court refused to concede that the lights represented speech.

The defendant argued that a *Brady* violation had occurred in that the traffic camera video from the dash of the police car was not furnished to the defendant. The hard drive containing the footage had been damaged and was not available. The defendant could not articulate how the footage would be exculpatory or impeachment evidence considering that audio transcripts were available. Moreover, the State did not willfully or inadvertently suppress the video.

Finally, the Supreme Court did not find persuasive that the threat to arrest the defendant was coercive. The fact is that a misdemeanor was being committed in the presence of the police officer and, therefore, an arrest could be made.

The defendant's conviction was affirmed.

Where there's Smoke, there's a Potential Client Burning Evidence of a Crime.

In the memorandum decision, *State v. Warburton,* 2015WL6181517, the defendant appealed from his convictions on the grounds that "the circuit court committed reversible error in allowing a police officer to testify as to witnesses' prior statements."

A police officer responded to a report of a possible burglary and house fire. When he arrived at the scene, he found the defendant and others covered in black soot and observed the defendant and another person burning copper wire in a trash can in the front yard of the residence. The officer also observed a truck parked at the location, containing a "large load of scrap metal." However, the officer left the scene without any official action.

A second call was made regarding a possible burglary, and the police officer again responded. At the scene, defendant's neighbors informed the police officer they had made the calls and believed that the defendant was burglarizing a vacant home in the neighborhood. The police officer then spoke again with the now showered and freshly clothed defendant. The neighbors then identified the defendant and his companion as the persons they had seen at the vacant house. The officer then went into the vacant house and saw evidence that "most of the residential copper wire had been removed along with the light fixtures, cabinets, stoves, a bathtub, and a hot water heater." An arrest of the defendant ensued. At the police station, incriminating items were found the defendant's backpack. Further investigation found a recycling site at which the defendant on the same day had sold thirty-two pounds of copper wire.

At trial, the police officer recounted his investigation including the statements he obtained from the individuals who were with the defendant on that day and who had subsequently pled guilty to misdemeanor destruction of property in the course of aiding the defendant in stripping the vacant house. An objection was made to the direct examination of the officer regarding these statements. The objection was sustained, but an admonition was given that if anyone opened the door, the police officer might be allowed to explain the statements.

On cross-examination, the defense counsel questioned the police officer about the testimony of one of the individuals, in both his testimony at trial and in his statements to the police officer. The prosecution made an objection, which the Court sustained. The Court then stated that the door had now been opened in the circuit court's opinion to the officer's testimony as to the prior statements. On redirect examination, therefore, the officer testified regarding the prior statement of the identified individual.

The Supreme Court recited that "it is fundamental that where the subject matter of a question has been introduced by a defendant on cross-examination, it may properly be covered on redirect." So, the questioning by the prosecution was properly permitted.

But, even if the questioning was not proper, it was error invited by the defense counsel.

Moreover, the error was harmless in that, while the officer's "testimony could possibly have had [an] effect on the jury's weighing of the evidence, he did not have a substantial impact on the result of the trial." After all, petitioner's backpack contained a pair of wire cutters and copper wire sheathing. And the neighbors spotted the defendant carrying a stove beside the vacant house. And the defendant sold thirty-two pounds of copper wire. And, so forth.

The circuit court's order was affirmed.

As Children, some played Doctor while I played Pharmacist.

In the memorandum decision, *State v. Coffey*, 2015WL6143414, the defendant was convicted of two counts of possession with intent to deliver a controlled substance and one count of conspiracy to deliver a controlled substance. Specifically, a dealer sold one hundred Opana pills at forty dollars a pill on two occasions to a middleman for the defendant, "because … [the defendant] was distrustful and would not deal with people he did not know." On a third occasion, the dealer sold directly to the defendant, although the middleman was present. The defendant was arrested on the day after the third sale.

The arrest resulted from "anonymous tips" that multiple vehicles were coming and going from petitioner's residence without "staying long" and that the defendant was selling drugs. A search of the residence pursuant to a warrant resulted in the seizure of $7,000. A search of the defendant's person revealed twenty-two Opana pills in the right jacket pocket in a silver metal pill bottle, thirty 15 milligram oxycodone pills in the right front shirt pocket in a piece of aluminum foil, and an additional Opana pill in a piece of aluminum foil.

The defendant argued at trial that the drugs were for personal use. In closing, the prosecutor hammered on the $7,000 in cash, the defendant's possession of three four-wheelers, his $5,000 purchase of drugs, and the absence of 78 Opana pills from the recent purchases in order to create the circumstances supporting the defendant's sale of the drugs.

The first ground on appeal involved a purported *Brady* violation in that the defense was not informed that a witness and several law enforcement officers had failed on various occasions to purchase controlled substances from the defendant. The Supreme Court found this evidence to not be exculpatory nor impeachment evidence, especially considering the defendant was "notoriously paranoid and would often turn others away." Moreover, the decision indicates that the evidence was available before cross-examination of these witnesses.

The second ground was the purported prejudicial effect of the prosecutor's closing argument in which it was stated that the defendant was "unemployed" and was yet found in possession of substantial cash. Apparently, no evidence was adduced during the trial regarding the defendant's employment or lack of employment. The Supreme Court found this to be a "reasonable inference" to be drawn from the elicited testimony that the defendant was home when the warrant was executed on a Friday afternoon and that the defendant "always seemed home" whatever the time of day. Accordingly, the remarks did not result in "clear prejudice or manifest injustice." It was noted that defense counsel had not objected to the remarks during the closing argument.

The final ground for appeal concerned the authentication of the evidence seized from the defendant during the search and seized from the residence. The officer who had seized the evidence was no longer employed by the law enforcement agency and was not a witness at the trial. Essentially, "before a physical object connected with a crime may properly be admitted into evidence, it must be shown that the object is in substantially the same condition as when the crime was committed." Moreover, "factors to be considered in making this determination are: (1) the nature of the article, (2) the circumstances surrounding its preservation and custody, and (3) the likelihood of intermeddlers tampering with it." Ultimately, the admission of the evidence is within the discretion of the trial court and, "absent abuse of discretion, that decision will not be disturbed on appeal."

The trial contained the testimony of a police officer who had been present when the evidence was seized and who tracked the evidence to the station and subsequently to the laboratory for testing. The Supreme Court found from the record that "the circuit court thoughtfully considered the chain of custody of the evidence in this matter, and selectively excluded evidence that it believed was improperly authenticated."

Significantly, the circuit court did exclude pills that had been contained in two pill bottles seized from the residence. The police officer had taken the pill bottles to the evidence locker and, without anyone else present, had removed the pills from each bottle to count the different type of pills and then had returned the pills to the bottles. While it was not stated why this was considered a break in the chain of custody and was not simply an inventory, it was not discussed by the Supreme Court.

A Public Defender becoming a Prosecutor would be as Farfetched as Batman fighting Superman … oh, Wait a Minute.

In the memorandum decision, *State v. Reed,* 2015WL6143394, the defendant was sentenced for convictions of sexual assault in the first degree and sexual abuse by a custodian.

A motion to sever five counts of sexual offenses had been granted.

The defendant was previously tried and convicted on two of the severed indicted sex offenses.

During a hearing on which the revocation of probation on unrelated charges was being considered, the defendant's public defender on these earlier charges, who was now employed by the prosecutor's office, was seen by defendant pointing to a document in the assigned prosecutor's file. The defense counsel moved to disqualify the prosecutor's office, which was denied upon the former public defender's testimony. The defendant was tried and convicted on the remaining charges. The defendant's sentence was a term of twenty-five to one-hundred years on the sexual assault conviction and ten to twenty years on the sexual abuse conviction.

On appeal, the defendant argued that the prosecutor's office should have been disqualified. However, the Supreme Court referred to *State ex rel. Tyler v. MacQueen,* 447 S.E.2d 289 (W. Va. 1994), which held that the prosecutor's office is not disqualified by an assistant's previous representation of a defendant if "the assistant prosecutor has effectively and completely been screened from involvement, active or indirect, in the case." The circuit court's discretion in not disqualifying the prosecutor's office was not abused in light of the "unrebutted testimony" that the former public defender had no involvement with the prosecution of the defendant. The former attorney's presence in court was attributed to his responsibility for another case on the docket.

Another ground for appeal was the circuit court's ruling that the victim in the first trial could testify in the second trial from which this appeal was taken to demonstrate lustful disposition. The defendant's argument was that the victim in the first case was a "pubescent female" while the victim in this case was a "pre-school aged boy" and, therefore, the matters were "substantially different." However, *State v. Edward Charles L.*, 398 S.E.2d 123 (W. Va. 1990), holds that "collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition towards children generally, or a lustful disposition to specific other children provided such evidence relates to incidents reasonably close in time to the incident giving rise to the indictment." Accordingly, the Supreme Court of Appeals of West Virginia reasoned that the difference between the genders of the children did not undermine the finding of a lustful disposition toward children generally.

The Supreme Court affirmed the defendant's convictions.

An Appeal with No Appeal means a Decision with Notable Derision.

In the memorandum decision, *State v. Dailey*, 2015WL6181494, the defendant appealed from the sentencing on his conviction of three counts of third-degree sexual assault for which the circuit court imposed three consecutive terms of imprisonment of one to five years. The convictions arose out of the petitioner's sexual intercourse with a fourteen year old girl. Notably, the conviction arose from the defendant's entry into a plea agreement.

The plea agreement provided for the dismissal of certain felony charges for which the sentences would potentially reach 90 years. The prosecution agreed to propose that the counts of conviction be concurrent with another term of imprisonment to be imposed for charges in another county. The agreement specifically recounted that it was not binding upon the circuit court.

When asked at sentencing if he had been promised concurrent sentences by anyone, the defendant replied that he had not. The court then sentenced him to the three consecutive terms and ran the sentences consecutively to the term of imprisonment imposed in the other county. The circuit court based this sentencing on the facts that the child had been "missing for three days while … [the defendant] and co-defendant committed multiple sex acts with the victim."

The Supreme Court criticized appellate counsel for articulating two grounds for an appeal while citing to no authority. The attorney made "broad generalizations while arguing that policy considerations support" the defendant's position. Accordingly, the Court felt "free to disregard such errors."

The additional ground for appeal was that the plea agreement "did not clearly state whether the State would recommend that the sentences in this case be served consecutively or concurrently." However, the brief from the defendant stated "the terms of the plea agreement from the State included the sentences for the three [sexual assault charges] would run consecutively to one another." Indeed, the plea agreement provided the effective incarceration would be three to fifteen years, which is the statutory term for the

charge multiplied by three. Moreover, the brief contained the further admission that the defendant "entered into this plea voluntarily, knowing that the [circuit court] would make the ultimate decision as to what the punishment … would be." Essentially, this ground was belied by the defendant's own brief.

Finally, the defendant complained that the circuit court erred "in limiting the issues he could raise on appeal." The defendant pled guilty, thus effectively limiting the appeal to "whether the plea is voluntary; whether the sentence is correct; and whether jurisdiction is proper." In other words, a plea by its nature limits the issues on appeal. Accordingly, no merit was found in this argument.

In short, the Supreme Court made short shrift of the appeal.

Bernie Sanders and I hold Redistribution of Wealth as an Immutable Principle.

In the memorandum decision, *Tincher v. Dingus,* 2015WL6181436, the appeal was taken from a summary denial of a petition for writ of habeas corpus. The defendant was serving a term of imprisonment of ten to twenty years for his conviction, by reason of a voluntary plea, to bank robbery without a handgun.

The habeas alleged that the sentence was disproportionate to the crime and that his counsel was ineffective for not filing an appeal of the sentence. The petitioner was summarily denied, without an evidentiary hearing or without any findings of fact. This appeal was then taken on the grounds that the circuit court should have held an evidentiary hearing and should have entered findings of fact.

The Supreme Court noted its precedent that "a court … may deny a petition for a writ of habeas corpus without a hearing and without appointing counsel for the petitioner if the petition, exhibits, affidavits or other documentary evidence filed therewith show to such court's satisfaction that the petitioner is entitled to no relief."

With respect to the sentence, the lower court noted that the issue of the proportionality of the sentence had been decided in the ruling on the petitioner's motion for a reduction of sentence. Accordingly, the circuit court properly refused to consider this ground any further.

Moreover, the Supreme Court opined that "counsel's failure to appeal a conviction, in and of itself, does not necessarily constitute ineffective assistance." Notably, "given petitioner's entry of a guilty plea in the criminal proceedings below and his failure to allege any facts that would give rise to an ineffective assistance claim in this regard, such as incompetent advice of counsel or an involuntary plea, the circuit court clearly did not err in denying petitioner relief on his ineffective assistance of counsel claim."

The summary denial of the petition for a writ of habeas corpus by the circuit court was affirmed.

If Judges had Kindles, they Couldn't throw the Book at you.

In the memorandum decision, *State v. Bowman,* 2015WL6181457, the defendant was sentenced to a cumulative term of incarceration of nine to one hundred years after he pled guilty to five counts of burglary, three counts of conspiracy, and one count of bringing stolen property into the state. The appeal asserts that the circuit court erred in "imposing the maximum allowable sentences for these offenses."

The defendant was part of a massive crime spree that spanned a time period of nine months and spanned across three states. The plea agreement resulted in the dismissal of "at least fourteen other offenses." The sentences for each count to which the defendant pled were to run consecutively.

The defendant complains that, at sentencing, the prosecution informed the Court about crimes for which the defendant had not been convicted. However, the fourteen other crimes which were dismissed by the plea agreement were "first referenced" by the defendant's counsel, although the context for making this reference is not set forth. Accordingly, the Supreme Court recited its precedent that "a judgment will not be reversed for any error in the record introduced by or invited by the party seeking reversal."

Moreover, the prosecution made reference to the fourteen other counts only in describing the benefit to the defendant to enter into the plea agreement. The Supreme Court simply did not consider these to be impermissible factors in the defendant's sentencing.

The prosecution asserted that the "sentence needed to speak justice for multitudes of victims." The Supreme Court was not certain from the record if this was a reference to the victims of the counts on which the defendant was convicted or of all the counts, including the dismissed counts. But the Supreme Court concluded that, "either way, there is, again, no evidence that the circuit court based its sentences on any impermissible factors."

"It's Utterly Ridiculous to Say I am Guilty of Uttering," Uttered the Defendant.

In the memorandum decision, *State v. Watts,* 2015WL6143413, the defendant was indicted on three counts of forgery and three counts of uttering, but was convicted on only two of the uttering charges and acquitted of all other counts.

The first ground for appeal was that the prosecution had failed to introduce any evidence that he committed forgery. This ground was immediately disregarded as the Supreme Court noted "petitioner was not convicted of forgery."

The second ground for appeal was that the prosecution had presented no evidence that the defendant knew that the uttered documents were forged.

The statute of conviction provided that "if any person … utter or attempt to employ as true such forged writing, *knowing it to be forged*, he shall be guilty of a felony…." W. Va. Code §61-4-5(a).

The prosecution did prove, however, a chronology of events which involved defendant's presentment at Chase Bank of a check that had been stolen but was made payable to him, at which time he was informed that the check could not be cashed and he needed to get another check. The next day the defendant then presented two more checks that had been stolen and again made payable to him or to cash. "Work" was written in the memorandum section of the checks. The last two checks were the basis for the two uttering charges upon which the defendant was convicted.

The Supreme Court found this chronology to be sufficient evidence to permit the jury to find that the defendant knew the checks were stolen and forged. Notably, the opinion does not state whether the Chase Bank representative told the defendant why the check could not be cashed. The Supreme Court seems to assume that the defendant was told and, therefore, had to know the checks were forged when he presented the checks the next day, which, significantly, were lowered numbered checks than the one presented to Chase Bank.

The convictions were affirmed.

I Did the Crime, So I Did the Time; And I Did More Time; and I Did Even More Time; and I am Doing More Time; Seriously, I Can Do Even More Time?

In the memorandum decision, *State v. Parker-Bowling,* 2015WL6143403, the supervised release of the defendant, a registered sex offender, was revoked and the defendant was incarcerated for a four year term for reason of the violation of the conditions of her supervised release. The decision of the court was three votes to affirm the conviction, one vote by Justice Davis to affirm the conviction in part and reverse in part, and one vote by Justice Ketchum to overturn the circuit court's order. No reasoning is provided in support of Justice Davis' and Justice Ketchum's votes.

The underlying conviction involved the defendant and another adult female having sexual intercourse with a fourteen year old boy in a bathroom at the boy's home during a party held by the boy's mother. The defendant had been drinking alcohol, smoking marijuana, and popping pills at the time of the incident. The defendant pled guilty to one count of sexual assault in the third degree. The defendant discharged the sentence.

On two different occasions, the defendant was incarcerated for violation of the terms and conditions of her supervised release.

On the third occasion, the defendant was alleged to have failed to report to her probation officer within twenty-four hours of her release from her second conviction on violating conditions of supervised release; tested positive for alcohol within forty-eight hours of her release; failed to account for 76 missing benzodiazepine pills from her prescription, but tested negative for the drug; never applied for a job although representing that she had; failed to maintain a verifiable residence in that the shelter was releasing her due to her behavior; and provided deceptive responses to a polygraph test regarding unreported sexual contact and illegal drug use. The circuit court found that these violations occurred and sentenced the defendant to four years of incarceration.

A ground for appeal was that the violations were unrelated to the original offense and, therefore, her due process rights were violated. Seemingly, the argument was that the revocation proceeding was a separate criminal prosecution, requiring all the incidents of a criminal trial. The Supreme Court readily dismissed this ground, repeating its previous holdings that a "revocation proceeding where incarceration is imposed is construed to be a continuation of the prosecution of the original offense." So, no due process rights were violated.

The second ground for appeal was that the twenty-five year term of supervised release was cruel and unusual punishment in light of the one to five year term of imprisonment for the original charge. The ground was summarily dismissed due to the Supreme Court precedent that the governing statute imposing periods of supervised release up to a term of life "is not facially unconstitutional on cruel and unusual punishment grounds."

The third ground for appeal was that the twenty-five year term of supervised release and the four year sentence for a violation were disproportionate to her crimes and her "technical" violations. The Supreme Court found that the sentences imposed on the defendant were less than that imposed on the defendant in *State v. Hargus,* 753 S.E.2d 893 (W. Va. 2013), and thus, "her term of supervised release and current four-year revocation sentence are not disproportional to those imposed for other offenses within the same jurisdiction."

Additional grounds for appeal were that the "four-year revocation sentence is an additional sentence that violates the proscription against double jeopardy given that her underlying criminal sentence has already been discharged." Again, the Supreme Court relied on its precedent that this "imposition of the legislatively mandated additional punishment of a period of supervise release is an inherent part of the sentencing scheme for certain offenses" and is not in violation of the double jeopardy provision.

Other grounds were summarily disregarded.

The defendant argued, further, that she was denied procedural due process because a jury did not hear and decide the charges and the burden of proof was less than beyond a reasonable doubt. The argument was based on language in *Apprendi v. New Jersey,* 530 U.S. 466 (2000) that "other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

Because the supervised release can be imposed based solely upon the jury verdict, *Apprendi* was deemed not to apply. Essentially, the supervised release is part of the sentence at final disposition and is not "an additional punishment" requiring additional facts to be found. The facts surrounding the conviction give the court sufficient basis upon which to determine a sentence within the permissible range, which, with respect to sex offenses, includes a period of supervised release. Restated, the period of supervised release constitutes the permissible range of the term of imprisonment for the offense, not an additional punishment.

A final hail Mary pass was the argument that all the revocation violations related to the defendant's inability to obtain housing and, therefore, the incarceration is based on discriminatory grounds "because it is based *primarily* on the fact that she cannot afford housing." Instead of discriminatory, the Supreme Court found the revocations to be reasonable because the defendant lost her housing primarily due to her behavior and, furthermore, the revocations were based on numerous other serious violations.

The circuit court's order of incarceration was affirmed. Again, the reasons for noting a dissent to the opinion are not set forth.

The KUDOS KORNER

**Recognition is given to Connor Robertson and Richard Weston who, as panel attorneys, zealously represented their client and obtained an acquittal in March of this year for a client accused of a sexual assault. The jury deliberated for over five hours according to news reports.

**After a trial that lasted more than a week, the panel attorneys for the two defendants in Martinsburg's "Bunker Hill" murder trial obtained a verdict of acquittal for one defendant and a conviction on a lesser included offense for the remaining defendant. Nicholas Colvin represented the defendant who was acquitted and Stephanie Scales-Sherrin represented the defendant who was convicted of involuntary manslaughter and wanton endangerment rather than the indicted charge of murder. Appreciation is expressed for the efforts of these counsel to provide zealous and effective advocacy for their clients.

VOUCHER UPDATE

For the period of July 1, 2015, through March 31, 2016

Most Highly Compensated Counsel		Most Highly Compensated Service Providers	
McGraw Law Offices	$173,857.50	Tri S Investigations Inc.	$98,806.64
Michael R. Whitt	$157,965.00	Forensic Psychiatry PLLC	$46,600.00
Joseph J. Moses	$145,466.50	Vaughan Investigations	$33,831.05

For the period of July 1, 2015, through March 31, 2016, Public Defender Services has processed 28,023 vouchers for payment in a total amount of $19,857,391.24

Most Notable Voucher Entries:

- **Call from clients mother explaining why her son's miscreant behavior is all my fault**
- **Conference with PA & CPSW re: "these dang visits I keep hearing about"**
- **Mom b*tching at me. Contact attorney for child and brother's attorney. Mom Whack.**
- **Email to DHHR worker re anonymous call that David is "loving" (we presume they meant "living") with Katherine.**
- **Review of hateful voice message from client.**

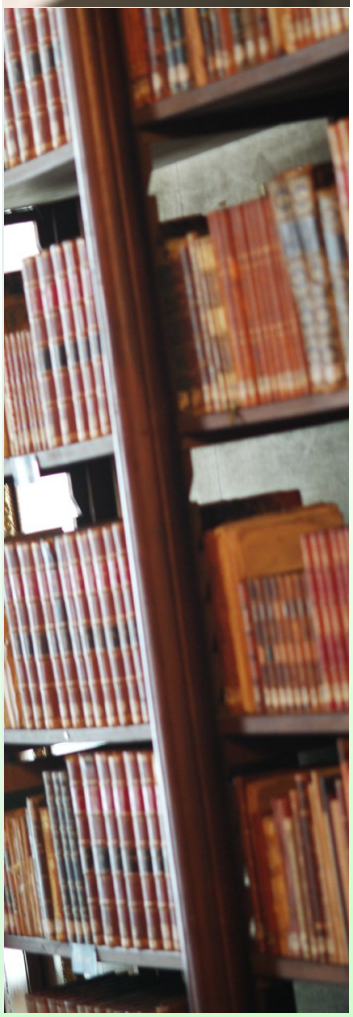
POINTS OF INTEREST

Did you know?....

West Virginia Code §62-1-5 establishes the prompt presentment obligation of law enforcement personnel. The statue provides: "(a)(1) An officer making an arrest under a warrant issued upon a complaint, or any person making an arrest without a warrant for an offense committed in his presence or as otherwise authorized by law, shall take the arrested person without unnecessary delay before a magistrate of the county where the arrest is made.
(2) If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith in accordance with the requirements of rules of the supreme court of appeals.
(3) An officer executing a warrant shall make return thereof to the magistrate before whom the defendant is brought.
(b)(1) Notwithstanding any other provision of this code to the contrary, if a person arrested without a warrant is brought before a magistrate prior to the filing of a complaint, a complaint shall be filed forthwith in accordance with the requirements of rules of the supreme court of appeals, and the issuance of a warrant or a summons to appear is not required.
(2) When a person appears initially before a magistrate either in response to a summons or pursuant to an arrest with or without a warrant, the magistrate shall proceed in accordance with the requirements of the applicable provisions of the rules of the supreme court of appeals.

Rule 5(a) of the West Virginia Rules of Criminal Procedure provides: "An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before a magistrate within the county where the arrest is made. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivision of this rule."

Notably, "once a defendant is in police custody with sufficient probable cause to warrant an arrest, the prompt presentment rule is … triggered." Syl. Pt. 2, *State v. Humphrey*, 177 W. Va. 264, 351 S.E.2d 613 (1986). Moreover, "when a statement is obtained from an accused in violation of the prompt presentment rule, neither the statement nor matters learned directly from the statement may be introduced against the accused at trial." Syl. Pt. 1, *State v. DeWeese,* 213 W. Va. 339, 582 S.E.2d 786 (2003). However, "certain delays such as delays in the transportation of a defendant to the police station, completion of booking and administrative procedures, recordation and transcription of a statement, and the transportation of a defendant to the magistrate do not offend the prompt presentment rule." *State v. Sugg,* 193 W. Va. 388, 395-96, 456 S.E.2d 469, 476-77 (1995). So not all delays result in violations of the prompt presentment rule. Essentially, "a sanctionable violation occurs if the purpose for detaining the defendant is to conduct an interrogation to obtain an incriminating statement from the defendant about his or her involvement in the crime for which he or she was arrested. *Deweese,* 213 W. Va. at 344 n.8, 582 S.E.2d at 791 n. 8. Conversely, "our prior cases do permit delay in bringing a suspect before a magistrate when the suspect wishes to make a statement." *Deweese,* 213 W. Va. at 345 n. 10, 582 S.E.2d at 792 n. 10.



Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311
Phone: (304) 558-3905
Main Office Fax: (304) 558-1098
Voucher Processing Fax: (304) 558- 6612
Website: www.pds.wv.gov

"NOTABLE QUOTES #1"

"Retained expert witnesses are like eggs. You can buy them by the dozen – they are just more expensive." *Perrine v. E.I. du Pont de Nemours & Co.,* 225 W. Va. 482, 582, 694 S.E.2d 815, 915 (2010) (Ketchum J., concurring in part and dissenting in part).

"NOTABLE QUOTE #2"

"[Under this logic], the local shoeshine boy who played with an erector set as a child can opine on quantum physics because it is the jury which evaluates the tendered expert's qualifications." *Id.*

"NOTABLE QUOTES #3"

"The State's obligation is not to convict, but to see that, so far as possible, truth emerges." *Giles v. Maryland*, 386 U.S. 66, 98 (1967)(Fortas, J., concurring)[cited by Justice Loughry, concurring opinion, *Buffey v. Ballard,* 782 S.E.2d 204, 221 (2015)]

"NOTABLE VOCABULARY"

"Rhadamanthine": "rigorously strict or just." Derived from the Greek mythology surrounding Rhadamanthus, a son of Zeus and Europa, who, after his death, became a judge in the Underworld and was known for being inflexible when administering his judgment. *See* Merriam-Webster.
Usage: "[A]nd this right [of cross-examination, e.g.,] does not yield to a Rhadamanthine application of court rules governing order of proof." *State v. Foster,* 171 W. Va. 479, 483, 300 S.E.2d 291, 295 (1983).