



# THE CAPITOL LETTER



A Publication of Public Defender Services  
Criminal Law Research Center



OCTOBER IS BREAST CANCER AWARENESS MONTH

## From the Executive Director

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### Investment in a Timekeeping Program Might Really Payoff and Perhaps I have an Offer you may not want to Refuse.

Public Defender Services ("PDS") is actively auditing the vouchers of panel attorneys. The findings have resulted in a watch-list and the payment of vouchers has been suspended for attorneys on the list. Conciliation agreements have been reached with some of the attorneys to resolve the outstanding issues.

One common factor among many affected attorneys is that he or she does not have any system for totaling the hours of services delivered on any particular date. Indeed, the most frequently described system for preparing a voucher is that time is entered into the file for a case and then at the end of the case the attorney uses the entries in the file to create the voucher. In this manner, the attorney will frequently not know if the travel has been entered in another case or if the hearing time was duplicated in

another case heard on the same day. Simply, the attorney does not know when creating the voucher for this case the total amount of time entered on the same dates in other cases.

The usual reaction when the attorney finds that thirty hours has been billed on a day is embarrassment.

In almost all the executed conciliation agreements, the agency requires the attorney to purchase a timekeeping software program that can generate a daily report of time. The agency further obtains the attorney's agreement that, upon seven days' notice, the agency can come to the attorney's office to inspect the timekeeping system and to require proof that daily reports of time can be, and are being, generated.

If you do not have the capability to keep track of your daily billing totals, you are encouraged to invest in a timekeeping program so that you can do so. The ability to

do so may avoid your embarrassment in the future. The following link is a comparison by the American Bar Association of time and billing software for solo practitioners or small law firms: <http://www.americanbar.org/content/dam/aba/migrated/tech/ltrc/charts/pmtbchart.outhcheckdam.pdf>.

The agency is aware that the licensing for the software programs can be cost prohibitive. Accordingly, the agency spoke with the company that designed and implemented the agency's online voucher system. The company may be willing to design a feature for the system that would enable attorneys to keep track of daily billing. The feature would require a subscription by the attorney, but would almost certainly be more affordable than the software licensing. Such a system would also be a management tool that would provide substantial benefit at an affordable price.

The agency needs to know if interest in such a feature for the program exists. If so, the outside company would then consider a design for the system and negotiate with the agency over the subscription rate to be offered.

If this is a feature in which you might be interested, you are asked to send an email to [Pam.R.Clark@wv.gov](mailto:Pam.R.Clark@wv.gov) expressing your interest. The email will not be shared with the outside company in that it will only be used to tabulate

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# The Bulletin Board

## AGENCY NEWS & INFORMATION

the number of people expressly interested. The agency will then use the email to provide you with the details when a design and pricing are configured.

Again, this management tool could very well save you the embarrassment of not knowing that through inadvertence or otherwise, you have completed a voucher which has a date that when the time is totaled from other vouchers may reflect services exceeding twenty-four hours. So, again, you are encouraged to invest in a time keeping program and if you are interested in using a modification to the online voucher system to do so, you should notify the agency.

### THE WATCHLIST:

Two additional attorneys were placed on the agency's watch-list since the publication of the last newsletter. The specific findings with respect to each attorney were:

"Since July, 8, 2013, [this attorney] has thirty (30) or more hours of billing on three (3) dates; twenty-four (24) to thirty (30) hours of billing on four (4) dates; twenty (20) hours to twenty-four (24) hours of billing on eleven (11) dates; and fifteen (15) to

twenty (20) hours of billing on twenty-six (26) dates"; and

"Since the date of August 15, 2013, [this attorney] has exceeded twenty (20) hours of billing on sixty-eight (68) dates. Of those dates, [this attorney] exceeded forty (40) hours of billing on one (1) date; [this attorney] billed between thirty (30) hours and forty (40) hours on eight (8) dates; and [this attorney] billed between twenty-four (24) hours and thirty (30) hours on twenty-three (23) dates. Significantly, [this attorney] billed between fifteen (15) hours a day and twenty (20) hours during this same time period on an additional eighty-three (83) dates."

One attorney executed a Conciliation Agreement and has been removed from the watch-list. Conferences are commencing with the second attorney.

The agency has communicated in writing with another attorney who, on ten vouchers, had 156 entries of which 72 entries were for exactly 1.0 hour of time and 49 entries were for exactly .5 hour of time. Apart from 12 entries for travel, only four other entries related to legal

services were in increments other than one-half hour or one hour. This billing is "value" billing rather than "actual" billing and is prohibited by statute. Notably, this attorney's billing has never exceeded 15 hours on a day.

Two additional attorneys have been identified who may be placed on the watch-list in the forthcoming weeks. Placement on the watch-list means payment of vouchers will be suspended until the matter is explained or resolved.

### ARE CONCILIATION AGREEMENTS PUNITIVE?

Public Defender Services has executed nine (9) conciliatory agreements with attorneys whose billing practices have been called into question. A misperception is that these agreements are merely "slaps on the wrist" and are not punitive.

The agreements first require acknowledgement of the actions that resulted in the agreement. In other words, the agency sets forth the facts that resulted in the confrontation with counsel and requires acknowledgement that the billing was improper. Unlike settlement agreements generally, the agreement will

not permit the counsel to deny any improper conduct.

Secondly, the agreement requires that the State of West Virginia be reimbursed for any duplicate payments, such as for travel or hearings. Thirdly, the agreement will impose a financial assessment. The agency's electronic records only cover two or three years. From these records, a calculation is made regarding the overpayment to the attorneys. The agency then arrives at a percentage by which all present vouchers will be reduced. The percentage has ranged from, approximately, 40% to 86% depending on the circumstances. For those who sell the vouchers, the offset against the vouchers becomes a point of contention between the attorney and the financier.

Fourthly, the attorney is required to give the agency the right to audit the practice's administrative records. And, in many instances, the attorney is required to purchase software that enables the attorney to run daily reports of time.

Finally, the attorney is required to self-report to the Office of Disciplinary Counsel or obtain a legal opinion from

qualified counsel that the matter does not rise, potentially, to an ethics violation. The failure to do so will result in the agency's complaint to the ODC.

So, the agreements are not "slaps," but, rather, impose substantial obligations upon the affected attorneys. On the other hand, however, the state is not deprived of the services of competent counsel in matters of indigent defense. And, of course, in situations where the actions are particularly egregious, the matter will not be the subject of conciliation, but will be referred for investigation. Currently, two investigations are pending.

**AADvice: Yes, West Virginia, Apprendi v. New Jersey applies to your Kidnapping statute.**

Over the last fifteen years, the United States Supreme Court has dismantled determinate sentencing schemes that allow judicial fact-finding to increase prison sentences beyond that provided by the offense of conviction. This trend started with *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000). *Apprendi* and its progeny stand for the proposition that, with the exception of the existence of a prior conviction, a defendant's Sixth Amendment right to jury trial "is implicated whenever a judge seeks to impose a sentence that is not solely based on facts reflected in the jury verdict or admitted by the defendant."

*United States v. Booker*, 543 U.S. 220, 232, 125 S.Ct. 738, 749 (2005). However, *Apprendi* does not apply to indeterminate sentencing schemes that involve judicial fact-finding, because these "facts do not pertain to whether the defendant has a legal right to a lesser sentence...." *Blakely v. Washington*, 542 U.S. 296, 308-09, 124 S.Ct. 2531, 2540 (2004).

Unlike most criminal statutes in West Virginia, kidnapping provides for a determinate life sentence that may be reduced based upon the existence of certain mitigating facts prescribed by statute. W.Va. Code § 61-2-14a(a) (2012). A life sentence for kidnapping is appropriate when "any person ... unlawfully restrains another person with the intent to 1) hold another person for ransom, reward, or concession, 2) transport another person with the intent to inflict bodily injury or to terrorize the victim or another person, or 3) use another person as a shield or hostage." W.Va. Code § 61-2-14a (2012). However, a defendant can only be sentenced to 10-30 years if the victim is unharmed and the defendant does not receive any concession or advantage in exchange. W.Va. Code § 61-2-14a(b)(4) (2012). If the victim is unharmed but the defendant receives a concession or advantage in exchange, the sentence is 20-50 years. W.Va. Code § 61-2-14a(b)(3) (2012).

Given the *Apprendi* rule, the existence of these mitigating facts must seemingly be found by a jury. However, the Supreme Court of Appeals of West Virginia did not see it that way ten years ago. See *State v. Haught*, 218 W.Va. 462, 624 S.E.2d 899 (2005); and see Syllabus Point 1, *State v. Farmer*, 193 W.Va. 84, 454 S.E.2d 378 (1994). *Haught* seizes upon a distinction between the West Virginia kidnapping statute and the statutes analyzed by the United States Supreme Court in the *Apprendi* line of cases to conclude that the Sixth Amendment does not require mitigating sentencing factors in a kidnapping case to be presented to a jury.

*Haught* reasons that *Apprendi* does not apply to the West Virginia kidnapping statute because the statutes found unconstitutional by the United States Supreme Court required a judge to **increase** a sentence based upon the existence of certain facts, but the West Virginia kidnapping statute requires a judge to **decrease** a sentence based upon certain facts.

This distinction is subject to criticism, however, because the mitigating factors in the kidnapping statute bestow upon defendants "a legal right to a lesser sentence" and are not simply factors left to influence a judge's discretion in sentencing. *Blakely*, 542 U.S. at 308-09. Under the United States Supreme Court precedent, a jury, rather than a judge, must determine

whether these mitigating facts exist under the Sixth Amendment.

The federal judiciary has, in fact, voiced this very criticism. In a habeas corpus case, United States Magistrate Mary Stanley opined that *Haught* "is out of step with the holdings of *Apprendi* and *Blakely*" and "should ... have clarified that W.Va. Code § 61-2-14a does not violate a defendant's 6<sup>th</sup> Amendment jury trial rights so long as a jury finds the facts necessary for determining the sentence, not a judge." *Rabb v. Ballard*, 2011 WL 1299359, \*21-22 (S.D. W.Va. Feb. 24, 2011); W.Va. Code § 61-2-14a. Magistrate Stanley stated further that *Haught's* common law predecessor, *State v. Farmer*, "must be overruled" for the same reason. *Rabb v. Ballard* at \*22; Syllabus Point 1, *State v. Farmer*, 193 W.Va. 84, 454 S.E.2d 378 (1994).

In short, mitigating factors that justify a departure from a life sentence for kidnapping must either be admitted by a defendant or found by a jury. You should ensure that your kidnapping jury instruction instructs the jury to decide whether the statutory mitigating factors exist. W.Va. Code § 61-2-14a(b). If your judge insists upon determining the existence of these mitigating factors, you must place your objection on the record so that this issue may be preserved for a future appeal and reconsideration by our Supreme Court.



## SUPREME COURT OF THE UNITED STATES: IT IS SO ORDERED....

### **ADDvice: A public service announcement.**

Zealous representation of the criminally accused can be difficult, time-consuming work. If you would like fresh insight into a case or if you just want help with some of the heavy lifting, the Appellate Advocacy Division is at your service. One of the missions of the Appellate Advocacy Division is to provide court-appointed attorneys in West Virginia with quality legal research and writing support.

The attorneys in the Appellate Advocacy Division will do their best to answer any question that you may have regarding West Virginia and United States Supreme Court criminal law. The AAD will also assist you with all types of research and writing; from pretrial motions and memoranda to appeals and extraordinary writs.

In addition to legal research and writing support, the AAD will get on the ground floor with you before trial and review discovery documents for issues ripe for pretrial

motions. Also, if you have an oral argument before the Supreme Court, the AAD can set up a moot court so that you can practice your oral argument before you go to the Capitol.

If you need or want help regarding any aspect of a criminal case, please feel free to contact one of the attorneys in the Appellate Division at (304) 558-3905. If you prefer to communicate via email, you may contact any or all of the members of the Appellate Division as follows:

[Matthew.D.Brummond@wv.gov](mailto:Matthew.D.Brummond@wv.gov),  
[Jason.D.Parmer@wv.gov](mailto:Jason.D.Parmer@wv.gov),  
[Crystal.L.Walden@wv.gov](mailto:Crystal.L.Walden@wv.gov),  
 and [Lori.M.Waller@wv.gov](mailto:Lori.M.Waller@wv.gov).

### **IT IS SO ORDERED....**

*Johnson v. U.S.*, 576 U.S. \_\_\_, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), sets forth the opinion of the Supreme Court of the United States that the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. §924, (the “ACCA”) is unconstitutionally

vague.

The Supreme Court noted that “the Fifth Amendment provides that ‘[n]o person shall ... be deprived of life, liberty, or property, without due process of law.’” Moreover, “our cases establish that the Government violates this guarantee by taking away someone’s life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or is so standardless that it invites arbitrary enforcement.”

The ACCA enhances the sentence for a person who is prohibited under the provisions of federal law from the possession of a firearm. See 18 U.S.C. §922(g). If the convicted person has three or more “violent felonies,” the ACCA increases the sentence from “up to 10 years’ imprisonment” to “a minimum of 15 years and a maximum of life.” 18 U.S.C. §924(e)(1). The so-called “residual clause” of the ACCA provides that a violent felony includes “any crime ... that otherwise

involves conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. §924(e)(2)(B).

The residual clause had been found to cover “Florida’s offense of attempted burglary” and “Indiana’s offense of vehicular flight from a law enforcement officer.” In contrast, the residual clause did not cover “New Mexico’s offense of driving under the influence” and “Illinois’ offense of failure to report to a penal institution.” In this case, the issue was whether the residual clause covered “Minnesota’s offense of unlawful possession of a short-barreled shotgun.”

If the requirement for a violent felony under the ACCA was that “an element” of the offense was the “use ... of physical force,” the application of the statute would be rather straightforward. But, instead, the residual clause “asks whether the crime ‘involves conduct’ that presents too much risk of physical injury.” And by categorically including burglary, arson, or extortion, the Supreme Court believed

that the legislature intended this analysis to extend beyond the mere assessment that it was the acts in the actual commission of the crime that might injure someone. Specifically, “risk of injury arises because the extortionist might engage in violence after making his demand or because the burglar might confront a resident in the home after breaking and entering.” Restated, the acts giving rise to the crime do not necessarily have to be the cause of injury, but, rather, the possible circumstances arising after the commission of the actual crime have to be considered. The Supreme Court noted that the application of the residual clause required, therefore, “a

court to picture the kind of conduct that the crime involves in ‘the ordinary case,’ and to judge whether that abstraction presents a serious potential risk of physical injury.”

The Supreme Court found this “indeterminacy of the wide-ranging inquiry required by the residual clause” to be unconstitutional because it “both denies fair notice to defendants and invites arbitrary enforcement by judges.” Restated, “increasing a defendant’s sentence under the clause denies due process of law.”

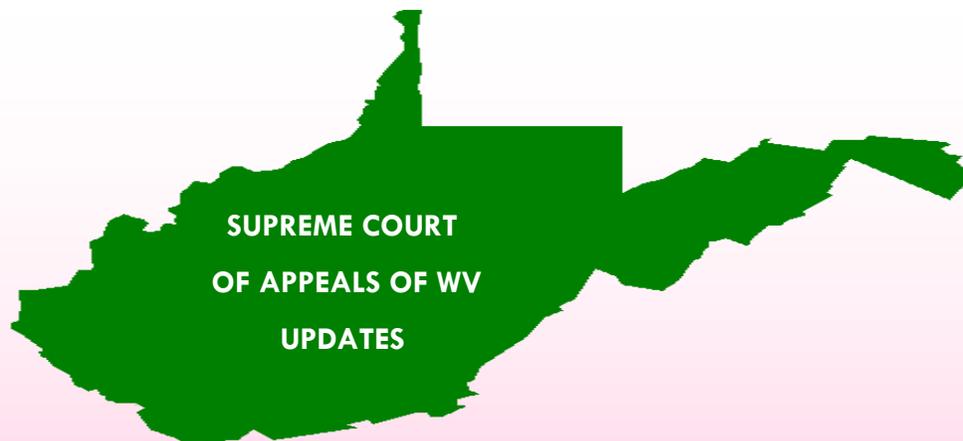
Specifically, the Supreme Court criticized the ACCA residual clause because “it ties the judicial assessment of risk to a judicially imagined

‘ordinary case’ of a crime, not to real-world facts or statutory elements.” As the Supreme Court postulated, “How does one go about deciding what kind of conduct the ‘ordinary case’ of a crime involves? A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?” The Supreme Court further criticized the ACCA residual clause because it “leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony.” These criticisms resulted in the conclusion that, “[b]y combining indeterminacy about how to measure the risk posed by a crime with the indeterminacy about how much risk it takes for the crime

to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.”

Interestingly, the Supreme Court’s majority opinion explained why it took five cases to determine the statute’s unconstitutionality: “This Court has acknowledged that the failure of persistent efforts ... to establish a standard can provide evidence of vagueness.”

Six Justices joined this opinion and two others concurred in the result, opining that the offense of possession of a sawed off shotgun should not be considered a violent felony. Justice Alito was the single dissenter.



### **Management Respectfully Requests that you not use the Drive-Through Lanes for Drive-By Shootings.**

In the reported opinion, *State v. Williams*, - S.E.2d - ( W . V a . 2 0 1 5 ) , 2015WL5684220, the issue was whether a witness’ credibility could be attacked on cross examination by use

of the witness’ pretrial diversion agreement on charges not related to the defendant’s charges. At the time of the witness’ testimony, the pretrial diversion had been successfully completed and the charges had been dismissed.

The witness worked at a McDonalds’ drive-through

window. When she handed the defendant his meal one day, she saw him with a gun in his lap and looking at the following car. Subsequently, a shot was fired in the parking lot striking the car that had been following the defendant’s car. Within thirty minutes after arriving at the scene, a state trooper took the witness’ statement. The

defendant was arrested and charged with being a felon in possession of a handgun and other charges. The defendant was convicted only of being a felon in possession.

Because the witness was the person who testified the defendant possessed a gun, the credibility of the witness was critical.

Before trial, a motion *in limine* was filed to preclude the defense counsel's questioning of the witness about charges she had faced for conspiracy to commit a robbery.

The witness' pretrial diversion agreement had been executed about eight months before the shooting. A guilty plea was held in abeyance and she was on probation for 24 months. So, at the time of the incident with the defendant, the witness was on probation. By the date of trial, the probation period was reduced to one year, the probation period was deemed to be completed, the guilty plea was withdrawn, and the charges were dismissed.

No evidence existed that the witness was pressured into making her statement to the trooper because she was on probation at that time or that she was given a shorter period of probation due to her cooperation. In an *in camera* hearing, the witness denied receiving any favorable consideration for her testimony.

The motion *in limine* was granted. The grounds for appeal were that the defendant had been denied his right to "confront an accuser" under the Sixth Amendment, and the jury was prevented from truly adjudicating the credibility of the witness.

The Supreme Court reiterated the test for whether

"restrictions on cross-examination violate the Confrontation Clause": (i) whether the excluded evidence was relevant; (ii) whether there were other legitimate interests outweighing the defendant's interest in presenting the evidence; and (iii) whether the exclusion of evidence left the jury with sufficient information to assess the credibility of the witness. Moreover, the Supreme Court restated the general guidelines for cross-examination: (i) the scope is "coextensive with, and limited by, the material evidence given on direct examination"; (ii) a "witness may also be cross-examined about matters affecting his credibility" which includes "interest and bias of the witness, inconsistent statements made by the witness and to a certain extent the witness' character"; and (iii) the "trial judge has discretion as to the extent of cross-examination."

The Supreme Court affirmed the trial court's order precluding the questioning of the witness. The facts did not support any connection between the witness' probation at the time and the statement to the state trooper thirty minutes into the investigation.

Moreover, the pretrial diversion agreement did not result in a conviction and, therefore, Rule 609 of the Rules of Evidence governing the impeachment of a witness by conviction of a crime did not apply.

In a concurring opinion, Justice Workman opined that the trial court abused its discretion in denying the right to cross-examine the witness about the charges, but, under a harmless error analysis, the conviction should nonetheless be affirmed. The principal fact underlying the opinion was that the police officer who arrested the witness on her charges was also assisting with the investigation into the defendant's charges. Moreover, the opinion emphasizes that "the test is the witness' expectation or hope of a reward, not the actuality of a promise by the State." Because the witness was still on probation at the time of her statement, the "hope of a reward" was relevant to her credibility. And, indeed, the witness was subsequently shown leniency on the length of her probation.

#### **These Murder Instructions are Killing Me.**

In the reported opinion, *State v. Lambert*, - S.E.2d - ( W . V a . 2 0 1 5 ) , 2015WL5511549, the defendant was convicted of first degree murder without mercy and was sentenced to life imprisonment without the possibility of parole. The victim was a professional ballet dancer and an employee at the Tamarack in Beckley, West Virginia. For a period of five months, the defendant and the victim had a relationship.

On the date on which the ballet dancer was killed, the

defendant purchased a 14-inch Bowie knife at the local Walmart store. The defendant sat outside the victim's apartment in his car and had two encounters with the victim. When the victim returned to her apartment the second time, the defendant entered the apartment with the Bowie knife in his pants. A roommate saw the defendant enter the victim's bedroom. The victim was stabbed twenty-three times. The victim bled-out before arriving at the hospital.

The defendant admitted to the killing. The defense was his diminished capacity, which proved to be unsuccessful. The defendant assigned six errors to the trial proceedings.

The jury had been instructed on the "lying-in-wait" and "felony murder" theories of murder in the first degree. The indictment referred only to premeditated murder, however. The defendant argued that only the premeditated murder theory should have been permitted at trial. Restated, the defendant argued he "had received no notice of the State's intent to prosecute him on felony murder and murder by lying in wait."

The Supreme Court referred to its precedent and held that an indictment "which sets forth a charge of only premeditated murder does not preclude the other categories of first-degree murder from being used in a

prosecution when the evidence supports them.” The Supreme Court also cited to the provisions of W. Va. Code §61-2-1 (1991) which provides that “in an indictment for murder ..., it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, but it shall be sufficient in every such indictment to charge that the defendant did feloniously, willfully, maliciously, deliberately and unlawfully slay, kill and murder the deceased.”

The defendant then argued that the prosecution should have been forced to elect between the theories of first-degree murder. Again, the Supreme Court relied upon its precedent that “the State may seek a conviction for felony murder and premeditated murder so long as the trial court instructs the jury on the distinction between the two theories.”

The defendant then argued that the jury was insufficiently instructed on the lying-in-wait theory of first degree murder. The Supreme Court affirmed that “lying-in-wait” as a “legal concept” has “both mental and physical elements.” Specifically, “the mental element is the purpose or intent to kill or inflict bodily harm” and “the physical elements consist of waiting, watching and secrecy or concealment.”

The Supreme Court agreed with the defendant that the

trial court failed to properly formulate a jury instruction on the lying-in-wait theory. Principally, the trial court instructed that “in order to prove lying in wait, the State is not required to prove that the killer was concealed or that the victim was unaware of his presence” and a “defendant acts in secrecy when he relies on the element of surprise in order to carry out his intent to kill or inflict bodily harm.” The Supreme Court noted that, by applying these principles, “all murders would be lying in wait unless the Defendant made an announcement or warned the victim of his or her intent to kill.” The trial court’s instructions seemingly “negate[d] the requirement of waiting, watching and concealment or secrecy.” The error was harmless, however. Why? Because the prosecution was based on several theories including premeditated murder for which sufficient evidence existed (NOTE: and, of course, no election between theories was required.).

The defendant then argued that the trial court should have given his requested voluntary manslaughter instruction. The Supreme Court reiterated that “the absence of malice distinguishes the crime of voluntary manslaughter from the crime of murder.” The defendant presented evidence to establish a diminished capacity due to multiple mental disorders. However, the medical expert never testified that the defendant “lacked the capacity to form

malice.” Accordingly, the court found the rejection of an instruction on voluntary manslaughter to be proper.

The defendant also assigned error to the State’s direct examination of a rebuttal witness. The witness testified as to the defendant’s acts of domestic violence against her. The witness identified herself as a “medical doctor, certified in internal medicine, and that she worked at the University of Virginia Hospital.” At that point, the prosecutor referred to her as “Dr. Osborne.” The defendant argued that the background information was irrelevant and the reference to her as “Doctor” was an improper bolstering of the witness’ credibility. The Supreme Court dealt with this issue summarily, adopting language from a Kentucky case in which a doctor had testified as a lay witness, that “background information is relevant to jurors in that it aids in assessing the credibility of fact witnesses and in determining the weight to give their testimony – questions within the unique province of the jury.” Ironically, the defendant was correct that the eliciting of such information did bolster the witness’ credibility, but the Supreme Court found this to be appropriate assistance to the jury.

The defendant also assigned as an error the playing of an entire transcript of his interview by a psychiatrist. The tape was partially relevant to impeach the defendant on statements he made while

testifying on his behalf.

The Supreme Court did acknowledge its concern that the entire interview was played. However, the transcript was not designated as part of the record and it was the defendant’s “burden of demonstrating that substantial rights were affected by the [alleged] error.” By failing to include a recording or transcript that could be reviewed, the defendant did not carry his burden and the Supreme Court found “no merit to this issue.”

The defendant’s next assignment of error concerned the extent to which inadmissible evidence could be introduced through expert testimony. The testimony of the defendant’s expert witness had been restricted. The rules of evidence provide for disclosure of the facts upon which the expert relied, either through direct examination or cross examination, even if the facts are not admissible. The Supreme Court opined that this is not an “unfettered” means, however, for “counsel to introduce inadmissible evidence.” Especially, the expert cannot be a “conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony.” Instead the facts are admitted, not as substantive evidence, but for the “independent purpose of enabling the jury to scrutinize

the expert’s reasoning.” And, notably, the “trial judge has discretion to limit the admission of such underlying inadmissible data under Rule 403 if it is unduly prejudicial, confusing or misleading.” Moreover, the appellate counsel was found to have failed to “set out the specific testimony that was excluded and the reasons why such exclusion was prejudicial.” The Supreme Court found no merit in this assignment of error.

The conviction was affirmed.

**The Forecast is Moments of Clarity followed by Periods of Crazy.**

In the memorandum decision of *State v. Jason R.*, 2015WL5555465, the defendant argued that he should have been afforded a hearing on his motion to withdraw his no contest plea before he was sentenced.

The unique circumstance in this case was that the defendant had been declared to be incompetent to stand trial. However, his competency was later found to be restored after treatment at a psychiatric facility. Ironically, the trial court found the defendant’s competency was clear from the defendant’s letters to the trial court which “outlined the court process and the nature and history of the proceedings.” Counsel should copy this part of the opinion to show to a client who insists on writing to a judge.

The defendant then entered his plea of no contest to two counts of third-degree sexual assault and one count of first-degree sexual abuse. Before sentencing, the defendant again took it upon himself to send a letter to the judge in which he requested to withdraw the plea because he “was not in the right state of mind.” In the course of the subsequent plea colloquy, however, the defendant denied any mental illness, which was bolstered by the psychiatrist’s competency report. The defendant was sentenced and then the motion to withdraw his plea was denied.

The Supreme Court opined, “notwithstanding that a defendant is to be given a more liberal consideration in seeking leave to withdraw a plea before sentencing, it remains clear that a defendant has no absolute right to withdraw a guilty plea before sentencing.”

The issue was, however, whether a hearing should have been held on the motion to withdraw the plea. The Supreme Court found no abuse in the decision to deny the motion without a hearing but, in great part, referred to the plea colloquy and the defendant’s answers to the trial court during sentencing to find that no reason had been proffered to support withdrawing the plea. In other words, the defendant wanted to avoid sentencing, but the defendant had to go through

sentencing and answering the questions because no hearing on his motion to withdraw the plea had yet been held, which then warranted the denial of a hearing upon his motion because he had answered the questions during his sentencing

**Come on Supreme Court, Don’t Bail on Me.**

In the memorandum decision of *State v. Campbell*, 2015WL5555574, the defendant was indicted on petit larceny charges but was already incarcerated for parole violations arising out of previous criminal matters. A detainer letter was sent to the division of corrections regarding the new charges. At an arraignment on the petit larceny charges, the defendant requested bail which was deferred until the defendant’s release on the previous charges. One month later a motion to set bail was filed. One month later, a hearing was held at which bail was again deferred until the defendant was released on the previous charges or until the parties could agree on an amount. One month later, a scheduling conference was held at which bail was again discussed. Two months later, an agreed order was entered establishing the terms and conditions of a bail bond. Two weeks later, the defendant discharged his sentence for his parole violations and he was placed on bond supervision.

Subsequently, the defendant’s bond was

revoked. Eventually, a plea agreement was made.

A dispute arose about the credit for time served. The probation officer calculated the time from the date when he was last incarcerated for violating the bond conditions. The defendant wanted credit from the time of the indictment when he had moved for, and was denied, a bond. The defendant insisted that because he had no bail, he could not have been released from his previous incarceration and thus the time served related to his current charges. However, no evidence was proffered that suggested that he had been held beyond any date on the previous charges due to the absence of bail.

The defendant was sentenced consistently with the probation officer’s calculation.

The Supreme Court found no merit in the defendant’s assertion that he had been improperly denied bail. Because the defendant was being held on other charges, bail, even if set, would not have resulted in the defendant’s release. Technically, the statute requires that bail be set when arrested, but the defendant’s issue was “moot” because he could not have been released on bail in any event. The Supreme Court emphasized that “[m]oot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property, are not properly cognizable by

a court.”

With respect to the issue of the proper credit for time served, the defendant again tried to argue that because bail had not been set, he could not be released on the previous charges due to the detainer and, therefore, he should be considered to have been held on the current charges from the time of indictment. The Supreme Court was unyielding and found that the defendant “is not entitled to have time served credit applied to his current sentence for time spent incarcerated on unrelated charges.” And, again, it was noted that the defendant had no evidence that he would have been released earlier on the previous charges even if he had been given bail earlier on the current charges.

The sentencing order was affirmed.

**Don't be Hating Those who be Adjudicating You...**

In the memorandum decision of *State v. Harris*, 2015WL5513491, the defendant's eighteen month old child was found unshod and “wandering in the street.” The defendant later claimed to be looking for the child for over one-half hour, but had not bothered to call the police. The mother was charged with the crime of child neglect creating risk of injury and, concurrently, an abuse and neglect proceeding was instituted.

A pretrial diversion agreement was made, requiring that the criminal charges be held in abeyance for twelve months. A standard condition was that the defendant would not violate state, federal or local law. If all conditions were satisfied at the end of a year, the charges would be dismissed.

However, the defendant made an overt threat to the presiding judge, stating that “if ... [the judge] thinks he is going to terminate my rights as a parent he's got another thing coming. I'm just going on a shooting spree and kill everyone involved. If my rights ain't terminated I'm going to sue, sue, sue the pants off the department, ... [the judge], and the [S]tate and I will never have to work again.” It is not stated to whom the threats were relayed, but, when charged with intimidating or harassing a public official, the judge withdrew, the defense counsel withdrew, and the pretrial diversion agreement was revoked without a hearing.

The defendant was indicted on the charge of felony child neglect, and the threats against a public official were bound over to a grand jury. The defendant's subsequent motion to enforce the pretrial diversion agreement was denied.

The defendant then entered into a plea agreement in which she pled guilty to the misdemeanor offense of contributing to the neglect of

a minor and she entered a *Kennedy* plea to the misdemeanor offense of intimidation or harassment of a public official.

The defendant was sentenced to consecutive sentences of one year for each offense. In part, the sentence was imposed based upon the court's judicial notice of matters and reports in the pending abuse and neglect proceedings.

The defendant challenged the sentence on the basis that the pretrial diversion agreement should not have been revoked and the evidence in the child abuse and neglect proceedings should not have been considered.

What was the Supreme Court's reaction to these issues? The matters were, at most, pretrial defects which were waived when she knowingly and voluntarily entered her plea of guilty. Specifically, “[a]n appeal ordinarily does not lie in a criminal case from a judgment of conviction rendered upon a plea of guilty.” The actual sentences were found to be within statutory limits and were based upon permissible factors including a prior criminal record, an ongoing history of abuse of controlled substances, and failure to enroll in substance abuse treatment. The sentences were affirmed.

**The Gun Accidentally Discharged after I pulled**

**back the Hammer and Put my Finger on the Trigger (which is similar to, the Bomb accidentally Exploded after I lit the Fuse).**

In the memorandum decision of *State v. Smith*, 2015WL5514010, the defendant's appeal of his second degree murder conviction was considered. The defendant described the events underlying the charges as follows: “[H]e had been sitting with his wife in their home, with his gun at his side. [His] wife was bothered by the presence of his gun and made complaints to him regarding the gun. In response to his wife's complaints, [he]... picked up the gun, pulled the hammer back, and handed the gun to his wife (with the barrel pointed towards her with his finger on the trigger). The gun ... discharged as ... [he] was handing it to his wife.” Based in part on the defendant's “calm” demeanor and his failure to “show any worry or concern about his wife,” the investigating officers decided to arrest him after his statement was taken and charge him with first degree murder.

The defendant was convicted by the jury of second degree murder. The conviction was based, in the defendant's contention, on twenty-nine statements by seven different witnesses regarding his prior bad acts. This included testimony by the wife's “boyfriend” who relayed several incidents told to him by the wife.

The record recites that, in fact, six witnesses testified on behalf of the prosecution regarding the defendant's prior bad acts and, after each witness' testimony, a limiting instruction was read. The defendant then called his wife's boyfriend who then recounted upon the State's cross-examination that the wife was afraid of the defendant.

The Supreme Court found that the trial court complied with the requirements for permitting Rule 404(b) witnesses, including holding an *in camera* hearing and offering a limiting instruction.

And, of course, the testimony given by the wife's boyfriend did not support a reversal since it was the defense counsel who called the witness and who did not object during the State's cross-examination of the witness.

The defendant also complained that he had not been "promptly presented" to a magistrate. The defendant was arrested at 11:30 p.m. and his waiver of rights occurred at 1:53 a.m. without his presentment to a magistrate. In the defendant's opinion, the delay was obviously for the purpose of obtaining a statement or confession.

The Supreme Court took note, however, that the testimony was that petitioner was not under arrest until

after he was taken to the police station and he had given a statement. Any delay after the confession was given was not to be considered for the purpose of determining whether the confession itself was involuntary due to the failure of a prompt presentment. In the Supreme Court's opinion, the trip to the police station was seen as investigatory and not for the "sole" purpose of obtaining a confession and, therefore, did not make the statement involuntary.

Another issue was whether it was error to allow the victim's family to wear purple ribbons during the trial. The defense counsel had not advised the trial court about the ribbons until the fourth day of trial and made no request that the trial court inquire whether the jury had been influenced by the ribbons, whether a mistrial should be declared, or whether the wearers of the ribbon should be admonished. Nonetheless, the trial court, outside the presence of the jury, ordered that the ribbons be removed. The assignment of error was deemed to be waived under these circumstances.

The conviction was affirmed.

### **Would you give me the Time and then Clock me, please?**

In the memorandum decision of *State v. Rattliff*, 2015WL511915, the issue was the defendant's motion to

correct his sentence. The defendant pled guilty to the offenses of forgery, second degree robbery, and robbery. The sentence for the offense of forgery was to run consecutively to the robbery sentences. At the hearing, the court sentenced the defendant in accordance with the plea agreement, but gave 448 days of credit for time served against the concurrent sentences on the robbery charges. No credit was given on the sentence for the forgery conviction. Defendant claimed that this was error and in violation of the Double Jeopardy and Equal Protection Clauses which required "that time spent in jail before conviction shall be credited against all terms of incarceration to a correctional facility imposed in a criminal case as a punishment upon conviction when the underlying offense is bailable."

The Supreme Court reiterated, first, that the "granting of presentence credit is, in fact, mandatory" and, second, in calculating a defendant's parole eligibility date, "credit for time served by the defendant prior to being sentenced should be applied to the aggregated minimum term of all the consecutive sentences combined."

Accordingly, the Supreme Court found that the circuit court erred by crediting the time to each of the concurrent

sentences rather than to the aggregated minimum of the consecutive sentences. However, the minimum term for the robbery sentence was ten years and, therefore, the credit was properly exhausted just on the robbery sentence and, therefore, the defendant was not improperly impacted by the refusal to credit time against the minimum term for the consecutive forgery sentence.

The sentencing order was affirmed.

### **Doggone it, that Bites; or, A Defense that you were not Clean Shaven could get Hairy.**

In the memorandum decision of *Settle v. Ballard*, 2015WL5086766, the denial of a petition for post-conviction habeas corpus relief was reviewed. The facts involved the sexual assault of a victim, who described her assailant as "shaggy, brown, dirty hair ... and closely shaven face" and as wearing a "bright green t-shirt and blue jeans." After her statement had been taken, the victim was brought to a McDonalds to identify a person who was wearing clothes consistent with her description. The victim did not identify the assailant as her attacker because he was older and was not clean shaven.

Eleven days after the assault, the victim believed she saw her assailant boarding a bus. She reported the sighting to 911. The bus was stopped and a suspect was detained. When

brought to the scene, the victim positively identified the petitioner. A bite mark was noted on the petitioner's right calf consistent with the defense of the victim by her dog during the assault.

The petitioner moved to suppress the identification by the victim when she was brought to the scene of the stopped bus, because it was overly suggestive in that only one person was detained. However, the circuit court ruled that the identification had been made when the petitioner boarded the bus, not later after the stop.

At trial, the petitioner defended the case on the basis that, at the time of the attack, he had a mustache, beard, and long hair. He was not clean shaven until ten days after the attack when he needed to be more presentable for an unrelated domestic relations matter.

Petitioner was convicted and sentenced as a recidivist.

The most compelling point on the appeal was that a witness was identified who lived in the victim's trailer park and who would testify that, after the time of the attack, the petitioner asked to use her phone. The significance of the evidence is that this witness would state that petitioner was bearded, not clean shaven at the time.

The Supreme Court refused

to consider this newly discovered evidence because the petitioner knew, if true, that he had this encounter, yet he failed to share it which his trial counsel or his trial counsel's investigator. Accordingly, "petitioner's failure to timely impart the information regarding the use of a neighbor's ... phone shows the petitioner was not diligent in ascertaining and securing his evidence," which is a requirement before a new trial will be granted on the ground of newly-discovered evidence.

The other problem for the petitioner is that he could not explain away the dog bite. He tried to pin it on another pooch, but the owners refused to corroborate the story.

The petition was deemed to be properly denied.

**Proposition:** *I Owed Money to My Drug Dealer – Observation by Supreme Court: It Could have been for Anything; Obvious Conclusion by Everyone Else: .....*

In the memorandum decision of *Sate v. Ford*, 2015 WL 5125828, a confidential informant testified regarding her purchase of heroin from the defendant. The heroin cost \$120, but the confidential informant gave the defendant the entire \$150 of the pre-marked currency. When asked why, the confidential informant replied

that it was to pay a debt "from, I don't know, a previous time." Defense counsel objected that this constituted improper Rule 404(b) evidence and the jury was instructed to disregard the statement. A motion for a mistrial was denied. The defendant was convicted.

The Supreme Court noted that the circuit court sustained the defendant's objection and issued an instruction. Moreover, the testimony did not "explain why she owed petitioner a debt before the circuit court sustained the objection." The Supreme Court does not postulate what the jury might conclude a "previous time" meant. In the Supreme Court's opinion, the prejudice, if any, of the statement did not rise to the level of "manifest necessity" required to declare a mistrial.

The sentencing order was affirmed.

**Hey, You opened the Door; You invited me in; so Don't Complain when I pull the Welcome Mat out from under you.**

In the memorandum decision of *State v. Nicholas*, 2015 WL 5125465, a confidential informant was given fifty dollars and a recording device "on her body" to purchase "Percocet 10s" from the defendant. On cross examination, defense counsel soundly criticized the investigating officer for

"failing to conduct a search of the petitioner's residence to determine that he was in possession of the fifty dollar bill the C.I. used to make the controlled buy or to prove that petitioner was involved in the controlled buy."

On redirect examination, therefore, the trial court permitted the prosecutor to elicit from the investigating office, over defense counsel's objection, the reason for which no search was made, which was that the police wanted to, and did, arrange a subsequent controlled buy from the defendant using the same confidential informant. The defendant presented no evidence and moved for a judgment of acquittal on the basis that no evidence tied the defendant to the controlled buy. The motion was denied and the jury convicted the defendant.

On appeal, the defendant argued that the testimony regarding the subsequent controlled buy violated Rule 404(b).

"Invited error" was the assessment of the Supreme Court. Notably, "an appellant or plaintiff in error will not be permitted to complain of error in the admission of evidence which he offered or elicited, and this is true even of a defendant in a criminal case."

The conviction was affirmed.

**Sorry is as Sorry does; or, Words can Hurt you, Apparently.**

In the memorandum decision of *State v. Randles*, 2015WL5125780, the defendant was sentenced to a term of imprisonment of one to three years for threats of terrorist acts, although she received probation. Specifically, the defendant had called a judge's office regarding her granddaughter's juvenile case. The message was fairly straightforward: the granddaughter's case was a "bunch of crap" and she was going to "bomb the town of Sutton, West Virginia."

The issue on appeal was whether this threat constituted actions that "could have affected the conduct of a branch of government." Moreover, the threat was argued to be unlikely to result in "serious bodily injury" because the defendant immediately apologized and the person receiving the threat did not "perceive any imminent danger."

The Supreme Court found that a bombing typically results in serious bodily injury and that the intent of the threat was to have the judge dismiss her granddaughter's case. Accordingly, the elements of a terrorist act under W. Va. Code §61-6-24 could have been found by the jury. Notably, the Supreme Court found that the statute

"does not require petitioner to specifically intend to commit the act or that someone perceive the threat as real."

The apology was deemed to be irrelevant.

**I Gave Up; Why Can't You Give In?**

In the memorandum decision of *State v. Dailey*, 2015WL5125788, the sixty year old defendant was sentenced to three consecutive terms of incarceration of five to twenty-five years, resulting from convictions on three counts of first-degree sexual abuse. The defendant argued that the sentence was disproportionate to the criminal acts because, at his age, this was a "life sentence." The defendant felt that consideration should be given to the fact that the victims were spared additional trauma by his willingness to plead "no contest."

The Supreme Court found that the sentences imposed were within statutory limits and that the decision to run the sentences consecutively was within the judge's discretion. The defendant failed to state any impermissible factors in the judge's decision, so the sentence was affirmed.

**I Cannot Afford to Pay for my Crimes.**

In the memorandum decision of *State v. Roger G.*,

2015WL5125486, the defendant was charged with several counts of sexual assault against a six year old boy and a nineteen month old girl. The defendant pled guilty to one count. After serving two years of incarceration, the defendant was discharged and placed on supervised release.

The defendant was subject to several petitions to revoke his supervised release and, indeed, served three years for one such violation. The appeal concerned the latest petition to revoke the supervised release, which was granted and resulted in the defendant's incarceration for a period of ten years. Noting that the underlying sentence was one to five years, the appellate counsel argued that the ten year period of incarceration constituted Double Jeopardy and Cruel and Unusual Punishment. The Supreme Court gave these arguments short shrift, relying on its previous opinions. Similarly, the Supreme Court rejected the proportionality argument.

The defendant then argued that his supervised release was improperly revoked for not attending sex offender counseling classes because he was unable to pay for the classes.

The legal issue was skirted, however, because the Supreme Court found that the sentencing court actually did inquire into defendant's

"financial ability to comply with the terms of his supervised release" and "ultimately based its decision to revoke ...[the] supervised release upon his repeated, willful disregard for those terms, rather than his financial situation." The record was replete with statements by the defendant that he did not need counseling, and the record established that he was unemployed despite substantial assistance to find a job and that the counselor had been waiving the fees for a long period of time.

The point is that the Supreme Court found that "an appropriate inquiry into petitioner's financial ability to comply with the terms of his supervised release" had been made. Accordingly defense counsel may have an argument in appropriate circumstances that a violation of the terms of supervised release was the result of financial issues and not an unwillingness to comply.

**I Wasn't Casing the Store, I simply Couldn't find the Sriracha Sauce!!!!**

In the memorandum decision of *State v. Breckenridge*, 2015WL5125498, the incident involved the disappearance of cash and checks from a Kroger store. Through video surveillance and eyewitness testimony, the evidence established the following: (i) defendant was at the Kroger location; (ii) defendant knew the location of the store's drop box; (iii) defendant was seen in a restricted area of the store;

and (iv) video showed defendant exiting a back door, examining the door; and reentering the door even though the door had no outside handle. Surveillance video then showed that during the night a masked man entered the rear door without any hesitation, carrying a hammer that was used to break open the drop box. Twelve minutes after the crime was committed the defendant was stopped for speeding seven miles from the location.

The defendant moved for a judgment of acquittal based on this evidence, challenging the evidence as purely circumstantial. The Supreme Court found that the jury was properly instructed on the burden of proof and had the opportunity to determine the credibility of the defendant. Accordingly, the conviction on admittedly purely circumstantial evidence would not be overturned.

### **The Court Stole Forty Years of My Life.**

In the memorandum decision of *State v. Johns*, 2015WL5125521, the Supreme Court considered whether the defendant's motion for reconsideration of a sentence was properly denied. The defendant pled guilty to one count of first-degree robbery for which he was sentenced to a term of incarceration of forty years. Four motions for

reconsideration of the sentence were denied. The defendant alleged that the court failed to meaningfully review the motions. The defendant also alleged the sentencing judge should have recused himself or herself due to a relationship with the County Sheriff and the victim.

The Supreme Court found that the simple denial of the motions without detailed findings of fact and conclusions of law did not mean that the circuit court failed to meaningfully review the motions. The Supreme Court pointed to the fact that hearings were held and rulings were issued, which "the court finds these orders [to be] sufficient." Moreover, the mere fact that the judge ruled against the defendant was not grounds to allege bias on the part of the judge.

### **You Can't Live With Them, which is a Problem when You can't Live Without Them.**

In the memorandum decision of *State v. Jarvis*, 2015WL5125792, the defendant pled guilty to a misdemeanor count of brandishing a weapon and a misdemeanor count of domestic battery, for which he was sentenced to a cumulative term of two years. The domestic count arose out of the defendant's drunken argument with his girlfriend that ended with the girlfriend being thrown into a door and against a dryer. The

brandishing occurred when law enforcement arrived and the defendant informed them not to enter because he had a loaded rifle. An hour later, the defendant surrendered, and the loaded rifle was found inside the house.

The primary issue on appeal seemed to be the defendant's contention that the judge had sentenced him so harshly because he had been in contact with the victim in violation of his bond conditions. The defendant generally posited that consenting adults should not be so penalized. Moreover, this fact had not been set forth in the presentencing report and no hearing had been held to determine if it was, in fact, true. The contact had been mentioned in a conference between the circuit court and the probation officer at the sentencing.

The Supreme Court rejected the argument stating that, from a review of the record, this improper contact with the victim was not a factor upon which the sentencing court had relied. Instead the sentencing court had made reference to a serious substance abuse problem; untreated anger management issues; denial of responsibility for the crimes; and the potential threat, overall, to the public. This "litany of reasons" established the sentencing court's belief that "giving petitioner probation or other alternative

sentencing would severely depreciate the seriousness of the offenses for which petitioner was convicted."

### **Does Homeowners' Insurance cover Lab Work?**

In the memorandum decision of *State v. Coriana C.*, 2015WL5125798, the defendant had been convicted of two counts of gross child neglect arising out of the manufacturing of methamphetamine in the house where the defendant resided with her two and three year old children. The resulting sentence was two consecutive terms of incarceration of not less than one nor more than five years.

The defendant appealed on the basis that the co-defendant testified that only he and another accomplice knew about the manufacturing of the methamphetamine, which exonerated the defendant. The defendant did not believe sufficient evidence existed, therefore, to convict her.

The Supreme Court disagreed with the defendant, relying on the circumstantial evidence in the case. The co-defendant testified to the "shake and bake" method of manufacturing methamphetamine, which was supported by material found in the defendant's home. Law enforcement testified about drug residue and drug paraphernalia found in the home. Also, the children's clothing was found in the same

room as a lab. And the co-defendant who purportedly exonerated the defendant gave a statement on the night of the arrests that “everybody ... pretty much knew.” As the co-defendant’s testimony was impeached by his previous statement, the jury could find a lack of credibility regarding the statement that the defendant did not know about the operations. Essentially, the circumstantial evidence was sufficient to convict the defendant.

The Supreme Court further rejected the argument that the trial court had permitted improper opinion testimony during the trial. Specifically, several witnesses referred to material as “meth labs” during the trial without any expertise on the subject having been established. The Supreme Court stated that the co-defendant admitted that the material constituted methamphetamine labs, which itself was bolstered by actual expert testimony. Accordingly, any other person’s reference to a methamphetamine lab was considered to be merely a statement of truth and not an opinion.

The conviction was affirmed.

### **I have to Behave for how long?**

In the memorandum decision of *Eric F. v. Plumley*, 2015WL3952668, the petitioner sought relief in

habeas corpus from the sentencing on his binding plea. The petitioner plead guilty to two counts of sexual abuse by a parent, guardian, custodian or other person of trust for which he was to be sentenced to concurrent terms of ten to twenty years in prison and to supervised release for a period of fifty years. The Court accepted the plea and entered a sentence consistent with the agreement.

In his habeas proceeding, the petitioner first argued that he was never the child victims’ custodian “because he and their mother did not have a romantic relationship.” The Supreme Court stated that the “issue of cohabitation with the victims’ mother is not determinative of whether petitioner was their custodian.” Instead, the mere fact that the children lived in his home for a period of time made him a custodian.

The petitioner then argued that the sentencing court had to find that he was a sexually violent predator in order to sentence him to a period of supervised release. The Supreme Court ruled that the finding is only required when “supervised release is imposed for a life term.” As the defendant’s period of supervision was fifty years, the absence of such a finding was of no significance.

The petitioner then complained that he was not aware of the “number of strict

conditions imposed with supervised release.” The Supreme Court found that the plea agreement informed him that he would not be allowed near children, that he would have to live in accordance with conditions of probation, and that additional conditions would be imposed. Accordingly, the Supreme Court determined that “petitioner understood the type and breadth of post-confinement supervision to which he was consenting when he signed the plea agreement.”

The denial of the habeas corpus petition was affirmed.

### **We Don’t Find Cleverness to Be Very Appealing...**

In the memorandum decision of *State v. Ferrell*, 2015WL3875748, the defendant challenged on constitutional grounds the imposition of consecutive maximum sentences for his conviction of two misdemeanor charges of possession of a controlled substance.

The defendant requested the Supreme Court to remand the matter for the imposition of concurrent sentences. The defendant argued that the consecutive sentences were not “proportioned to the character and degree of the” offenses as required by Article III, Section 5 of the West Virginia Constitution. The primary point made by the defendant is that the sentences were for

the same offense, i.e., possession of a controlled substance, and the only difference was the drugs, i.e., methamphetamine and hydrocodone.

In actuality, the defendant was raising a Double Jeopardy issue in that he should have been subject to only one count pursuant to the Supreme Court precedent. However, the defendant waived the right to appeal his conviction on Double Jeopardy grounds when he entered into the plea agreement. Accordingly, the defendant was cleverly trying to reach the same result by arguing that he should not be sentenced, effectively, for two offenses through consecutive terms under the proportionality principle. If he could not have been convicted at trial for two offenses, then being sentenced twice is contrary to the character and degree of the offenses and violates the proportionality clause in the State’s constitution. The Supreme Court refused the gambit.

### **I’ll send You all my Admissions in a Letter Sealed with a Kiss.**

In the memorandum decision of *State v. Williams*, 2015WL5684220, the defendant was appealing from his jury trial conviction for two counts of domestic battery. The defendant was living with the two victims, a mother and her child. After

some drinking, an altercation arose and the mother testified the defendant smacked her and, when the thirteen year old daughter intervened, the defendant grabbed the daughter by the hair. The defendant had admitted to some of the alleged conduct in a letter to the mother, but also indicated that the mother had been the aggressor.

On appeal, the defendant complained that the trial court should have given a self-defense instruction at his request. The Supreme Court noted that it was within the trial court's discretion to determine whether the instruction was justified by the facts. As the only evidence supporting self-defense was the defendant's own letter written after his arrest while sitting in jail in which he alleges the mother was the aggressor, the trial court properly determined that no competent evidence had been offered in support of the instruction. The Supreme Court wryly noted "allowing defendants to draft their own self-serving evidence after the fact of the crime is clearly bad policy and should not be accorded weight."

The defendant further complained that the letter he had written to the victim should have been redacted to prevent disclosure of Rule 404(b) evidence. Apparently, the petitioner hinted at other bad acts. The Supreme Court found

that the admission of the letter in its entirety was proper. First, the letter was admitted into evidence because it contained the defendant's admissions and not because it proved the defendant's bad "character." Moreover, the incidents to which reference was made were considered to be part of the story set forth in the letter and were intrinsic in nature and should not be suppressed.

The defendant further complained that his counsel's cross-examination of the child victim was improperly interrupted by the trial court. The child had begun to cry and the trial court halted the examination and asked that all other questions be listed. Eventually, the trial court permitted all the questions to be asked. The defendant's apparent assertion was that "a full and fair opportunity to fully ... cross-examine" extended to causing a complete emotional breakdown of the child on the stand. The Supreme Court held that the limitation was designed to prevent harassment of the victim and the management of the questioning in this fashion was not an abuse of the court's general discretion regarding the extent of the cross-examination.

Finally, the defendant complained about the running of the sentences consecutively. The defendant noted that the

injuries to the mother and daughter were not serious and he had been found to not be guilty of child abuse. The Supreme Court gave no consideration to this issue noting, simply, that it was statutorily permissible to run the sentences consecutively.

The sentencing order was affirmed.

### **Seriously?**

In the memorandum decision of *State v. Wright*, 2015WL3875809, the defendant was challenging the sentence entered after his binding plea agreement. The defendant pled guilty to eight counts of sexual abuse in the first degree. The binding plea agreement provided that the circuit court was to run petitioner's sentences consecutively on no more than five of the eight counts.

The presentence report described the defendant as a 68 year old male with a fourth grade education and a prior criminal history of driving on a suspended license, committing a breach of the peace, and committing assault and battery. The victim was eleven years of age and was a member of the defendant's extended family.

A diagnostic report concluded that the defendant possessed a low to moderate risk for sexual violence, had a low probability of recidivism, and was a good candidate for probation.

The sentencing court denied the motions for an alternative sentence and probation. The defendant was sentenced to a term of five to twenty-five years on each count, with four to run consecutively. The appeal followed.

The Supreme Court found that the defendant entered into the agreement knowingly and voluntarily. Specifically, "the circuit court was cognizant of the petitioner's limited educational background, and took great care in ensuring that petitioner understood the charges against him, the plea agreement, and his rights."

The defendant argued that he could not be guilty of the offenses because the touching of the victim was not for the purpose of sexual gratification, but, instead, was to teach the victim "what was going to happen and, you know, how it would be when she got older." Restated, the defendant claimed that he was not sexually gratified by the touching that occurred (and thus the caption for this summary).

The Supreme Court noted that the circuit court's role in a plea hearing is not to make a "formal adjudication of guilt beyond a reasonable doubt on the charge." Instead, the "court's role ... is to ascertain that the plea is voluntarily and intelligently made and that the defendant understands its consequences

and the constitutional rights he is waiving.” Moreover, “a guilty plea waives all antecedent constitutional and statutory violations save those with jurisdictional consequences.” Because the record showed that the circuit court had ascertained the defendant’s understanding of the charges against him and what would have to be proved to convict him, the court fulfilled its role.

The defendant further noted that he received, effectively, a life sentence considering his age. The Supreme Court relied upon its oft quoted precedent and found that “petitioner’s sentences are not disproportionate to the multiple instances of his admitted victimization of an eleven year old child.”

Obviously, therefore, the Supreme Court found no error in the circuit court’s refusal to give probation to the defendant, which is considered to be a “matter of grace.”

The sentencing order was affirmed.

**I did not Download the Pictures, but when discovered, I did not Trash the Pictures Because I believe in Recycling.**

In the memorandum decision of *State v. Spaulding*, 2015WL3875802, the criminal charges were first-degree sexual assault and possession of material

depicting minors engaged in sexually explicit conduct. The investigation into the charges ensued when a “local pawn shop received a computer ... containing a substantial amount of material depicting minors engaged in sexually explicit conduct.” The investigation led to the defendant, to whom a substantial amount of the material on the computer had been transferred. The defendant’s computer was then seized under a search warrant which resulted in the discovery of numerous files depicting child pornography.

In resulting interviews with and without counsel, the defendant admitted that he knew “kiddie porn” was on his computer, but he denied knowing how the material came to be on his computer.

In the eventual trial, the prosecutor described the evidence as “bizarre.” The allegation was that the defendant’s source for the pornographic material also had access to two children, aged three and fourteen years, who eventually were proffered to the defendant for his sexual gratification.

In a Rule 404(b) ruling, the trial court was going to permit evidence of fourteen pictures on the computer of other victims in order to prove lustful disposition and absence of mistake. The prosecutor was not to mention that thousands of such images existed. After

defense counsel’s opening statement in which it was claimed that the defendant was “set up” by the source of the material, the trial court modified its previous ruling to permit the prosecutor to refer to the number of images on the computer.

Based principally on the testimony of the person who provided the material and who had pled guilty, the defendant was convicted on three counts of sexual assault in the first-degree and fifty counts of possession of material depicting minors engaged in sexually explicit conduct. The testimony was, frankly, disturbing and will not be repeated in this summary.

One assignment of error was the purported failure to authenticate text messages, which included pornographic images, sent to the defendant’s phone from his alleged source. The Supreme Court found the evidence was sufficient to establish that the text messages were what they purported to be. The source confirmed that she texted the defendant. The investigating officer tied the phone number from the source’s phone to a phone owned by the defendant. And the defendant confirmed ownership of the phone in his statement. Thus, authentication was not in question.

Another assignment of error concerned the use of the additional photographs found

on the defendant’s computer. The defense counsel had stated in the opening that the source had placed the images on the computer. The substantial number of actual images found, however, exceeded that found on the source’s computer, suggesting that the defendant had placed his own material on the computer. The Supreme Court found any prejudice to be outweighed by this probative value.

Another assignment of error was that the defendant’s second statement should have been played to the jury in addition to his first statement. The defendant tried to characterize the statement as part of his overall statement and therefore the rules of evidence required the entire statement to be played upon his objection. The Supreme Court affirmed that this was a separate statement and was subject to proper objections and exclusion.

Another assignment of error concerned alleged jury impropriety. This revolved around the fact that a juror worked in the circuit clerk’s office and the clerk was the mother-in-law of an investigating officer in the case. The defense counsel failed to discover this connection until after the trial. The Supreme Court laid this issue at defense counsel’s feet in that voir dire had not been limited in any fashion and no reason existed for this information not to have

been discovered at the commencement of the trial.

Another assignment of error related to the court's refusal to permit the cross-examination of an investigating officer by a notarized, written statement of a victim implicating a person other than the defendant. The Supreme Court ruled, without discussion, that this was properly excluded as hearsay.

Another assignment of error was that defense counsel was prevented from introducing the younger victim's identification of another perpetrator. The defense counsel's problem was that he did not actually try to call any other witness to establish this testimony, claiming, instead, that the court's ruling on the written statement of the other victim made it futile for counsel to try. The Supreme Court characterized this argument as illogical.

Another assignment of error was that the testimony never established, in the defendant's opinion, that the young victim was ever in the control of the other person such that an encounter between the young victim and the defendant could have been arranged as the source testified. The Court found the following evidence sufficient to establish this fact: (i) the source's testimony; (ii) text messages between the source and defendant consistent with the testimony;

and (iii) pornographic images of the youngest victim consistent with the testimony found on the defendant's computer.

The circuit court's orders were affirmed.

### **Is Forty-five the New Seventeen?**

In the memorandum decision of *State v. Delbert R.*, 2015WL3875796, the defendant was convicted of sexual abuse by a custodian and sexual assault in the first-degree.

A backstory exists, however. The defendant had pled "no contest" to an information charging the defendant with unlawful assault. A three year period of probation was granted, during which the plea was held in abeyance. If he successfully completed the period of probation, the plea would be withdrawn and a plea would be entered, instead, to the misdemeanor offense of battery.

The current charges arose while the defendant was within the probationary period. As a result, the probation was revoked.

The defendant was convicted of the inappropriate touching of a twelve year old female.

The first assignment of error was that no testimony was ever presented that the defendant was over eighteen years of age, which is a

necessary element of the sentence imposed for the underlying charge. An *Apprendi* argument was made that because age is an aggravating factor resulting in an enhancement to the sentence, the jury had to determine the issue. The instruction to the jury did not state that the defendant's age had to be over eighteen years. The complicating factor for the defendant is that his birth certificate was entered into evidence to which reference was made by the prosecuting attorney in the closing argument. Moreover, defense counsel had not presented any evidence that the defendant was under the age of eighteen (in fact, he was forty-five). The Supreme Court found that the "omitted age element was uncontested and supported by overwhelming evidence" and that a proper jury instruction would not have changed the jury's verdict.

The defendant further argued that he had been prejudiced by evidence that was not timely disclosed. Essentially, the State filed three supplemental discovery responses less than a month before trial identifying eight additional witnesses. The Supreme Court deemed the issue without merit because all the witnesses and the reason for their testimony were known to the defendant.

The most significant issue was

one witness' testimony about another purported victim of the defendant. The witness was the defendant's brother who had contacted the defendant about an allegation by the brother's granddaughter that the defendant had sexually abused her. The Court ruled pretrial that the brother could discuss his contact with the defendant but could not specify the allegation. No sense is made of why the contact was relevant when the reason for the contact was not to be stated. In any event, the brother testified and blurted out the allegation of the improper sexual contact with his granddaughter. An objection was made and the court admonished the brother and instructed the jury to disregard the testimony. On appeal, the defendant argues that the incident was so prejudicial as to require the circuit court to declare a mistrial.

The Supreme Court's terse assessment was: "[the] prohibited testimony was sufficiently cured by the trial court's cautionary instruction, offered immediately upon the offense, and the circuit court did not abuse its discretion in *eschewing the drastic, disfavored declaration of a mistrial.*" [emphasis added]. And, if that was not sufficient enough, the Supreme Court then blamed defense counsel for not moving for a mistrial, stating a "party will not be

permitted to remain silent hoping for a satisfactory verdict from the jury, and then complain when he is disappointed therein.” The editor would comment, however, that courts often delay ruling on motions for a mistrial until the jury verdict is rendered for the very purpose of seeing if a satisfactory result is obtained.

Finally, the defendant complained about the revocation of his probation on the previous charge. Defendant argued that the evidence was insufficient at the hearing on the revocation to support the revocation. The Supreme Court refuted the claim with the following syllogism: You were not to commit a crime while on probation; we have just affirmed your conviction of a crime; and, ergo, you violated your terms of probation.

*The Criminal Law Research Center extends its thanks to Jason D. Parmer for his contribution of the following summaries of recent opinions of the Supreme Court of Appeals of West Virginia:*

**A biased jury or El Dorado, which will be found first?**

*State v. Lewis*, 2015WL5125476 (W.Va. Aug. 31, 2015).

Petitioner Lewis was convicted of conspiracy to commit a felony, kidnapping, and first-degree robbery. During jury selection, one prospective juror revealed that he was the brother-in-law

of the prosecuting attorney prosecuting Lewis’ case. Another prospective juror was a CPS worker in a neighboring county. Both jurors denied bias or prejudice, and the trial court denied Lewis’ motion to strike for cause. Lewis subsequently used peremptory strikes for both prospective jurors, and after Ms. Lewis’ conviction, she appealed the trial court’s refusal to strike them for cause.

The Supreme Court affirmed the trial court’s ruling because Ms. Lewis must show that she had a biased jury before it will find prejudice from a trial court’s refusal to strike for cause. Lewis invited the Court to discard this rule, but the Court refused to do so, reasoning that “the overwhelming majority of states require a showing of prejudice with regard to prospective jurors who are not ultimately empaneled because, when a criminal defendant has been tried before an unbiased jury, he or she has received exactly what the constitution guarantees.”

**Thomas Jefferson did not own a car.**

*City of Elkins v. Black*, 2015WL5125468 (W.Va. Aug. 31, 2015).

Petitioner Black was convicted in Elkins Municipal Court for driving on a revoked license. Black appealed to the Circuit Court of Randolph County and had a *de novo* trial. Black “argued that he

had various constitutional rights that permitted him to drive his vehicle on public highways as an American citizen without a state-issued license.” Despite his patriotic appeal, the circuit court affirmed his conviction. Black again appealed his conviction to the Supreme Court, arguing that W.Va. Code §17B-4-3 “violates his constitutional rights to travel and to pursue life, liberty, and happiness.” Black, citing a case from 1915, further argued “that the West Virginia Legislature lacks the authority to impose licensing requirements on citizens.” However, the Supreme Court trumped Black’s precedent with a 1928 case holding that it is necessary for highways to “be governed by certain laws, so that the rights of each citizen may be certain of protection.”

**Twelve year pre-indictment delay not prejudicial.**

*State v. Howard C.*, 2015WL5125834 (W.Va. Aug. 31, 2015).

Petitioner Howard C. was indicted in January 2012 for an act of sexual abuse alleged to have been committed in July 1999. The circuit court denied Howard’s motion to dismiss the indictment for pre-indictment delay. Howard appealed, arguing that pre-indictment delay in excess of twelve (12) years is inescapably prejudicial. The Supreme Court disagreed, finding that Howard “can only speculate that now-unavailable church

attendance records could indicate that the victim was not present during the time of the abuse. Based on our review of the record, there is simply nothing that would suggest petitioner suffered actual prejudice.”

Howard also appealed the trial court’s ruling that allowed the victim to identify him during her testimony. Howard argued that the victim did not recognize him before she saw him at the courthouse the day of trial. However, the Supreme Court affirmed the trial court’s ruling, stating that “the victim’s in-court identification was properly a question for the jury, who were competent enough to discern the truth following extensive cross-examination of the victim by petitioner’s defense counsel.” Despite the lapse of time between the incident and indictment, the victim “immediately recognized petitioner upon seeing him again.” The Court found further that “petitioner was an adult at the time of the abuse and there was likely not a significant change in his core physical traits between the time of abuse and his prosecution.”

**One bad act can result in multiple punishments if the Legislature makes it so.**

*State v. Samuel R.*, 2015WL5125441 (W.Va. Aug. 31, 2015).

Petitioner Samuel R. pleaded guilty to one count of

first degree sexual abuse and one count of sexual assault by a parent, guardian, or custodian. Samuel received consecutive sentences. Samuel appealed his sentence, arguing that he was being punished twice for the same act in violation of the prohibition against double jeopardy. The Supreme Court affirmed Samuel's sentence because "the legislature has clearly and unequivocally declared its intention that the sexual abuse statute involving parents, custodians or guardians is a separate and distinct crime from the general sexual offenses statute for purposes of punishment."

**Without evidence of error, there can be no reversal.**

*State v. Flora*, 2015WL5125880 (W.Va. Aug. 31, 2015).

Petitioner Flora was convicted of two counts of burglary, two counts of conspiring to commit burglary and one count of petit larceny. Flora's victim was the Sheriff of Webster County and his spouse. On appeal, Flora complained that the trial court did not grant his motion to change venue and denied his motion for individual voir dire. However, the appendix record transmitted to the Supreme Court did not include Flora's motion for change of venue, the order denying change of venue, or the transcript of hearing regarding this motion. Because Flora's brief did not point to any "portion of the

record in his discussion of this issue," and Flora's brief failed "to cite any authority in support of his claims," the Supreme Court declined to address the change of venue issue. The Supreme Court also found that the record did not show any evidence of juror bias that would justify individual voir dire, and denied this challenge.

**You are on parole, stop complaining.**

*Gamble v. Williamson*, 2015WL5331874 (W.Va. Sept. 11, 2015).

Petitioner Gamble filed a writ of habeas corpus in the Circuit Court of Pocahontas County, alleging that the Board of Parole's revocation of his parole constituted legal error. Gamble was placed back on parole before the circuit court ruled on the merits of Gamble's petition. After Gamble's release, Respondents filed a motion to dismiss the appeal as moot, and the circuit court granted this motion. Gamble appealed to the Supreme Court, arguing that his release on parole did not render his habeas petition moot. The Supreme Court affirmed the circuit court's dismissal, stating that "we settled the question of whether parolees in the state penal system may file habeas petitions by holding that they may not."

**Prisoner unsuccessfully sues prison for transfer.**

*Chance v. Chandler*, 2015WL5331443 (W.Va.

Sept. 11, 2015).

Petitioner Chance was transferred from Mount Olive Correctional Center to Northern Correctional Center. In response, Chance sued Cheryl Chandler, the executive assistant to MOCC Warden David Ballard, and Chandler's superiors. Chance alleged that he was transferred in retaliation for his pursuit of criminal charges against Mount Olive officials for various financial improprieties. Chance further alleged that Chandler threatened to have him killed by other inmates at Mount Olive. The Circuit Court dismissed Chance's complaint because the conclusory allegations did not satisfy the heightened fact pleading required for inmate lawsuits against prison officials. The Supreme Court affirmed the dismissal of the complaint.

Chance's "bald allegations of conspiracies do not survive the heightened pleading standard." Court further noted that "prison officials have discretion to transfer prisoners in an effort to maintain a satisfactory operational environment." The motivation for Chance's transfer is irrelevant, and inmates may only successfully sue prison officials when a fundamental right is violated.

**No attorney fees in dispute between prosecutor and reporter.**

*Ramezan v. Hough*, 2015WL5331810 (W.Va. Sept. 11, 2015).

Gilmer County Prosecuting Attorney Gerald Hough subpoenaed Mr. Ramezan, publisher of The Gilmer Free Press, to appear before a grand jury and disclose the identity of the author of a letter published in the Free Press regarding a confidential juvenile matter. Mr. Ramezan asserted Reporters' Privilege under W.Va. Code §57-3-10 and refused to comply with the subpoena. In response, Mr. Hough subpoenaed Mr. Ramezan's income tax returns to determine whether Mr. Ramezan derived income from his reporting.

In the midst of this flurry of subpoenas, Mr. Ramezan sued Mr. Hough for harassment and asked to be compensated for attorney's fees incurred while defending against the subpoenas. Although the lower court quashed both subpoenas, Mr. Ramezan was not awarded attorney's fees.

Mr. Ramezan appealed the denial of attorney's fees. The Supreme Court held that, in the absence of a contract, attorney's fees may only be awarded if (1) a statute authorizes it, or (2) equity requires it. The Supreme Court affirmed the lower court's denial of attorney's fees because W.Va. Code §57-3-10 does not include a fee-shifting provision and Mr. Hough did not act vexatiously, wantonly, or in bad faith.

**DAFFYNITION:**  
**Harmless Error** - Shooting one's self in the foot rather than the head.

## VOUCHER UPDATE

For the period of July 1, 2015 through September 30, 2015, Public Defender Services has processed 7,706 vouchers for payment in a total amount of \$5,371,420.29.

### Most Highly Compensated Counsel

For the period of July 1, 2015, through September 30, 2015:	
McGraw Law Offices	\$ 97,269.50
James E. Hawkins, Jr.	\$ 53,623.50
Michael R. Whitt Law Office of	\$ 49,596.00
Courtney L. Ahlborn, PLLC	\$ 40,881.00
David M. Grunau	\$ 36,411.50

### Most Highly Compensated Service Providers

For the period of July 1, 2015, through September 30, 2015:	
Tri S Investigations, Inc.	\$ 45,683.70
Maranatha Professional Services LLC.	\$ 27,868.69
Joseph I. Cohen	\$ 15,000.00
Vaughan Investigation	\$ 13,706.45
Philip E. Pate	\$ 12,850.00

### Most Notable Voucher Entries:

- "Call from client re: wants his \$ back. Told him to call me in May after next Grand Jury"
- "Call from client re: wants his money back"
- "Calls and emails with Prosecuting Attorney re: Dude wants his money back"
- "Call from client re: wants his money back"
- "Call from client re: wants his money back"
- "Call from client re: wants his money back"
- "Call from client re: wants his money back"
  
- "Spent hour yelling at client; prep for preliminary hearing"
  
- "Write clients PO, need 'fear of God' strategy"
  
- "More dadburned discovery"



*\*AND A SPECIAL THANKS TO THE ATTORNEY WHO SENT IN THE RECIPE FOR "HIGH PROTEIN CHICKEN SALAD" WITH THE VOUCHER.*



## POINTS OF INTEREST

**Did you know?.....that pretrial diversion agreements are governed by statute? Specifically:**

**§ 61-11-22. Pretrial diversion agreements; conditions; drug court programs**

(a) A prosecuting attorney of any county of this state or a person acting as a special prosecutor may enter into a pretrial diversion agreement with a person under investigation or charged with an offense against the state of West Virginia, when he or she considers it to be in the interests of justice. The agreement is to be in writing and is to be executed in the presence of the person's attorney, unless the person has executed a waiver of counsel.

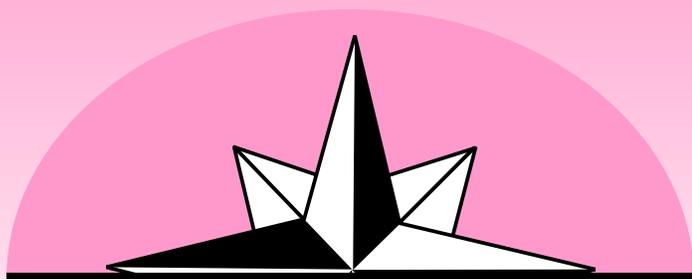
(b) Any agreement entered into pursuant to the provisions of subsection (a) of this section may not exceed twenty-four months in duration. The duration of the agreement must be specified in the agreement. The terms of any agreement entered into pursuant to the provisions of this section may include conditions similar to those set forth in section nine, article twelve, chapter sixty-two of this code relating to conditions of probation. The agreement may require supervision by a probation officer of the circuit court, with the consent of the court. An agreement entered into pursuant to this section must include a provision that the applicable statute of limitations be tolled for the period of the agreement.

(c) A person who has entered into an agreement for pretrial diversion with a prosecuting attorney and who has successfully complied with the terms of the agreement is not subject to prosecution for the offense or offenses described in the agreement or for the underlying conduct or transaction constituting the offense or offenses described in the agreement, unless the agreement includes a provision that upon compliance the person agrees to plead guilty or nolo contendere to a specific related offense, with or without a specific sentencing recommendation by the prosecuting attorney.

(d) No person charged with a violation of the provisions of section two, article five, chapter seventeen-c of this code may participate in a pretrial diversion program: *Provided*, That a court may defer proceedings in accordance with section two-b, article five, chapter seventeen-c of this code. No person charged with a violation of the provisions of section twenty-eight, article two of this chapter may participate in a pretrial diversion program unless the program is part of a community corrections program approved pursuant to the provisions of article eleven-c, chapter sixty-two of this code. No person indicted for a felony crime of violence against the person where the alleged victim is a family or household member as defined in section two hundred three, article twenty-seven, chapter forty-eight of this code or indicted for a violation of the provisions of sections three, four or seven, article eight-b of this chapter is eligible to participate in a pretrial diversion program. No defendant charged with a violation of the provisions of section twenty-eight, article two of this chapter or subsections (b) or (c), section nine, article two of this chapter where the alleged victim is a family or household member is eligible for pretrial diversion programs if he or she has a prior conviction for the offense charged or if he or she has previously been granted a period of pretrial diversion pursuant to this section for the offense charged. Notwithstanding any provision of this code to the contrary, defendants charged with violations of the provisions of section twenty-eight, article two, chapter sixty-one of this code or the provisions of subsection (b) or (c), section nine, article two of said chapter where the alleged victim is a family or household member as defined by the provisions of section two hundred three, article twenty-seven, chapter forty-eight of this code are ineligible for participation in a pretrial diversion program before the July 1, 2002, and before the community corrections subcommittee of the Governor's Committee on Crime, Delinquency and Correction established pursuant to the provisions of section two, article eleven-c, chapter sixty-two of this code, in consultation with the working group of the subcommittee, has approved guidelines for a safe and effective program for diverting defendants charged with domestic violence.

(e) The provisions of section twenty-five of this article are inapplicable to defendants participating in pretrial diversion programs who are charged with a violation of the provisions of section twenty-eight, article two, chapter sixty-one of this code. The community corrections subcommittee of the Governor's Committee on Crime, Delinquency and Correction established pursuant to the provisions of section two, article eleven-c, chapter sixty-two of this code shall, upon approving any program of pretrial diversion for persons charged with violations of the provisions of section twenty-eight, article two, chapter sixty-one of this code, establish and maintain a central registry of the participants in the programs which may be accessed by judicial officers and court personnel.

W. Va. Code Ann. § 61-11-22 (West)



**Honorable Earl Ray Tomblin - Governor**

**Jason Pizatella - Secretary of Administration**

**Public Defender Services**

**Dana F. Eddy - Executive Director**

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## NOTABLE QUOTES

“In holding that the harmless error rule governs even constitutional violations under some circumstances, the Court recognized that, given the myriad safeguards provided to assure a fair trial, and taking into account 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.” *U.S. v. Hasting*, 461 U.S. 499, 509, 103 S.Ct. 1974, 1981, 76 L.Ed.2d 96 (1983).

“The Court is tired of the Armed Career Criminal Act of 1984 ... and in particular its residual clause. Anxious to rid our docket of bothersome residual clause cases, the Court is willing to do what it takes to get the job done. So brushing aside *stare decisis*, the Court holds that the residual clause is unconstitutionally vague even though we have twice rejected that very argument within the last eight years. The canons of interpretation get no greater respect. Inverting the canon that a statute should be construed if possible to avoid unconstitutionality, the Court rejects a reasonable construction of the residual clause that would avoid any vagueness problems, preferring an alternative that the Court finds to be unconstitutionally vague. And the Court is not stopped by the well-established rule that a statute is void for vagueness only if it is vague in all its applications. While conceding that some applications of the residual clause are straightforward, the Court holds that the clause is now void in its entirety. The Court's determination to be done with residual clause cases, if not its fidelity to legal principles, is impressive.”

Justice Alito, dissenting, *Johnson v. United States*, 135 S. Ct. 2551, 2573-74, 192 L. Ed. 2d 569 (2015)

“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”

*Griffin v. Illinois*, 351 U.S. 12 (1956)