

THE CAPITOL LETTER

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Criminal Law Research Center*

From the Executive Director

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RECAPPING THE ANNUAL CONFERENCE:

The 2015 Public Defender Services Annual Conference was held at the Stonewall Jackson Resort and Conference Center on the dates of Thursday, June 18, 2015, and Friday, June 19, 2015. This was the second annual conference to be held during the tenure of Dana F. Eddy as Executive Director of Public Defender Services and, under the direction of his deputy director, Donald L. Stennett, the conference was specifically designed to more directly address the practical issues faced by criminal defense lawyers. The theme was "Raising the Bar," which was a reference to the focus of the presentations, but also a reference to Public Defender Services' commitment to provide support to criminal defense lawyers representing indigent clients, whether the lawyers are panel attorneys or salaried public defenders.

One hundred and forty-nine

attorneys attended the conference. The agency's continuing disappointment is that the salaried public defenders were disproportionately represented.

The conference was opened with a presentation from Joseph Garcia, the Governor's Director of Legislative Affairs, who spoke generally about the current administration's effort to reform the criminal law with respect to issues of incarceration, generally, and disposition of juvenile matters, specifically. Breakout sessions were then offered through the remainder of the conference on numerous topics, including Rule 404(b), juvenile welfare reform, domestic violence, resources for incompetent clients, representation of youthful offenders, practice in magistrate courts, preparation of expert witnesses on psychological evaluations, ethics, case studies in mitigation, and recent federal courts' opinions on constitutional issues. The presentation on challenging drug evidence made by Drew

Northup, the Assistant Public Defender for Baltimore, Maryland, and the "ABC's of DUI" given by David Pence, a private attorney, were especially well received and highly lauded.

George Daugherty finished the first day of the conference with his presentation, "Preventing Burnout in the Practice of Law: Psychoneuroimmunology, the Healing Power of Laughter, Music & Joyful Living," which was a particularly moving introspective examination of his life and his battle with alcoholism and a particularly heartfelt retrospective on what it means to be a lawyer in today's world.

At the Thursday night barbeque dinner, the agency's "Award for Outstanding Scholarship in Criminal Law" was given to Greg Ayers, the recently retired director of the panel of attorneys now comprising the agency's Appellate Advocacy Division. The "John A. 'Jack' Rogers Award for Outstanding

Leadership in Public Services" was given to George Castelle, the recently retired Chief Public Defender for Kanawha County, West Virginia. The banquet was concluded with entertainment from Bob Noone, whose repertoire included recently penned parodies of Hillary Clinton's run for the presidency and Rachel Dolezal's presidency of the Seattle Chapter of the NAACP.

The conference attendees received 11.5 hours of credit for continuing legal education,

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The Bulletin Board

AGENCY NEWS & INFORMATION

which included one hour of ethics and one hour of law office management. An additional 7.2 hours of credit is available to the attendees by watching the videotape of the breakout sessions which were not attended during the conference. Essentially, the attorneys at the conference received a potential of 18.7 hours of credit for continuing legal education, a banquet dinner, and entertainment for the cost of one hundred and fifty dollars (\$150). And despite the popular belief, the cost of attendance for the salaried public defenders came from the budgets of the public defender corporations and was not “free.” Accordingly, the low attendance of panel attorneys remains a point of consternation for the agency.

The agency has set the date for its 2016 annual conference as June 16 and 17, 2016. The present plans are to have the conference in Charleston, West Virginia. The agency hopes to see you then.

If you have any ideas regarding subject matter for the 2016 Annual Conference, you are encouraged to share the idea with the Criminal Law Research Center through an

email to Pam.R.Clark@wv.gov.

WATCHLIST:

To date, six attorneys have been placed on, and subsequently removed from, the agency’s watch list. All six attorneys signed conciliatory agreements with the agency which set forth generally any obligations of restitution to the agency; the reduction of vouchers presently held by the agency in consideration for a release of any claims related to all past vouchers; the conditions to be imposed on the processing of future vouchers; and the general commitment to the payment of future vouchers if the terms of the agreement are met. The circumstances of one of the attorneys did result in the agency’s complaint to the Office of Disciplinary Counsel. However, the circumstances related more to the perceived unresponsiveness of the attorney. Since the report, the agency and the attorney have executed a conciliatory agreement.

Another attorney contacted the agency to discuss potential issues with the attorney’s vouchers. A conciliatory agreement has been proposed and is awaiting execution.

Accordingly, the agency does not have any attorneys on the watch list currently. All vouchers are being processed in the regular course.

However, the agency is currently reviewing the vouchers of several attorneys to determine if action is warranted.

Again, if you have engaged in billing practices that might not be consistent with the statutory provisions or the agency’s guidelines, you are encouraged to contact the agency. The agency is committed to rectifying the situation quickly and then releasing affected attorneys to continue the work of accepting appointments.

AADvice: A discussion of the proposed revisions to the Rules of Appellate Procedure.

The Supreme Court of Appeals of West Virginia has requested comment from Public Defender Services (“PDS”) on proposed revisions to Rules 3, 4, 5, 10 and 11 of The Rules of Appellate Procedure. Most of the proposed changes are intended to allow appellate counsel to fulfill his or her obligation to file a brief on behalf of a client without violating Rule 3.1 of the Rules

of Professional conduct and Syl. Pt. 3, *State v. Mc Gill*, 230 W.Va. 85, 736 S.E.2d 85 (2012), both of which prohibit, generally, the assertion of frivolous arguments before the court. A summary of the changes is set forth in this article. A full copy of the proposed revisions is set forth on PDS’ website. PDS encourages you to share with the agency any thoughts or concerns you may have regarding the proposed changes by August 31, 2015, so that criminal defense lawyers may speak as a united voice when submitting comments to the Court.

Rule 3: Attorneys- The proposed change, found in 3(d)(2), would prohibit counsel from withdrawing from representation of the client in an appellate matter for the sole reason that counsel lacks a good faith belief that the appeal is reasonable or warranted by the facts of the client’s case.

Rule 4: Unrepresented Parties- The proposed change to Rule 4 prohibits a *pro se* filing or oral argument by a client who is represented by counsel regardless of whether counsel has made any filings or appearances in the Supreme Court on behalf of the client. *But see*, Rule 10 regarding *pro se*

briefs.

Rule 5: Appeals from Circuit Court- The proposed change to Rule 5(b) continues the theme that counsel will not be relieved from the appointment to represent the client even if counsel does not have a good faith belief that an appeal is reasonable and warranted and, moreover, counsel will be obligated to file a brief on behalf of the client. Specifically, 5(b) states that counsel *must* complete the Certification in Appendix A even if counsel does not have a good faith belief that an appeal is reasonable and warranted under the circumstances. The Clerk's notes explain that "good faith may at times be defined by the legal obligation of counsel to file an appeal that raises any arguable points of error that are advanced by the client."

Rule 10: Briefs- The proposed changes to Rule 10 are intended to provide appellate counsel guidance as to what procedure satisfies their obligation on behalf of the client to file a brief and still comply with Syl. Pt 3, *State v. McGill*, 230 W.Va. 85, 736 S.E.2d 85(2012) with respect to the assertion of frivolous arguments.

A new section was added, 10(c)(10), with which an appellate counsel *must* comply if a client insists on filing a brief even though counsel lacks a good faith belief that an appeal is reasonable or warranted. Specifically,

10(a) - Counsel must engage in a candid discussion with the client regarding the merits of the appeal. If, after consultation with the client, the client insists on proceeding with the appeal, counsel must perfect the appeal. Counsel is not obligated to make unsupported contentions made by the client, but counsel must cite the appendix and any case law that applies to any other contentions.

10(b) - If the client insists on raising unsupported arguments, counsel must alert the court that the appeal is being filed under 10(c)(10)(b). In this situation counsel must file a motion with the court requesting leave to allow the client to file a *pro se* supplemental brief raising the assignments of error that counsel does not have a good faith belief are reasonable and warranted. Counsel should refrain from arguing against the client's interests in the motion. *The decision to allow your client to prepare his or her own brief must be made prior to filing the motion for leave as 10(c)(10)(b) provides the pro se brief must be attached to the motion.*

Under the provisions of 10(g), Petitioner is now prohibited from filing more than one reply brief unless permitted to do so by order of the Court.

Rule 11: Abuse & neglect appeals - The Court is going to require transcripts in abuse and neglect cases, which is a

major change from the current procedure permitting counsel to provide a statement in lieu of transcripts. This statement facilitated the expedited docketing of the appeals in abuse and neglect cases, so the impact that requiring a transcript will have on the expedited scheduling is unknown and unaddressed. Court reporters would seemingly have some reaction to this requirement.

In 11(d), *Docketing the appeal*, Counsel must complete the certification in Appendix A even if counsel does not have a good faith belief that an appeal is reasonable and warranted under the circumstances.

In 11(i), *Special requirement for the briefs*, briefs in abuse and neglect cases must contain a section immediately following the summary of the argument that sets forth the current status of the child(ren), any plans for permanent placement, and the current status of parental rights. This is in addition to the requirements listed in Rule 10 for briefs.

In 11(j), *Update regarding the current status of the child (ren)*, the Court is requiring that within one week of any oral argument scheduled by the Court, or within such other time as may be specified by order, the parties *shall* provide a written statement to the Court of any change in circumstances that were set forth in the briefs.

In conclusion, if you have any thoughts on the proposed changes which you would want PDS to consider before providing its final comments to the Court, you are encouraged to contact Crystal Walden at (304) 558-3905 or by email at Crystal.L.Walden@wv.gov.

WORDS OF WISDOM:

The writ of error *coram nobis* was "originated in sixteenth-century England as an instrument used by trial courts to correct their fact-based errors." *State v. Hutton*, -- S.E.2d -- (W.Va. 2015), 2015 WL 3822814. "There also was another, similar writ that was called the writ of *coram vobis*. The distinction between the two writs involved the courts in which they were filed. 'It was called *coram nobis* (before us) in King's Bench because the king was supposed to preside in person in that court. It was called *coram vobis* (before you – the king's justices) in Common Pleas, where the king was not supposed to reside.' ... Insofar as the United States is a democracy and not a monarchy, 'American courts entertaining petitions in the nature of *coram nobis* or *coram vobis* have indiscriminately invoked both labels.'" *Id.* [citations omitted].



SUPREME COURT OF APPEALS OF WV: IT IS SO ORDERED....

I want a writ just like the writ my forefathers use to file.

In the opinion reported at *State v. Hutton*, -- S.E.2d --, 2015 WL 3822814 (W. Va. 2015), the continuing efficacy of the writ of error *coram nobis* in West Virginia was debated. An interesting facet of the matter is that the petitioner's cause was advanced by representatives of the West Virginia University College of Law Clinical Program and, in fact, argument before the Supreme Court of Appeals of West Virginia was made by one of the students in the program.

The petitioner, a Jamaican citizen, had pled guilty to unlawful assault without, allegedly, being informed by his counsel that the resulting conviction could result in his deportation. The petitioner wanted the conviction vacated on the grounds of ineffective assistance of counsel. Two of the three grounds for denial of the writ by the lower court were that *coram nobis* was no longer available "as a remedy in West Virginia" and

even if it was available, ineffective assistance of counsel was not a ground for this relief.

The Supreme Court reversed the lower court and remanded the matter for further proceedings.

Specifically, the fifty-three year old petitioner had lived in America since the age of nine, but, notwithstanding his classification as a "permanent resident," the petitioner was not an American citizen. In 2010, the petitioner was indicted for "malicious assault and three counts of sexual assault in the second degree." The purported victim was the petitioner's "live-in girlfriend" and the "mother of their then-four-year-old son." An *Alford* plea was taken to the crime of unlawful assault and the resulting sentence was a term of one to five years.

Ten days before the petitioner's release from prison, the Department of Homeland Security notified him that he would be held under a federal detainer

pending his deportation to Jamaica due to his felony conviction.

After his delivery to the federal government, the petitioner filed, *pro se*, the petition for a "writ of error *coram nobis*." The hearing in the lower court was held by telephone with the petitioner unrepresented. The petitioner had not requested appointed counsel for fear the resulting delay would extend past his actual deportation. After a telephonic hearing, the order denying the writ was entered on the two grounds set forth above and on the somewhat mysterious additional ground that the petitioner "failed to show ... [his] counsel did not inform him of the deportation consequences." This was mysterious in that the petitioner's counsel had filed an affidavit which "indicated that he did not remember speaking with Mr. Hutton regarding his immigration status nor the consequences he faced as an immigrant if he was found guilty of the charges in the indictment."

The writ of error *coram nobis* evolved in jurisprudence because "trial courts lacked the authority to correct their own errors." Restated, it was developed "as a means of rectifying the unjust situation arising from the fact that any allowable method of appeal at common law was limited only to review for errors of law and there was no redress for an error of fact not apparent on the record and unknown to the court at the time of trial." Moreover, the "writ of error *coram nobis* ... contemplates a review of the judgment by the court which rendered it, not by an appellate court; and no writ issues from an appellate court."

In current jurisprudence, Professor Cleckley noted that "*coram nobis* is of limited scope and is sometimes the proper vehicle for vindicating constitutional rights ... [and] theoretically, *coram nobis*, not being dependent upon custody, is available indefinitely." Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure* 508 (2d ed. 1993). Essentially, "it has been said that the writ exists to afford a

remedy against injustice – when no other remedy is available.”

The issue before the Court was the continued efficacy of the writ. The question arises due to legislative activity repealing a statute that had made reference to a motion for *coram nobis*. In 1868, the infant State of West Virginia adopted verbatim a Virginia statute that directed that a “motion” was to be made with respect to “any clerical error or error in fact for which a judgment or decree may be reversed or corrected on writ of error *coram nobis*.” The State’s argument, which was adopted by the lower court, was that this statute abolished the common law writ and when this statutory provision was repealed in 1998, West Virginia effectively eliminated the *coram nobis* remedy.

The lower court agreed, but the majority of the Supreme Court disagreed, with Justice Davis writing the opinion.

Essentially, the appellate court found that the Virginia statute did not abolish the common law writ but, instead, simply offered a less expensive alternative. The statute permitted filing a post-judgment motion on the error of fact in the same proceeding rather than requiring an entirely new proceeding to be commenced by a petition. Moreover, the appellate court found that, historically, the courts had applied the statute as merely an alternative to the filing of an actual petition for a writ. So, the statute did not eliminate the writ as a

remedy.

The Court further found that the repeal of the statute did not affect the remedy in criminal matters. With the adoption of the modern rules of civil procedure in 1960, Rule 60(b) expressly abolished the “writs of *coram nobis*, *coram vobis*, petitions for rehearing, bills of review and bills in the nature of a bill of review.” The rule provided the means and mechanism by which relief could be obtained from a judgment in a civil matter. No similar rule was adopted with respect to criminal proceedings. And, in 1997, the Supreme Court of Appeals noted that “this particular writ has been used for post-conviction issues when the defendant is not incarcerated.” When the motion statute was repealed in the following year, therefore, the writ was available at that time only in criminal cases. And because the Legislature did not “affirmatively articulate such an intent,” the repeal of the statute did not affect the common law remedy in criminal proceedings.

Could the writ, therefore, be used to raise the constitutional issue of the ineffective assistance of counsel?

The Supreme Court held that the petitioner’s claim did raise constitutional issues in that under *Padilla v. Kentucky*, 559 U.S. 356 (2010), “the Sixth Amendment requires defense counsel to warn an immigrant client of the

deportation consequences of a guilty plea.” Moreover, “when the deportation consequence is succinct, clear, and explicit under applicable law, counsel must provide correct advice to the client.” Finally, “when the law is not succinct or straightforward, counsel is required only to advise the client that the criminal charges may carry a risk of adverse immigration consequences.”

The state argued that the writ was constrained to address errors of fact and not errors of law such as the deportation issue. The Supreme Court noted, however, that “the modern trend has been to narrowly expand the writ to include limited legal errors involving constitutional deprivations.”

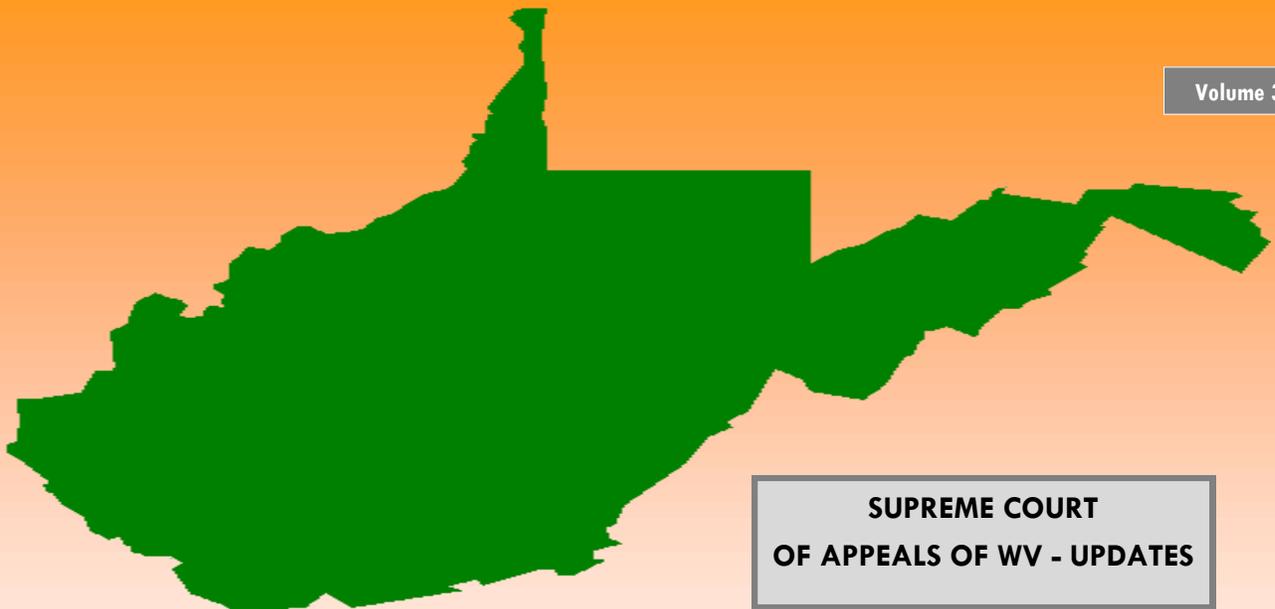
So, ironically, the Supreme Court took great care to demonstrate that the English common law writ of *coram nobis* was preserved in the State of West Virginia in criminal proceedings, but then in this opinion decided to “modify the common law writ” under its inherent power to modify or alter common law principles.

Accordingly, the Supreme Court deemed that the writ should not be limited to just technical matters, but should be available to address constitutional legal errors. The Supreme Court adopted the following “four-part test” for use of the writ of error *coram nobis* to “assert a constitutional legal error”: (1) a more usual remedy is not available; (2)

valid reasons exist for not attacking the conviction earlier; (3) there exists a substantial adverse consequence from the conviction; and (4) the error presents a denial of a fundamental constitutional right. The Supreme Court then remanded the case so that the lower court could apply the test to the petitioner’s circumstances.

Justice Loughry concurred with the majority’s opinion regarding the continued availability of the writ of error *coram nobis* in “extraordinary circumstances in criminal proceedings in West Virginia.” However, the Justice dissented from the opinion to the extent that its application of *Padilla* placed an affirmative burden on the defense lawyer to ascertain a client’s immigration status.

Justice Benjamin dissented, stating that the provisions of W. Va. Code §2-1-1 govern such that West Virginia adopted the English Common law as “altered by the General Assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-three.” Because the writ had been altered by the Virginia statute, W.Va. Code §2-1-1 compels the conclusion that West Virginia did not adopt the common law writ as an available remedy.



**SUPREME COURT
OF APPEALS OF WV - UPDATES**

It's Not that I am Biased; It's just that he is Obviously Guilty.

In the reported opinion, *State ex rel. Parker v. Keadle*, -- S.E.2d -- (W. Va. 2015), 2015WL3649611, the prosecuting attorney sought a writ of prohibition against the circuit court judge who ordered a new trial based upon the court's failure to strike a juror for cause.

Specifically, a defendant had been convicted by a jury of twenty-seven counts of first degree sexual assault, twenty-seven counts of sexual abuse by a parent, guardian or custodian, and twenty-seven counts of incest. Sixty-nine counts additional counts had been dismissed upon the State's motion. The number of counts in the indictment was, therefore, one hundred and fifty.

An initial trial commenced but resulted in a mistrial when two jurors were stricken for cause.

For the second trial, a

questionnaire was prepared, which consisted of thirteen pages and sixty-nine questions. One juror answered several questions indicating she had formed an opinion as to the defendant's guilt. One handwritten comment was that "I try to presume innocence until found guilty, but when I read there were up to 50 counts, I know my thinking was that this person must have done something." In response to the question as to whether the fact of indictment would lead her to believe that the defendant was guilty, the juror had answered "it would lead me to believe there is a suspicion."

The court denied the initial motion to strike for cause, but stated the motion might be renewed after the individual voir dire. But during the individual voir dire, no questions were asked of the juror by either the court or the counsel. And the defense counsel made no objection when the juror was empaneled.

After conviction, the

defendant's post-trial motions were heard by a different judge. An additional fact was made known which was that, after the trial, the subject juror sent a thank-you letter to the prosecuting attorney complimenting his performance. The new judge agreed that the juror should have been stricken for cause and that the juror's bias was obviously confirmed by the thank-you letter. A new trial was ordered, therefore, and the prosecution's petition for a writ of prohibition was then filed.

The Supreme Court stated that "a juror is considered to be biased where the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant." The Supreme Court then acknowledged that "actual bias can be shown either by a juror's own admission of bias or proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed." The Supreme Court then noted that it could "interfere with a trial court's

discretionary ruling on a juror's qualification to serve because of bias only when it is left with a clear and definite impression that a prospective juror would be unable faithfully and impartially to apply the law." Finally, the Supreme Court elaborated that "when a prospective juror makes a clear statement of bias during *voir dire*, the prospective juror is automatically disqualified and must be removed from the jury panel for cause." But, "when a juror makes an inconclusive or vague statement that only indicates the possibility of bias or prejudice, the prospective juror must be questioned further by the trial court and/or counsel to determine if actual bias or prejudice exists."

In the Supreme Court's opinion, the answers given by the juror in the questionnaire did not "manifest a clear and definite impression" that the juror would not be able to "fairly and impartially apply the law." And because neither the trial court nor counsel made any further inquiry, the Supreme Court did not believe the totality of the circumstances

established that the juror should have been dismissed for cause. Accordingly, the lower court should not have granted the motion for a new trial as a matter of law and a writ of prohibition would properly issue. The Supreme Court never addressed the significance, if any, of the juror's thank-you letter to the prosecutor as evidence of the juror's actual bias.

Justice Ketchum dissented, stating the juror's answer was "clear" and "she had formed an opinion before hearing the evidence."

Which one in this group does not belong with the others?: Burglary, Abduction, Rape, Voluntary Manslaughter and the Rule of Lenity.

In the reported opinion, *State v. Lewis*, -- S.E.2d -- (W. Va. 2015), 2015WL3448047, the relevant facts were that the defendant went to the apartment of his former girlfriend in violation of a protective order. The defendant had previously lived with the girlfriend in the apartment and remained a tenant on the lease for the apartment. The protective order gave the former girlfriend exclusive possession of the apartment, however. The allegation is that when the former girlfriend, L.F., tried to close the door on the defendant, he kicked it open and entered the apartment. Another person in the apartment then witnessed the defendant's abduction of L.F. from the apartment. The

person did not follow the defendant because he was unclothed, but the person did dial 911. The police arrived but could not locate either the defendant or L.F.

The testimony was that the defendant took L.F. to another apartment in which the defendant and the girlfriend had previously resided, but which was currently unoccupied. The defendant then allegedly sexually assaulted the former girlfriend. L.F. eventually escaped, but was followed by the defendant back to her apartment. The defendant was then reported by the defendant and the other person in the apartment to have stated that L.F. "should telephone the police because he knew he was going to prison for rape and kidnapping." The police were called and the defendant was arrested.

Trial was had on the resulting charges except for the violation of the terms of a protective order to which the defendant pled guilty. After the prosecutor's case in chief, a motion for a judgment of acquittal on all charges was made and was denied. The defense did not call any witnesses. The jury found the defendant guilty of burglary by entering without breaking, abduction with the intent to defile as a lesser included offense of kidnapping, and second degree sexual assault. The defendant was found not guilty of breaking and

entering and second degree sexual assault by oral intercourse.

A recidivist information was filed before sentencing with respect to the defendant's conviction in Virginia in 1994 by his plea of guilty to the felony offense of voluntary manslaughter.

The resulting sentence was twelve months for violating the protective order which was to run concurrently with the consecutive sentences of one to fifteen years for burglary; three to ten years for abduction with intent to defile; and an enhanced twenty to twenty-five years for the second degree sexual assault.

One assignment of error was that the convictions on the charge of sexual assault and the charge of abduction with intent to defile violated the Double Jeopardy Clause. The argument was, based upon case law, that the movement of L.F. to the other apartment was "merely intended to facilitate the commission of the sexual assault" and the abduction, therefore was "merely incidental or ancillary to the commission of the other offense" and could not be separately charged.

The Supreme Court deemed this point of error to be waived, noting that the issue was not raised in the circuit court and, moreover, the defense counsel specifically requested that the jury be instructed on the charge as a lesser included offense of

kidnapping. The defense counsel also approved the verdict form. The Supreme Court concluded, therefore, that the defendant "cannot now complain of his tactical decision."

Although waived, the Supreme Court further held that Double Jeopardy was not present in this case because the distance between the apartments and the length of time L.F. was held made the abduction more than incidental to the commission of the sexual assault.

Another assignment of error was that the instruction on the charge of abduction with intent to defile was deficient. The first problem for the defendant is that the instruction was proffered by the defendant and given over the State's objection. The second problem is that the purported deficiency was the absence of an element of sexual motivation or purpose, but the instruction proffered by defendant defined "defile" as "having a sexual purpose or motivation." Needless to say, the assignment was rejected in one paragraph.

Another assignment of error concerned whether the defendant could be convicted of burglary of an apartment when he was a named lessee. Essentially, the defendant argued that he had not "entered the premises of another." The Supreme Court noted that it was "possession or occupancy" of a building or premises that was the determining factor and the

protective order had given the former girlfriend sole possession of the apartment. Accordingly, the defendant could be convicted of burglary.

Additionally, the defendant argued that the records of conviction from Virginia should not have been admitted in his recidivist proceeding because no transcript existed to establish that his conviction by reason of a guilty plea was done knowingly, voluntarily, and willingly. The Supreme Court rejected this argument holding that the records would be presumed valid absent any proof from the defendant of any irregularity and, moreover, the asserted grounds would be deemed to be waived absent any actual attack of the prior conviction on the grounds now argued by the defendant.

Finally, the defendant argued that the recidivist enhancement should not have been applied to the harshest statutory penalty under the rule of lenity. The rule of lenity would require the strictest construction of the recidivist statute against the State and because it did not direct which sentence was to be enhanced, it should be the least harsh penalty. The Supreme Court disagreed, holding that the “selection of the sentence to be enhanced is committed to the sound discretion of the trial court” and, “unless based on some impermissible factor” and unless the resulting sentence is not within statutory

limits, that exercise of discretion would not be reviewed.

If the Shoes Fit, You must Convict.

In the reported opinion, *State v. Bouie*, -- S.E.2d -- (W. Va. 2015), 2015WL3822768, the defendant’s convictions of felony murder and conspiracy to commit burglary of a residence were affirmed.

At 3:15 a.m., the defendant and another person allegedly prepared to enter an apartment through a rear bedroom window in order to steal money and drugs. Unexpectedly, the occupant of the apartment confronted the pair. The person accompanying the defendant fatally shot the occupant in the chest.

Surveillance videos were found establishing that one of the persons trying to break into the apartment wore sneakers even though it was a snowy morning.

During his transport in a police cruiser from his place of incarceration on other charges in Pennsylvania, the defendant asked to see a copy of the complaint resulting in his arrest in West Virginia. Upon reviewing the complaint, the defendant asked why he was being charged with murder when he was not the shooter. Further statements placed him at the scene of the shooting at the time of the shooting. For felony murder purposes, the defendant had effectively

confessed.

The Supreme Court held that, at this time, the Sixth Amendment right to counsel had not attached because a “formal prosecution” had not yet commenced. The defendant was being transported and had not yet been arraigned or brought before a magistrate for a preliminary hearing. Acknowledging that the defendant had not been Mirandized, the Supreme Court further held that the defendant’s comments were made spontaneously and without prompting from the police officer. The Fifth Amendment is invoked in custodial situations only with respect to “questioning initiated by law enforcement officers.” The statements were admitted at the trial, therefore.

At trial, a witness testified as to statements made by the purported shooter. The statements confirmed the shooting and confirmed the fact of the robbery. The declarant refused to give testimony for fear of self-incrimination. The defendant argued that the statements were inadmissible hearsay and violated the Confrontation Clause.

The Confrontation Clause did not apply, according to the Supreme Court, because the statements were not testimonial in that the statements were not “made under circumstances which would lead an objective

witness reasonably to believe that the statement would be available for use at a later trial.” A hearsay exception applied because the declarant was technically “unavailable” by reason of asserting the Fifth Amendment privilege and the statements were against the declarant’s “own penal interest.” Restated, “the very fact that a statement is ‘genuinely self-inculpatory’ ... is itself one of the particularized guarantees of trustworthiness.” Moreover, the Supreme Court found the trustworthiness was not compromised by the fact the witness and declarant were smoking pot at the time. The irony is, however, that the statements were not found to be testimonial for Sixth Amendment purposes, but the statements were found to be “inculpatory” for hearsay purposes. If the defendant did not expect the statements to be used at a trial, were they truly inculpatory?

The defendant further moved to suppress recorded phone calls that he made from the jail. The defendant’s problem is that each phone call started with a warning that the calls were recorded and, therefore, the defendant essentially “ignored the warnings at his own peril.”

The final issue in the case was the testimony regarding a pair of tennis shoes that were stated to be similar to the shoes worn the night of the burglary based upon prints found in the snow below the window and images on the surveillance video. These shoes were also similar to shoes

owned by the defendant. In other words, if the jury believed these were the shoes worn by the person in the video and the jury believed the shoes were similar to ones owned by the defendant, then the jury could conclude the defendant was the person in the video. The shoes depicted at trial were deemed to be “demonstrative evidence.” During the trial, the jury was informed on several occasions that the demonstrated shoes did not belong to the defendant. And the FBI testimony was that it could not be stated with certainty that this brand of shoe was the one worn by the unidentified person in the surveillance videos. Indeed, a cautionary instruction was given by the presiding judge.

The defendant objected to the “lay” opinions offered by the investigating officer that the shoe accurately depicted a shoe that made the prints in the snow and that seemingly visually matched shoes worn by the defendant in surveillance videos found on the night of the shooting and attempted robbery. The Supreme Court found no abuse in permitting the investigating officer’s testimony stating, somewhat perplexedly, that “it doubtlessly aided the jury’s understanding of the case to hear that Sergeant Cox had taken note of these salient facts and examined their potential significance, else it might presume that this investigation had been

incomplete or – worse – that the police or prosecutor had concealed exculpatory information.” The explanation seems to be that an investigating officer’s unqualified opinions on scanty forensic evidence should be permitted so the jury can understand why the officer is convinced of the defendant’s guilt.

Finally, the court found that the circumstantial evidence was sufficient to prove a burglary was intended and the defendant was involved in the plan. The defendant’s convictions were affirmed.

Justice Davis dissented criticizing the majority’s opinion that the investigating officer could offer lay opinions that shoes he purchased on eBay were similar to the shoes worn by the defendant when “he did not personally observe the defendant on the night in question” and “merely viewed barely visible video footage of footwear of an unidentified person on the night of the incident.” The Justice further noted that the jury was able to see what the investigating office saw and, therefore, “where the jury is capable of drawing their own conclusions, the lay witness’s testimony is unhelpful and thus should not be permitted.” The Justice found this error to be prejudicial and not simply harmless error.

Unless You Drive A Food Truck, Shake and Bake in a Vehicle will Fry you.

In the reported opinion, *State*

v. Brock, -- S.E.2d -- (W. Va. 2015), 2015WL3385059, the appeal was taken from the defendant’s conviction after a jury trial on charges of operating or attempting to operate a clandestine drug laboratory and conspiracy to operate or attempt to operate a clandestine drug laboratory. The resulting consecutive sentences were suspended and the defendant was given a three year period of probation.

The charges arose out of a vehicle stop. A police officer followed a Monte Carlo at around 1:40 a.m. in the morning and observed the vehicle traveling left of center three times and the driver was also tapping the brakes and causing the vehicle to go right of the fog line. Evidence was not permitted at the trial that the purpose for following the car in the first place was the observation of the car on two different occasions at a house which was under surveillance by a team of drug enforcement officers. The officer was in plainclothes and called a marked car to make the traffic stop.

Notably, the marked car pulled over the vehicle based only on the first officer’s observation of impaired driving. Defendant was driving and produced the vehicle’s registration but could not produce any personal identification when first asked. The car was registered to defendant’s girlfriend who had given him permission to

use the vehicle. After being ordered to step out of the car, the defendant then produced a revoked Ohio driver’s license. The officer’s assessment was that the defendant “was acting real nervous. He was fidgety.”

The officer asked to search the car, but the defendant refused. The officer then called a canine unit to the scene. After the unit arrived, the dog alerted to the presence of drugs. A resulting search of the car resulted in the discovery of materials that were believed to be the components of “a young pop clandestine laboratory or shake and bake.” An odor and vapor was also present in the car. Additionally, the officers found a syringe, a cold pack, coffee filters, a used filter with a white powder residue, and ammonium nitrate. Testing of the material found evidence of methamphetamine.

The first assignment of error was that the circuit court should have dismissed the indictment. The defendant argued that, pursuant to Rule 8 of the W.Va. Rules of Criminal Procedure, the “operation” of, or the “attempting to operate”, a clandestine drug laboratory were separate offenses and should not have been charged together in one direct count.

The Supreme Court disagreed, stating that the statute provided for one offense that could be committed in two ways, i.e., either (i) operating, or (ii) attempting to operate, a clandestine drug laboratory.

The more substantive ground for the appeal was whether the search of the car was proper. The interesting facet of this opinion is that it was argued on April 21, 2015. On April 21, 2015, the United States Supreme Court also issued its opinion in *Rodriguez v. United States*, 135 S.Ct. 1609, holding that, without articulable suspicion, a traffic stop cannot be extended for the purpose of calling a canine unit to the scene to do a sniff.

No additional argument was apparently had in light of this development of controlling precedent. However, the eventual opinion in this matter did discuss the United States Supreme Court's *Rodriguez* opinion.

Consistent with the federal precedent, the Supreme Court found that use of a drug dog did not constitute a search and did not require, therefore, probable cause or a warrant. But, under *Rodriguez*, the Supreme Court had to determine if the traffic stop was impermissibly delayed to bring the drug dog to the scene.

The Supreme Court then stated that the drug sniff occurred during a time in which the traffic stop was not completed due to the defendant's "nervousness" and inability to produce identification and exiting of the vehicle. The Supreme Court then found that the "evidence fails to show that the mission of the lawful traffic

stop was completed at the time the dog sniff of the vehicle occurred." Notably, a videotape of the stop existed and was reviewed and the time involved was noted to be thirteen minutes. A close reading of *Rodriguez* would further require, however, a determination that the officer had completed the traffic stop as expeditiously as possible. No discussion of this issue can be found in the opinion, although, again, the videotape was apparently reviewed by the Supreme Court.

The final ground for the appeal was the purported insufficiency of the evidence that the defendant had constructive possession of the chemicals found in the vehicle. The Supreme Court focused on the evidence at trial that the material was found in the front seat, was emitting a strong odor, and was emitting a vapor cloud. Based on these facts, the Supreme Court found that the defendant, as the operator of the car, and as one of only two persons in the car, both of whom were in the front seat, had to know that an active meth lab was operating and he had clear dominion or control over the material as it was within his reach and observation. The defendant's conviction was affirmed.

Does Using a Wrench as a Weapon make you a Tool?

In the reported opinion, *State v. Murray*, 773 S.E.2d 656 (W. Va. 2015), the defendant was tried on, and convicted of, the charges of first degree

murder without mercy and concealment of a deceased human body.

The victim, who resided with the defendant and a mutual friend, had stolen computers and television from the defendant's father. The defendant and the friend and the defendant's father did not want to inform the police about the identity of the thief due to the fact the victim was privy to their own criminal activities, including drug use. The Solomonic solution was simply to beat up the victim, "possibly breaking his fingers, or his knees, or something." The father offered to forgive a debt of the defendant's friend and to give his son and friend drugs once the beating was administered.

One night the defendant and his friend told everyone to leave the premises, presumably to carry out a plan to kick the victim out of the house after beating him up. When confronted, the victim pushed the friend into a wall and held him by the throat. In response, the friend grabbed a large wrench from the table and hit the victim on the head two or three times. Eventually, the victim let the friend go and sat down on a couch and slumped over.

According to the friend's testimony at trial, he started to leave when the defendant picked up the same wrench and started hitting the victim repeatedly on the head. The friend left and subsequently the defendant appeared

stating that the victim had "peed himself" and "was dead."

The defendant and the friend then proceeded to dispose of the body. The body was rolled up in a carpet. The bloody couch was removed from the house and burned. The body was eventually placed in a hole on a riverbank and the carpet was burned.

When the body was found two weeks later, the friend's girlfriend contacted the police and identified the defendant and his friend as the killers. At the subsequent trial, the friend testified against the defendant pursuant to a proposed plea agreement resulting in a conviction on second degree murder. The defendant did not testify and did not present any witnesses.

The defendant appealed on various grounds, including the argument that the evidence failed to show any premeditation and malice. The Supreme Court articulated its established rulings on this issue noting that some period of time, whatever length it might be, must exist which permits reflection on the formed intent to kill. Again, it was noted that "the duration of that period cannot be arbitrarily fixed" and "varies as the minds and temperaments of people differ and according to the circumstances in which they may be placed." Further, "any interval of time between the forming of the intent to kill and the execution of that intent ... is

sufficient to support a conviction for first degree murder.” Finally, “malice may be inferred from the intentional use of a deadly weapon.” In the circumstances of this matter, the Supreme Court found that the defendant’s observation of his friend striking the victim and then retrieving the large wrench and continuing the beating while the victim was slouched on the couch permitted the jury to find premeditation and malice.

The second ground for appeal was that the prosecutor’s office should have been disqualified in the matter. A potential witness changed details of her story during trial preparation with the prosecutor’s office. The witness’ testimony supported a potential conspiracy charge. The defendant argued that this made the attorney in the prosecutor’s office a witness and moved to disqualify the office. The Court deferred a ruling until it actually became an issue, but it never did because the witness was not called and the conspiracy charges were dismissed. Without showing some actual prejudice, the defendant’s argument was deemed to be unfounded.

During deliberations, a juror suddenly realized that she knew the defendant’s ex-wife. She immediately notified the trial court. Upon defense counsel’s request, the juror was

replaced by an alternate. On appeal, the Supreme Court was asked to review, under the plain error doctrine, whether the trial court should have examined the remaining jurors to make certain that no prejudicial remarks had been made by the excused juror. The Supreme Court found no error, believing that the juror had not displayed any lack of candor that would suggest bias and noting that the defense counsel had not objected to the continuation of the deliberations at the time.

Another assignment of error was the playing of a recorded conversation between the defendant and his girlfriend at the sheriff’s office that was captured on a closed-circuit video camera. The investigating officer had brought the defendant and his girlfriend to the station for questioning. After both were interviewed, the defendant and the girlfriend were seated together in the interview room. The audio on the video was barely discernible, but it apparently demonstrated a very agitated defendant admonishing the girlfriend for talking. Without discussion, the Supreme Court upheld the lower court’s admission of the video as relevant and more probative than prejudicial.

The final assignment of error concerned the potential vouching of the friend as a witness by his testimony that

his plea agreement required that he “offer truthful testimony.” The trial court gave the standard cautionary instruction that the jury could not consider the witness’ plea agreement as evidence of the defendant’s guilt. Instead, the fact of the plea agreement was merely to be used to assess the witness’ credibility. The assignment of error was rejected by the Supreme Court primarily because the defense counsel never objected to the introduction of the condition in the plea agreement that the witness had to provide truthful testimony.

The conviction of the defendant was affirmed.

If the Rule of Law must yield to the Rules of Grammar, should English Teachers be Assigned as Special Judges?

In the reported opinion, *State ex rel. Lorenzetti v. Sanders*, -- S.E.2d -- (W. Va. 2015), 2015WL3385051, the prosecuting attorney sought a writ of prohibition against the enforcement of a circuit court judge’s order dismissing fifty-three counts of a fifty-four count indictment.

The defendant, a dean of students at Shepherd University, allegedly used a state purchasing card for purposes other than official state business. The issue was whether, under a Double Jeopardy analysis, the fifty-four transactions were

chargeable only as one offense rather than fifty-four separate offenses.

The circuit court deemed the purchases to be “part of a continuing offense.” Accordingly, Double Jeopardy principles dictated that only one count in a criminal charge under the unlawful use statute could be made. Moreover, the separate charge of a fraudulent “scheme” and the now consolidated charges of unlawful use of a state purchasing card overlapped, creating Double Jeopardy concerns. In this manner, fifty-four counts became one count.

The Supreme Court articulated that “the question under the Double Jeopardy Clause whether punishments are multiple [for the same offense] is essentially one of legislative intent.” The legislative intent relates to what was intended to be a “unit of prosecution.”

The circuit court relied upon language in a preamble to a 2014 legislative amendment to determine that the legislature intended the offense of unauthorized use of a purchasing card to be a “continuing offense,” even though the actual amended statute did not contain the language. Moreover, the circuit court was using the 2014 actions of the Legislature to construe the provisions of the governing 1996 statute which also did not make reference to a “continuing offense.”

The Supreme Court found the 1996 language to be unambiguous which then precluded the circuit court's attempts to construe the language by reference to the 2014 legislative action. The statute unambiguously criminalized the "use" of the card "to make any purchase".

The Supreme Court engaged in a grammatical analysis and found that "use" was a transitive verb requiring an object, which then provides the context for the transitive verb. Because "purchase", which was the object of the transitive verb, is singular, the verb "use" must be limited to a single event. Accordingly, "each purchase made in violation of the statute constitutes a separate chargeable offense and a distinct unit of prosecution." The opinion is a somewhat interesting linguistic study and includes an analysis of the difference between "utter," a transitive verb, and "swear," an intransitive verb, in distinguishing or applying case law precedent.

With respect to whether multiple punishments were being imposed by the same offense, the Supreme Court again acknowledged that this involved statutory construction. Did the legislature require in each offense "proof of an additional fact which the other does not"?

The Supreme Court noted, however, that the described

transactions supporting the charge of an unlawful scheme and the transactions supporting the charges of unlawful use occurred at different times. Accordingly, "the prohibition against multiple punishments for the same offense is not implicated where the alleged crimes do not arise from the same act or transaction." Upon review of the two statutes, however, the Supreme Court further determined each had elements that were not contained in the other and, therefore, double jeopardy was not implicated.

Accordingly, the Supreme Court granted the writ of prohibition, thus reinstating the additional fifty-three counts of the indictment.

Justices Loughery and Workmen concurred in the opinion, but engaged in an analysis that went beyond double jeopardy. As the Justices have articulated in several opinions, the "propriety of multiple or single charges ... is measured by evidence of multiple separately-formed or singular intent(s), as determined by a jury." The analysis seems to suggest that the prosecution needs to prove not only the elements of the offenses, but that each offense involved a newly formed intent. Accordingly, while prosecution of multiple counts is proper in this matter, multiple convictions will turn on the jury's determination of

whether a specific intent existed for each transaction.

Due to Your Commitment to Guns, You will be Committed.

In its reported opinion, *State ex rel. Smith v. Sims*, 772 S.E.2d 309 (W. Va. 2015), the Supreme Court of Appeals of West Virginia again granted a writ of prohibition with respect to a circuit court order dismissing charges. See also, *State ex rel. Lorenzetti v. Sanders*, -- S.E.2d -- (W. Va. 2015), 2015WL3385051, discussed above.

In this matter, the issue was whether a crime involved an act of violence against a person such that the charges against an incompetent defendant did not have to be dismissed but, instead, could result in the commitment of the defendant to a psychiatric facility pursuant to the provisions of W. Va. Code §27-6A-3(h).

The defendant was a twelve year old boy who brought a gun from his grandparents' house to his school with the intent to scare a girl who had been bullying him. The principal discovered the gun in the defendant's backpack in his locker after confronting the defendant. The gun was never brandished nor used for any purpose by the defendant. The defendant was evaluated after the resulting petition was filed for the charge of possession of a deadly

weapon on the premises of an educational facility. His IQ was measured as 70, "which is equivalent to a nine-year-old child," and he was "functioning at about the third grade level." The evaluator concluded that the defendant did not have "a rational, as well as factual, understanding of proceedings against him" and was not competent to stand trial "due to his limited intellectual abilities and high distractibility." The resulting motion to dismiss the charges pursuant to W. Va. Code §27-6A-3(g) was granted because, in the circuit court's opinion, no violence against a person since the "weapon was not seen by anyone prior to its discovery" and was "never brandished" and the defendant made no "specific threats to, or against, anyone." Restated, "absent any use or threatened use of physical force against a person by [the defendant], the alleged offense ... is not an offense [that] constitutes an 'act of violence against a person.'" If an act of violence had occurred, the charges could not be dismissed and the defendant would be committed under the following subsection of the statute.

Subsequently to this ruling by the circuit court, the Supreme Court of Appeals of West Virginia issued its opinion in *State v. George K.*, 760 S.E.2d 512 (W. Va. 2014) in which the language of the competency statute was found ambiguous due to the "absence of an explicit statutory definition" for

what constitutes an “an act of violence against a person.” In that matter, the incompetent defendant had sexual relations with a young girl that was consensual and did not involve force.

In divining the legislative intent, the Supreme Court found that an “act of violence against a person” within the meaning of W. Va. Code §27-6A-3 is “an act that indicates an incompetent defendant poses a future risk of harm to the public.” While no harm was potentially suffered by the young girl in the charged offense, “it does not follow that another child subject to a similar encounter in the future would also not suffer severe harm.” In summary, the Supreme Court found that the legislature was intending to protect the public, not just the immediate victim, and this meant that harm did not have to actually occur in the offense underlying the commitment but, rather, harm might potentially occur if the behavior recurred. Indeed, violence is not even required to be an element of the offense under this analysis.

With respect to bringing the gun onto the premises of the educational facility, it was “clear” to the Supreme Court that “the actions of ... [the defendant juvenile] posed a significant risk of harm to the other students as well as school personnel ... [and] [i]t was only because of timely

intervention by the principal that a potential tragedy was avoided.” Consistent with the ruling in *George K.*, therefore, the charges represented “an act of violence against a person.”

The actual holding was, however: “we now hold that possession of a deadly weapon on the premises of an educational facility with the express intent to intimidate another student ‘involves an act of violence against a person’ as set forth in W. Va. Code §27-6A-3.” The language seems to suggest that if an incompetent person brought a weapon to school for a benign purpose, the charges for possession of a weapon on the premises of an educational facility might be properly dismissed. In any event, the defendant in this matter was required to be committed subject to the requirements of an annual review and commitment in the least restrictive environment.

The petition for a writ of prohibition was granted.

Your Reputation may have Been Tainted; but Your Conviction Wasn’t.

In the reported opinion, *Ballard v. Hunt*, 772 S.E.2d 199 (W. Va. 2015), the Supreme Court of Appeals of West Virginia reversed the decision of the circuit court to grant a new trial upon a petition for a writ of *habeas corpus*.

The petitioner had been convicted of sexual abuse in the first degree and sexual abuse by a custodian. The offenses were allegedly against an eleven year old boy. The circuit court found that the references by the State’s expert witness and the prosecutor to the petitioner as a pedophile during the trial warranted a new trial.

The petitioner was a newspaper delivery person, twenty-four years of age. On his route, he sometimes invited the victim. The sexual offenses allegedly occurred in the car. The abuse was discovered when the parents overheard a telephone conversation between the defendant and the young boy in which the defendant asked the young boy when they would have sex again.

In the opening statement, the prosecutor referred to the defendant as a pedophile. Moreover, the prosecutor stated that the defendant “has a lustful disposition toward young children” and that, “consistent with being a pedophile,” the defendant “participated in only the minimum amount of therapy and counseling while incarcerated for a previous sexual offense involving a young girl.”

An expert witness testified regarding his counseling of the defendant while incarcerated. He testified to “a diagnostic impression on file” stating that

the defendant was a “pedophile.”

In closing, the prosecutor referred to the “minimal counseling and the diagnostic impression that ... [the defendant] is a pedophile.”

The defendant took the stand and denied any sexual encounters with the young boy and further asserted that he was wrongly convicted of the offense for which he had been incarcerated.

A direct appeal was denied. The subsequent petition for a writ of *habeas corpus* alleged that his due process rights were violated due to the references to him at trial as a pedophile. Relief was granted after the omnibus hearing.

The circuit court determined that the reference to the defendant as a pedophile was “inadmissible character evidence under Rule 404(a).” Specifically, “to be diagnosed as a ‘pedophile’ is not evidence of a prior bad act or crime but evidence of the character (propensity) of the Petitioner to engage in particular conduct.” The circuit court found this to be highly prejudicial evidence and entirely unnecessary since the State proved the defendant’s prior conviction for sexual abuse of a child.

The Supreme Court, in the majority opinion, found error in the use of the term pedophilia to establish a character trait of the defendant and to prove

that the defendant acted in conformity with this trait on a particular occasion. However, the opinion further found that this error was subject to a harmless error analysis. Consistently, the comments by the prosecutor on such evidence were also improper, but were also subject to a harmless error analysis. The Supreme Court had no doubt, however, that the error was harmless and recited the evidence that, in its opinion, “overwhelmingly established the ... [defendant’s] guilt of the crimes charged.”

An inconsistency in the holding seemingly exists, however. The Supreme Court seemed to apply the standard that the harmless error had to be established so that “there is no reasonable possibility that the violation contributed to the conviction.” This followed the Supreme Court’s acknowledgment that the error was prejudicial to the defendant “at trial,” which seemingly rises to the level, therefore, of a constitutional violation. Subsequently, however, the holding states that “a petitioner is only entitled to reversal if the error affected his substantial rights” and the Court then finds “this error did not rise to a level of a constitutional violation or otherwise violate Hunt’s substantial rights.” It is not certain, therefore, whether the Supreme Court believed the standard of harmless error

beyond a reasonable doubt applied and was met or whether the lesser standard of harmless error applied and was met. Again, both standards were recited and analyzed.

Justice Loughery and Justice Workman concurred in the result, but dissented with respect to the finding that error occurred in allowing the defendant to be characterized as a pedophile. Essentially, evidence can show a lustful disposition and that is the essence of a diagnosis of pedophilia disorder. Accordingly, the justices would permit “expert testimony concerning that diagnosis.”

The lower court’s order granting relief was reversed.

Handcuffs are Just Bling if Only Worn Briefly.

In its reported opinion, *Ballard ex rel. Mount Olive Correctional Center v. Meckling*, 772 S.E.2d 208 (W. Va. 2015), the Supreme Court of Appeals again reversed the grant of relief by a circuit court on a petition for a writ of *habeas corpus*. See also, *Ballard v. Hunt*, 772 S.E.2d 199 (W. Va. 2015), discussed above.

The defendant was charged with kidnapping, malicious assault, driving while revoked for DUI, and abduction with intent to defile. The charges arose out of an incident

in which the defendant “allegedly assaulted and kidnapped his longtime girlfriend ... outside of a bar and allegedly forced her to give him money to buy crack cocaine.”

The defendant appeared for his trial and, at the lunch recess, the court ordered the defendant to be taken into custody for violating his bond because he had contacted the victim. A warrant had been issued prior to the trial, but not executed. No reason is stated for why the defendant was not taken into custody immediately upon appearing for trial.

A motion for mistrial was made due to the defendant being placed in handcuffs in front of at least one, but perhaps several, members of the jury. The motion was denied.

The record reflects that, in fact, some jurors saw the handcuffing. For the remainder of the trial, however, the defendant was free of restraints.

The jury convicted the defendant of the felony count of abduction with intent to defile and the misdemeanor offense of battery. A recidivist information was filed and, subsequently, the defendant was sentenced to a term of imprisonment for life.

Eventually, the circuit court granted the petition for writ of *habeas corpus* finding that the

defendant had been “deprived of his due process rights ... when it ordered him shackled during the course of trial in the presence of the jury, and security and order did not warrant such intrusive conduct.”

Upon review, the Supreme Court recited its precedent that “a criminal defendant has the right, absent some necessity relating to courtroom security or order, to be tried free of physical restraints.” The articulated reasons for this is that (i) “such treatment of a defendant must inevitably cause the jury to infer that the judge thinks him to be a dangerous man”; (2) “physically restraining the defendant may also interfere with his ability to participate in his own defense or his privilege of being a competent witness on his own behalf”; and (3) “such treatment of the defendant detracts from the dignity and decorum of the judicial process.”

However, the Supreme Court noted that this precedent related to wearing handcuffs “throughout the duration of their trials.” In this matter, the handcuffing was for a brief period of time and in view of only some of the jurors. Accordingly, it was deemed to not be a ground for mistrial or reversible error. However, the Supreme Court did admonish that it is the better practice to “remove restraints before a prisoner is brought before the jury ... [and that] ... reasonable efforts should be

made to prevent prisoners under such restraints from being seen by jurors.”

The order of the lower court granting relief was reversed.

Go ahead and Complain to the Feds, See what that gets you – Oh, Really, you’re now Free?

The Supreme Court issued a memorandum decision in *State v. Donald B.*, 2015WL3751987. As background, the defendant had been convicted in 1999, after a jury trial, of eight counts of sexual offenses related to two minor victims. The Fourth Circuit Court of Appeals (“FCCA”) vacated six of the counts related to one of the victims. The FCCA held that the trial court’s application of the rape shield statute violated the defendant’s rights under the Confrontation Clause. Specifically, the defendant had been precluded by the state court from cross-examining an expert witness about whether abuse by other men might account for the victim’s post-traumatic stress symptoms. The defendant had evidence that the victim had accused other men of abuse.

The state court applied the rape shield statute to preclude this line of questioning. Pursuant to the opinion in *Michigan v. Lucas*, 500 U.S. 145 (1991), the “use of any per se evidence rule favoring either the prosecution or the defense” is rejected and “a

state court must determine on a case-by-case basis, whether application of the rule is arbitrary or disproportionate to the State’s legitimate interests.” Indeed, *Lucas* involved a rape shield statute. After review of the matter, the FCCA held the trial court erred in its application of the statute because precluding the defendant’s right to present a defense was a disproportionately harsh result to the protection of the victim in these circumstances, and the FCCA vacated six of the eight counts of conviction.

The memorandum decision addressed the defendant’s appeal of his sentencing on the remaining two counts. Initially, the defendant had been sentenced to terms of ten to twenty-five years, but this was based on a version of the statute that was in effect in 1991. The acts that were alleged occurred in 1989 and 1990. Eventually, the defendant prevailed on a petition for habeas corpus in federal court on ex post facto grounds and the defendant was resentenced by the state court to a term of ten to twenty years under the statute that governed before 1991.

The defendant had wanted a “plenary” sentencing hearing so that he could argue for an “alternative sentence.” The court eventually entered an order without a hearing as simply an order correcting the term limits.

Under Rule 35(a), the “court may correct an illegal sentence at any time.” The defendant argued that because the federal court vacated the sentencing order, no order existed to be corrected. Accordingly a new sentencing hearing was required. The Supreme Court rejected the argument stating that the only requirement imposed on the court was to enter a sentencing order correcting the illegal sentence.

The Supreme Court further rejected the petitioner’s argument that he had been improperly denied the right “to allocution, presentation of mitigation evidence, an opportunity for his attorney to address sentencing alternatives, and to be present in person at a sentencing hearing.” Because the defendant had this opportunity originally, the Supreme Court could find no “controlling authority entitling him to a second plenary hearing.” The federal mandate was simply that the defendant be resentenced and he was. No relief was granted, therefore.

Going to the Pokey is Worse than a Poke in the Eye.

In the memorandum decision of *State v. Ganey*, 2015WL3689225, the Supreme Court of Appeals considered the defendant’s argument that “his due process rights” had been violated by the circuit court “in the manner in which it allowed the victim to make an impact

statement.”

The defendant pled guilty to one count of conspiracy to commit malicious assault. The assault was carried out by another person and entailed both the beating and stabbing of the victim.

At the plea hearing, the defendant denied doing anything more than serving as a “lookout.” The victim’s account was that the defendant participated in the attack and that the victim gave the defendant a black eye during the assault. The defendant countered that the black eye was suffered before the attack, as established by pictures on his cell phone.

The defendant was sentenced to a term of one to five years.

The appeal was made on the grounds that, through the impact statement, the “victim was impermissibly allowed to present allegations related to charges that were dismissed, factually inaccurate allegations, and irrelevant disparaging comments toward ... [the defendant’s] counsel.” Moreover, the “victim’s mannerisms and demeanor were overly emotional and inappropriate.”

The Supreme Court noted that W. Va. Code §61-11A-2(b) requires the court to allow a victim impact statement in these circumstances. The statute does require, however, “that the statement must relate solely to the facts of the case and the

extent of injuries, financial losses and loss of earnings directly resulting from the crime for which the defendant is being sentenced.” The defendant posited, therefore, that the victim’s statements about the actual assault were improper because that charge was dismissed and were generally inaccurate.

The Supreme Court simply held that the attack related to the conspiracy charge and it was not improper for the victim to discuss it. Moreover, the victim’s allegations were not clearly inaccurate and were consistent with the “State’s version of events contained in petitioner’s presentence investigation report, **to which petitioner did not object.**” [emphasis added]. The Supreme Court determined, therefore, that the sentencing court did not rely on any impermissible factors.

Upon Reflection, I Ain’t as Guilty As I originally Thought.

In the memorandum decision of *State v. Frank D.*, 2015WL3689178, the Supreme Court affirmed the circuit court’s decision to not permit the defendant to withdraw his *Kennedy* plea. The defendant was indicted on fifty-nine counts of sex-related crimes. The defendant eventually pled guilty to six felonies pursuant to *Kennedy v. Frazier*, 357 S.E.2d 43 (W. Va. 1987). The resulting sentence was a

cumulative term of fifteen to fifty years in prison.

Prior to sentencing, the defendant moved to withdraw his guilty plea. The Supreme Court emphasized that, while “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 Supreme Court found that the circuit court did not abuse its discretion in denying the motion because the defendant presented no “fair and just reason” for the withdrawal. The defendant claimed in the motion that his counsel did not provide him a copy of a statement, but at the plea hearing defendant agreed with his counsel that he was prepared for trial and had reviewed the discovery. The defendant claimed that he disagreed with the State’s description of events, but he acknowledged this disagreement even before he entered the plea. The defendant claimed he was coerced into the plea by counsel, yet he affirmatively acknowledged to the court on several occasions that he wanted to plead and that he had not been forced by anyone to do so. The defendant’s claim of innocence formed the basis of a *Kennedy* plea in the first instance. So, no circumstances had changed from the time the plea was entered to the time the motion to withdraw was filed. The

motion was properly denied, therefore, in the opinion of the Supreme Court.

It’s a Good Deal, Except for the Part Where I have to go Prison.

In the memorandum decision of *State v. Richard D.*, 2015WL3751819, the Supreme Court of Appeals of West Virginia again confronted the desire of a defendant to withdraw his plea of “nolo contendere” to five counts of possession of material depicting minors engaged in sexually explicit conduct. In exchange for the plea, the State dismissed the remaining counts including one count of sexual assault on an eight year old; five counts of use of minors to produce obscene matter; and five counts of use of minors in filming sexually explicit conduct. Moreover, the State agreed not to seek a recidivist enhancement relating to a 2010 conviction of sexual abuse by a parent, guardian or custodian.

At the plea hearing, the defendant gave every acknowledgment regarding the plea and his understanding of the plea. Asked twice if he wanted to continue the plea agreement or change his mind, the defendant “unequivocally answered” yes. The defendant further signed the plea agreement in which it was stated that the maximum sentence for each count was two years in prison.

Before sentencing, however, the defendant moved to withdraw his plea. His primary contention was, intriguingly, that he possessed the graphic images of his eight year old niece for “legitimate reasons.” The reasons were not stated. He acknowledged, however, that, despite dissatisfaction with his counsel, he had not been coerced into the plea and it was in his best interests. The defendant was sentenced to five consecutive prison terms of two years. The defendant appealed.

The Supreme Court reiterated the standard for such an appeal: “a direct appeal from a criminal conviction based on a guilty plea will lie where an issue is raised as to the voluntariness of the guilty plea or the legality of the sentence.” The defendant claimed he was, in fact, coerced into the agreement by the amount of time he was facing on all the counts charged by the State and he was humiliated that the State might use his 2010 conviction on a count of sexual abuse by a parent, guardian or custodian.

The Supreme Court quickly dealt with these issues, stating that the State has the authority to seek indictments and has the authority to move for the admission of collateral acts or crimes, especially when it concerns a lustful disposition toward children. The petitioner’s requested relief was denied.

To Err is Clerical; To Deny Relief, Judicial.

In the memorandum decision of *Stuckey v. Ballard*, 2015WL3751816, the appeal was from the denial of a petition for a writ of habeas corpus. Two interesting issues in the habeas corpus proceedings involved errors in the jury verdict form and in the lower court's subsequent findings of fact and conclusions of law. The petitioner had been tried and convicted by a jury on two counts of felony murder. The indictment named each victim in separate counts. On the jury verdict form, two counts separately referenced each victim but each identified the same count in the indictment, which was a mistake. The lower court found that this error "was not deserving of habeas relief." The Supreme Court of Appeals of West Virginia summarily found no error.

The second issue was the reference in the lower court's findings and conclusions that the circuit had reviewed "the transcript of the plea of guilty." The petitioner had been convicted, however, by a jury trial. So, this fact, although found by the lower court, was obviously incorrect.

The Supreme Court classified this as a merely a "clerical error," although, presumably, a clerk did not prepare the findings of fact. Accordingly, the error could be corrected

"by the court at any time of its own initiative" pursuant to W. Va. R. Civ. Pro. 60(a) (Note: habeas proceedings are civil matters). Because no other findings or conclusions related to this erroneous statement, the error was deemed to be harmless. Moreover, the defendant was chided for "his reliance on this seven-word phrase in a nineteen-page order" and thus ignoring the "pages" of findings and conclusions "discussing his jury trial." The order denying the petition was affirmed.

Okay, I Learned my Lesson, Can I go Home now?

In the memorandum decision of *State v. Turner*, 2015WL3687867, the defendant filed a *pro se* appeal from the denial of a motion for reduction of a sentence. In 1997, the defendant had been convicted by a guilty plea of three counts of first-degree sexual assault and three counts of first-degree sexual abuse. The resulting sentence was three prison terms of fifteen to thirty-five years to be served consecutively to three prison terms of one to five years.

The petitioner filed a motion for reduction of sentence. No hearing was held, however, until seven years later and only after an additional motion had been filed for a psychological evaluation. The motions were denied. The Supreme Court of Appeals affirmed the order denying the motion, noting that all the

matters raised by the defendant as not having been considered had, in fact, been considered.

The decision is discussed, however, to note the Court's reaffirmation of its 1996 holding that, "When considering West Virginia Rules of Criminal Procedure 35(b) motions, circuit courts generally should consider only those events that occur within the 120-day filing period; however, as long as the circuit court does not usurp the role of the parole board, it may consider matters beyond the filing period when such consideration serves the ends of justice." Syl. Pt. 5, *State v. Head*, 480 S.E.2d 507 (W. Va. 1996).

It's Only a Flesh Wound; Go Ahead and Convict.

In the memorandum decision of *State v. Michael C.*, 2015WL3672733, the defendant was found guilty after a jury trial of five counts of incest, five counts of first-degree sexual assault, and six counts of sexual abuse by a parent, guardian, custodian or person in a position of trust. The appeal was taken from an order denying a motion for a new trial.

One assignment of error related to the prosecutor's explanation to the jury why five counts against one victim had been dismissed by the Court on a motion for judgment of acquittal. Specifically, the counts had

been dismissed because no evidence of penetration of this victim had been presented. In closing, the prosecutor explained to the jury that, in fact, the victim had been penetrated but "didn't want to talk about it." The prosecutor then stated, "the mere fact she doesn't want to tell you, that's on me, ladies and gentlemen, not on her. It's okay if she doesn't want to tell you." Defendant's counsel objection was sustained.

The Supreme Court reiterated its standard that "a judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice." The Court then restated its guidance for determining when reversal is required by improper comments: "(1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters."

The Supreme Court then opined that, in this matter, "the State's commentary was *not* so *damaging* as to require reversal." [emphasis added].

Apparently, the State's extraneous information that the victim was penetrated even though the counts had been dismissed "hurt," but was not "hurtful" enough.

But, as in many cases, the wounds were somewhat self-inflicted. The defense counsel had argued in closing that the dismissal of the counts attested to the State's failure to "conduct an appropriate investigation." The prosecutor's comments were found to be responsive to this argument and not an attempt to "divert attention." And, besides, the defendant's guilt was readily established by the victims' testimony.

A second assignment of error was the asserted invalidity of the rape shield statute. In the course of trial, the defendant was precluded, by reason of the provisions of the rape shield statute, from asking a victim about her current pregnancy and the other victim about her abuse by another adult. The defendant claimed that Rule 404 of the Rules of Evidence would allow such testimony and, therefore, the rape shield statute was invalid. (As a note, Rule 404 has been amended.)

The Supreme Court found, however, that the Rule 404 created an "exception" to the statute and, accordingly, was not in conflict with the statute. The paradox is that, obviously, the Rule and the statute were in conflict

because the rule changed the application of the statute. The court did not explain why the "exception" was permissibly created in the rule and found, instead, that there was "no conflict." This may be a practical recognition of the fact that the new Rules of Evidence simply supersede the rape shield statute and the issue before them was effectively moot.

A third assignment of error was the lower court's application of the provisions of the rape shield statute. Again, the evidence that the defendant wanted to present was one victim's consensual activity with a boyfriend and another victim's abuse by another person. The Supreme Court then articulated its test for whether a defendant's due process rights are violated by application of the statute: "(1) whether that testimony is relevant; (2) whether the probative value of the evidence outweighed its prejudicial effect; and (3) whether the State's compelling interests in excluding the evidence outweighed the defendant's right to present relevant evidence supportive of his or her defense." The lower court's application of the test is to be reviewed for an abuse of discretion.

The Supreme Court determined that no relevance attached to any of the issues raised by the defendant because it did not bear on the

question of whether the defendant had or had not committed the alleged acts. The effect of the evidence was also found to be unduly prejudicial, thus clearly outweighing the probative value. Accordingly, error was not found in precluding the evidence.

A fourth assignment of error related to the testimony of witnesses that the victims had told them "the petitioner engaged them in sexual conduct." The Supreme Court analyzed whether the hearsay testimony was permitted under the "other exceptions" provision of the hearsay rule which analyzes five factors going to the trustworthiness and probative value of the testimony.

But the decision does not really critique whether the admission of the testimony was proper as the Supreme Court found "no error" due to the "unique circumstances before us, including the availability of the victims for cross-examination, and the testimony of neither [witness] added anything substantive to the children's testimony." Candidly, this statement seems more consistent with finding error, but declaring it harmless. This is supported by the footnote in which the following language is found: "when a child witness is present to testify, however, it would generally seem to be a better practice not to permit [another witness] to testify as to the child's extrajudicial

statements ... But it is harmless when, viewed in the spectrum of all the evidence, it creates no prejudice to the defendant." *State v. Edward Charles L.*, 398 S.E.2d 123 (1990). In any event, relief on this ground was denied.

You should have Stopped after Just One

In the memorandum decision of *State v. T.D.*, 2015WL3448196, the petitioner appealed the denial of his petition for the expungement of five misdemeanor offenses "related to the consumption of alcohol while a freshman at West Virginia University."

The offenses occurred on three different dates. Additionally, the defendant had been also convicted of underage consumption in Pennsylvania. The circuit court reluctantly denied the expungement because, technically, the offenses, with respect to one another, represented "other prior or subsequent charges," which, under the governing statute, made the defendant ineligible for expungement. See W. Va. Code §61-11-26 (b).

On appeal, the Supreme Court disagreed with the petitioner that the circuit court should have permitted his live testimony. The statute requires a "verified" petition and lists the subjects to be addressed. Indeed, the statute provides for a "summary" grant or denial of the petition, supporting the

conclusion that the lower court did not have to take testimony.

The Supreme Court further supported the circuit court's conclusion that the petitioner was not eligible for expungement. While the statute does refer to "convictions" in the plural, the statute only permits expungement of multiple convictions that arise out of "offenses from the same transaction." The petitioner's offenses arose out of three different incidents. Relief was properly denied, therefore.

If You don't prove no "I do (s)"; then you cannot Prove "I did."

In the memorandum decision of *John K. v. Ballard*, 2015WL3448204, the denial of a petition for a writ of habeas corpus was appealed.

John K. was found guilty by a jury of sexual abuse in the first degree of one victim, sexual abuse by a parent, guardian, or custodian of that victim, a sexual assault in the first degree of a second victim, and sexual abuse by a parent, guardian, or custodian as to the second victim.

An issue raised by the habeas was the testimony by an adult witness of her abuse by the petitioner when she was a child. The testimony was permitted under Rule 404 (b) of the Rules of Evidence for the "limited purpose" of

proving the petitioner's lustful disposition toward children. (As an editorial comment, this is a common prosecutorial practice of using an adult witness to testify as to prior acts in matters in which the victims are young and possibly poor witnesses.) The petitioner's primary contention was that the acts to which this witness testified ended in 2002 and the charges for which he was prosecuted occurred between 2005 and 2006. The petitioner argued that this did not satisfy the requirement that the prior acts be "reasonably close in time." The Supreme Court did not flinch, stating that the similar fact pattern, i.e., the abuse occurred in the petitioner's bedroom, and the lapse of only seven years did not make the testimony inadmissible. The Supreme Court noted that it had previously upheld the use of a sixteen year old conviction because of the similarity in conduct giving rise to the conviction and to the pending charges.

The remaining issues concerned whether the state had proved that the defendant was not married to the nine and six year old victims and that the acts were done for purposes of sexual gratification. Because the victims had testified that the petitioner was married and living with their grandmother, the Supreme Court held that the jury had sufficient evidence to resolve this matter

in the State's favor. Because the adult witness testified to prove the petitioner's lustful disposition toward children, the proof of this lustful disposition was held to sufficiently prove the desire for sexual gratification.

No error was found, therefore, in the denial of the habeas relief.

Thanks for the Hand-out, Now Put your Hands-up!!

In the memorandum decision of *State v. Watson*, 2015WL3369768, the defendant appealed from her convictions of first degree felony murder, first degree robbery, burglary, and conspiracy, resulting in a life sentence without mercy.

The defendant moved into an apartment with Ms. Cooke and apparently sold crack cocaine from the apartment. The defendant was aware, therefore, that Ms. Cooke received a child support check in the amount of \$6,000 which she cashed in the form of two pre-paid credit cards, three money orders, and cash. Ms. Cooke became uncomfortable with the level of drug dealing and asked the defendant to move out.

Shortly afterwards, two masked men entered Ms. Cooke's apartment and demanded the money and the pre-paid credit cards, together with the necessary PIN numbers. A third person was present in the background

whom Ms. Cooke identified as the defendant due to the "unmistakable" hair and body shape. In the course of the robbery, Ms. Cooke's boyfriend tried to intervene in the rough handling of Ms. Cooke and was fatally shot. Ms. Cooke was also wounded.

Once apprehended, the defendant agreed to identify the gunmen in exchange for her release on a surety bond rather than the existing cash bond. While the defendant's story corroborated the robbery, her identification of the gunmen provided no usable details. The State refused, therefore, to agree to a modification of the bond.

The defendant appealed the convictions, asserting various errors.

The defendant first argued that no evidence existed to prove that she was anything other than a witness to the crime. The Supreme Court noted that the entire robbery was to obtain the prepaid credit cards, which was an obvious connection between the defendant and the masked men, who had never been to West Virginia before that night. Accordingly, the Supreme Court found the evidence to be adequate to support the jury's verdict.

The defendant then argued that her statement was involuntary in that she was duped into believing that she would be given a surety bond,

rather than a cash bond. The Supreme Court acknowledged that any evidence obtained by promises of leniency was not admissible. However, the court did not equate the agreement to modify a bond with a promise of leniency. The “collateral benefit” of a bond did not relate in any manner to a “benefit to the accused with respect to the crime under inquiry.” Accordingly, the Supreme Court found the statement to be voluntary and admissible. Moreover, the promise of the State was not “false” and, therefore, was not coercive. The defendant’s statement was incomplete and she provided no more than that which was already obtained from other witnesses and records.

The defendant then argued that the evidence of her drug dealing was improper, especially in the absence of a hearing under Rule 404(b) of the Rules of Evidence. The Supreme Court agreed with the lower court that the drug dealing was part of the *res gestae* of the crime in that the robbery occurred only after the defendant was kicked out of the apartment. Moreover, it was noted that the defendant had herself admitted to the drug dealing in order to present a defense regarding a lack of motive, - why would she rob a partner in crime? As “intrinsic” evidence for both the prosecution and the defense,

the admission of the drug dealing was not covered by Rule 404(b).

With respect to the issue of mercy, the defendant argued that it was a “runaway jury bent on ignoring the rules of evidence and the rule of Law to exact their own peculiar vision of Justice.” The Supreme Court noted that the following facts supported the jury’s lack of mercy: (i) the defendant robbed a person who had loaned her money and given her a place to stay; (ii) the robbery was accomplished in the “dead of night” by armed and masked men while children whom the defendant babysat slept nearby; and (iii) the shootings occurred within the sight of the victims’ nine-year-old son.

Further, the defendant argued that the court improperly precluded evidence that the murdered boyfriend was also a drug dealer. The defendant wanted to posit a theory that out of towners killed the victim for reasons related to the drug dealing. No abuse of discretion was found because the defendant had no evidence to support this contention.

Finally, the defendant complained that the jury instructions on felony murder improperly referred to the gunmen as “co-conspirators” rather than “accomplices.” The impact of the distinction is not clearly articulated except that, perhaps, the defendant

believed it confused the jury in some manner regarding the separate charges of felony murder and conspiracy. The Supreme Court determined that because the defendant was actually charged with conspiracy, the use of the term in the felony murder instructions was fair and not misleading.

We are Thieves, not Robbers.

In the memorandum decision of *State v. Imoh*, 2015WL2382569, the defendant appealed his conviction of second degree robbery on the basis that the evidence was insufficient to establish second degree robbery “because none of the victims were placed in fear of bodily injury.” The stolen items were cellular phones that the defendant and another person took from three minors. In one instance, the phone was grabbed out of the hands of the victim when he was not looking. In the other instances, the phones were handed over to the defendant and his co-defendant after a pretense was made about an emergency requiring use of the phones. No victim was dispossessed of the phones by use of a threat of bodily injury.

The Supreme Court affirmed the convictions stating that the testimony established that, in fact, the victims were placed in fear of bodily injury. In all instances, the fear arose after the phones were “copped.” In one instance, the victim

demanded return of the phone to which the co-defendant replied that he would have to fight them for the phone. In the other instance, the victims were dissuaded from regaining possession by threats that the defendant and co-defendant would “beat [their] ass.” The Supreme Court seems to suggest that dissuading a person from regaining possession of property should be considered part of the commission of the robbery, although this point is not expressly articulated.

There’s no Guarantee of a Soft Landing if you Throw yourself on the Mercy of the Court.

In the memorandum decision of *State v. David G.*, 2015WL2382577, the Supreme Court reaffirmed that “it is not an abuse of discretion for a circuit court to decide the merits of a motion to reduce a sentence without having an evidentiary hearing.” It was noted, however, that “the circuit court was “both the original sentencing court and the court that denied the Rule 35(b) motion and thus it had the benefit of the entire record to review in determining the appropriate sentence to impose.” Finally, the Supreme Court “disagree[d]” with the proposition that a “*pro se* litigant should be afforded a degree of leniency in any action before the circuit court.”

The defendant’s real issue was that the sentences on the two of the six counts of sexual abuse

by a parent, guardian or custodian to which he pled guilty were imposed consecutively. The Supreme Court noted that “we have previously upheld the propriety of consecutive sentences imposed when a plea agreement results in a much lesser sentence than the crimes for which defendant was originally indicted.” In other words, you pled guilty to two crimes, but you were guilty of much of much more, so be satisfied. The order denying the Rule 35 motion was affirmed.

Sorry, Your Credit is No Good Here.

In the memorandum decision of *State v. Wake*, 2015WL2382580, the defendant argued that “because he became parole eligible on his prior charges during his prosecution for malicious wounding, he was held on that [i.e., the malicious wounding charge] and is accordingly entitled to time-served credit for that offense.” In other words, he would have been out of prison but for the pending charges arising out of an attack on another inmate. He demanded credit, therefore, for the additional time awaiting prosecution. The Supreme Court of Appeals disagreed, noting that he was in prison in the first place for the prior charges, not for the pending charges. Moreover no guarantee existed that the defendant would be paroled,

as “parole is not a right.” The defendant did point to a code provision that an inmate who commits an assault while incarcerated cannot be discharged while the prosecution is pending. See W. Va. Code §62-8-2(d). Seemingly, his continued incarceration could then be tied to the pending charges. The defendant’s only problem is that, while the statute was applicable on its face, it was not the statute under which he was charged. The State chose to prosecute under the provisions for malicious assault, which did not have similar language. The order denying the motion for correction of the defendant’s sentence was affirmed.

Piling On is only a Penalty in Football.

In the memorandum decision of *State v. Robertson*, 2015WL2381193, the application of Rule 404(b) was raised as an issue.

The defendant was involved in two controlled buys of oxycodone on the same date, but about three (3) hours apart. The buys involved the same police officers and the same confidential informant. Two separate indictments issued with the first indictment focusing on the later transaction. The State filed a motion to use the earlier transaction as 404(b) evidence in the trial on the first indictment. The Court held the matter in abeyance.

At the trial, the defendant took the stand and denied that he had been involved in a drug transaction and that he “didn’t mess with them [drugs] anymore.”

After the defendant’s case, the prosecution renewed the motion to use the earlier drug transaction to prove the defendant’s intent to deliver a controlled substance. The court held an *in camera* hearing and found, by a preponderance of the evidence, that the earlier transaction occurred and that it was more probative on the issue of the defendant’s intent than it was prejudicial. Accordingly, the prosecution was now able to present in its rebuttal a transaction substantially identical to the charged offense, subject to the court’s limiting instructions. The jury found the defendant guilty.

The Supreme Court upheld the introduction of the earlier transaction even though it involved the same confidential informant, the same two police officers, and the same general testimony and had to be extremely prejudicial to the defense.

In Criminal Law, Giving Credit where Credit is Due is not a Thing.

In the memorandum decision of *State v. Rodeheaver*, 2015WL2382921, the defendant demanded credit for time-served in another state and raised the issue of the violation

of the speedy trial provisions of the state code.

The defendant was indicted and arraigned on a charge of aggravated robbery. The defendant was released on his own recognizance to attend a medical hearing, but the defendant did not report, as ordered, to the jail the following day. A *capias* was issued.

About six months later, petitioner was arrested, and pled guilty, on charges resulting in his incarceration in Pennsylvania. The States of West Virginia and Maryland then both placed a detainer on the defendant. Defendant then served time in Maryland and was then extradited to West Virginia.

The defendant plead guilty to the West Virginia charge and was sentenced to twelve years in prison, which was suspended so that defendant could be remanded to the Anthony Center for Youthful Offenders. The defendant completed the program and was placed on five years of probation.

The defendant’s probation was revoked for use of controlled substances and for failing to report to the probation office. The original sentence was imposed and credit for time served was given for the previous time spent in jail in West Virginia and for the time spent incarcerated in Maryland while awaiting extradition. However,

the defendant was not given credit for the time served on the Maryland charges during which West Virginia had a detainer placed on him.

The defendant challenged the court on the failure to credit his time while in Maryland and additionally alleged that his rights to a speedy trial were denied.

The Supreme Court gave short shrift to the denial of credit for time-served noting that it is settled that “criminal defendants are not entitled to credit for time served on unrelated charges.”

The Supreme Court gave more attention to the speedy trial argument, acknowledging that a statute does require the State “in certain circumstances” to apply for temporary custody of a defendant incarcerated in another state so that the defendant may be tried within three terms of court. See W.Va. Code §62-14-1. However, an express exception to the three term rule in W. Va. Code §62-3-21 exists for when “the failure to try him was caused ... by reason of his escaping from jail, or failing to appear according to his recognizance.” The defendant failed to report and his whereabouts were unknown, so the statute did not apply in the Supreme Court’s opinion.

No discussion is had about whether the state should have

tried the defendant upon learning of his incarceration and placing the detainer on him or whether the state properly waited until the detainer was honored. Presumably, the three terms had already ran when the State learned of the defendant’s incarceration and issued the detainer, but, again, should not the state then have fulfilled its duty to bring the defendant to trial? The exception for failing to appear is logical for as long as the state is unaware of the defendant’s whereabouts but, in this case, the defendant was found, so why did the state not have a mandatory duty to bring the defendant to trial? Notably, the appeal was filed *pro se*, and perhaps these issues were simply not raised.

The order denying the defendant’s motion was affirmed.

Probation may be Cool, but it is not Retro.

In the memorandum decision of *State v. Henry*, 2015WL2402464, the Supreme Court reviewed the circumstances of the revocation of the defendant’s probation.

Defendant pled guilty to four counts of delivery of a controlled substance for which he was sentenced to a cumulative term of four to thirty years of incarceration. The sentence was suspended and a five year probationary period was imposed.

On the third petition to revoke his probation, the circuit court did so. The charges were possession of a controlled substance, i.e., Oxycodone, and obstructing a police officer. The circuit court imposed the original sentence.

The issue became the application of the provisions of W. Va. Code §62-12-10(a)(2) which was enacted in 2013. The 2013 version of the statute provided that the number of violations would determine the length of the resulting sentence due to the revocation of probation. If this was the second violation, the sentence would be one hundred and twenty days. The circuit court found that the petitioner had exceeded three violations and, therefore, no limitation on the period of incarceration existed and the original sentence could be imposed.

Upon review, the Supreme Court found that the 2013 version of the statute had no application to the defendant, whose probation violations occurred before the statute was enacted. The Supreme Court found that “West Virginia Code §62-12-10 (2013) was intended to operate prospectively” since the “Legislature did not include the necessary language for the 2013 amendments to apply retroactively.” So, the circuit court did err, but it erred only in the reason why the 2013 amendments had no

effect. So, the error was harmless.

Just Because Your Lawyer’s Poor Does not mean You have a Poor Lawyer.

In the memorandum decision of *Young v. West Virginia Dept. of Corrections*, 2015WL 2365926, the rate of compensation of court appointed counsel was made an issue, among other grounds. The petitioner in the habeas corpus proceeding had pled guilty to the second degree murder of an 81 year-old man.

The petitioner alleged (i) ineffective assistance of counsel, both at trial and on appeal; (ii) that his guilty plea was predicated on a coerced confession and involuntary statements; and (iii) the rate of compensation for court appointed counsel violated his Sixth Amendment rights.

With respect to the ineffective assistance of counsel claims, the Supreme Court stated its intent to “decline to second-guess the strategic decisions of petitioner’s trial or appellate counsel and find that the circuit court did not err in denying the amended petition for writ of habeas corpus on these grounds.”

With respect to the coerced confession claim, the Supreme Court noted that the petitioner’s plea hearing was completely devoid of any stated concerns regarding the voluntariness of the plea or the existence of any pressure to enter the plea.

Again, the Supreme Court found no error.

With respect to the issue over the rate of compensation for court-appointed counsel, the petitioner argued that “this inadequacy of pay threatens criminal defendants’ Sixth Amendment right to counsel.” The purported factual basis was that the counsel would have spent more time on the case if more highly compensated. The Supreme Court summarily dismissed this ground, stating “we find no merit to petitioner’s assertion that his court-appointed counsel, simply because of their lower rate of pay, are incompetent.”

Its My Sentencing Hearing – So Shut Him Up.

In the memorandum decision of *State v. Chapman*, 2015WL2382559, the defendant’s appeal was that the sentence for his first degree robbery charge was excessive and that the circuit court placed undue emphasis on the victim’s impact statements during sentencing.

After a night of drinking and drug use, the defendant entered a residence in search of money or prescription drugs. The defendant was confronted by the resident whom he then struck. The defendant left the residence with a television and several pieces of jury.

The defendant pled guilty to an information to one count of

first-degree robbery and one count of malicious wounding. The resulting sentence was a term of incarceration of eighty years on the robbery charge and a consecutive term of two to ten years on the malicious wounding charge.

The defendant argued that the eighty year term was disproportionate in violation of the provisions of Article III, Section 5 of the West Virginia Constitution. The sentence was properly reviewable on this ground because no maximum limit was imposed on the sentence by statute.

The defendant did not argue that the sentence was “subjectively” disproportionate in that it would shock the conscience of the community. Under the objective standard, the Supreme Court did not find that the sentence was excessive. The defendant entered the home knowing it was occupied, destroyed the home in a rage, and struck the victim with his hands. The violence was extreme, resulting in the victim suffering multiple facial fractures, multiple brain bleeds, cervical fractures, multiple broken ribs, and a broken arm. A comparison of other jurisdictions supported the length of the sentence. Relief was denied, therefore.

The defendant’s argument that undue emphasis was placed on the victim’s impact statements was also rejected. The defendant’s primary point

was that the statements “constituted seventy-two percent of the sentencing hearing and ... included numerous photographs and visual aids.” The Supreme Court opined that the statute obligated the circuit court to consider the statements to some degree, but that from the record the circuit court also reviewed the presentence investigation report, which included the defendant’s prior criminal history and extensive drug abuse history, and the defendant’s and his family’s letters of sentiment. Accordingly, the Supreme Court found no evidence that undue emphasis was placed on the victim impact statements.

You’re Brainchild will not Grow up if you don’t Raise it Right.

In the memorandum decision of *State v. Caldwell*, 2015WL2381318, the defendant complained that the delay in his Magistrate Court trial on a DUI charge violated the speedy trial rule and resulted in the expiration of the statute of limitations. The defendant was found in his car wrapped around a tree. The defendant stated during treatment by EMT personnel that he had been drinking alcohol. He had to be treated in an out of state hospital and required a month’s recuperation. No sobriety test was taken at the scene.

A month after the completion of his recovery a criminal complaint for the misdemeanor

offense of DUI was filed. However, a warrant was not issued and executed until more than one year later, apparently due to the seriousness of the defendant’s injuries and due to the fact that the defendant was already regularly reporting to a probation officer.

A trial date was set. Two continuances in his trial date were granted on the State’s motion because the out-of-state hospital at which the defendant was treated had not yet complied with the subpoena for the results of blood testing. A third continuance was granted to consider the defendant’s motion that that the statute of limitations had run and the continuances were “without good cause.”

When the defendant’s motion to dismiss the charges was denied by the magistrate court, the defendant entered a conditional plea, preserving two issues for appeal. The circuit court affirmed the magistrate court’s decisions. The appeal to the Supreme Court then ensued.

With respect to the statute of limitations’ argument, the defendant argued that the delay between the charges being filed and his arrest resulted in the one year statute of limitations on misdemeanors expiring. The Supreme Court of Appeals declined to “broaden the scope of that statute to govern delays between the filing of a criminal complaint

and the warrant's execution." Instead, the Court reaffirmed that "the filing of a criminal complaint ... commences prosecution on that offense and tolls the statute of limitations." The complaint was filed one month after the accident.

With respect to the requirement that "unless good cause for delay exists, criminal trials in magistrate court should be commenced in one hundred and twenty days of the execution of a warrant," the court found good cause in this case due to the "State's inability to obtain its only evidence through no fault of its own."

The defendants' primary contention that good cause was lacking was based on the fact the continuances had been granted through *ex parte* communications between the State and the Court. No service of a motion for a continuance was made upon defendant's counsel and no opportunity was provided for defendant's counsel to oppose the same. The Supreme Court refused to consider this argument because the defendant's counsel had not raised this issue in the appeal to the circuit court and had no valid excuse for failing to do so. Moreover, the Supreme Court found no prejudice to the defendant resulting from the delay because his incarceration during the delay was due to other charges, not

the pending charges.

The circuit court's order denying the motion was affirmed.

Just Take Your Licks.

In the memorandum decision of *Andy E. v. Doe*, 2015WL2381320, the Supreme Court upheld the petitioning inmate's loss of good time credit for filing a purportedly frivolous civil action against certain correctional entities.

The inmate was a convicted sex offender. He was moved several times on his own request due to his fear that he would be beaten by other inmates due to the nature of his crimes. Eventually, he was beaten.

The inmate sued his captors "alleging the respondents herein violated his constitutional rights by allowing him to be physically harmed by fellow inmates and not securing him in a housing unit designated specifically for sexual offenders or high risk inmates."

The circuit court reviewed the complaint under the provisions of the West Virginia Prisoner Litigation Reform Act, W. Va. Code §§25-1A-1, *et seq.* The circuit court dismissed the complaint as frivolous and failing to state a claim upon which relief could be granted. Moreover, the circuit court "ruled that petitioner must forfeit sixty days of good-time credit pursuant to West

Virginia Code §25-1A-6 as a result of his frivolous filing."

The Supreme Court of Appeals affirmed the circuit court's actions stating that the civil action had "no arguable basis in fact or law." This warranted the forfeiture of good time under the Act because the action, by definition, constituted a "frivolous" complaint if there was no "arguable basis" for it. See W. Va. Code §25-1A-4(b) (1). No discussion was had about the petitioner's actual beating and whether the correctional institution had knowledge of the threats, yet took no precautions.

What's on my Mind is for me to Say, not You.

In the memorandum decision of *Swafford v. Ballard*, 2015WL2364503, the Supreme Court of Appeals reviewed the denial of a petition for a writ of *habeas corpus*.

The petitioner had been indicted for the offenses of first degree murder, attempted aggravated robbery, and conspiracy to commit a felony. A first trial ended in a mistrial. A second trial ended with convictions, but was overturned because the prosecutor overtly referred to the failure of petitioner's codefendant to testify.

So, a third trial was had. In this trial, however, two co-defendants stated that, at this trial, the co-defendants would

not be witnesses for the state. Due to their refusal to testify, the Court approved the use of the transcripts of their testimony from the second trial. The petitioner was then convicted of the murder charge and sentenced to life with mercy.

The petitioner on appeal argued that the admission of the transcripts of the co-defendants violated his rights under the Confrontation Clause. The use of the transcripts was consistent with precedent in that the witnesses were unavailable and had been subject to cross-examination. The petitioner was seemingly arguing that the witnesses were not truly unavailable, but the Supreme Court noted that the lower court had ordered them to testify to no avail, so they were undeniably unavailable.

The petitioner then argued that the prosecuting attorney had again made remarks that drew attention to the petitioner's election not to testify. The prosecutor did say that "now, as attorneys, we like to have witnesses testify from the stand." Standing alone, the statement appears to be improper, but, in the provided context, the prosecutor was actually referring to the situation in which the transcripts of the co-defendants had to be read and was reminding the jury that "you're to consider that the same as if those women took the stand personally in this courtroom."

In discussing motive, the prosecutor did attribute actions to the petitioner, suggesting that it was greed or “a macho thing.” The Supreme Court has found in previous matters that, “by directing attention to what was in the appellant’s mind, the prosecutor stealthily emphasized that he had not testified and had not revealed his thoughts.” In this matter, the Supreme Court found that “the prosecuting attorney properly argued potential motive for the murder, and nothing in the prosecuting attorney’s comments appears to serve as a reminder, implicit or otherwise, that petitioner did not testify in his own defense.” This demonstrates the nebulous nature of the rule “formulated for ascertaining whether a prosecutor’s comment is an impermissible reference, direct or oblique, to the silence of the accused,” which is “whether the language used was manifestly intended to be a reminder that the defendant did not testify.” Apparently, this ground will exist only when the prosecution overtly mentions that the defendant did not supply an explanation for an action, which the prosecution did not do in this matter.

The petitioner also argued that he was not present at a critical stage in the trial of his matter as required by Article III, Section 14 of the West Virginia Constitution and

W.Va. Code §62-3-2. Specifically, the petitioner was not present when his counsel and the prosecutor agreed on the portions of the transcripts to be read during the trial. The defendant’s “right to a fair trial” was not affected by this process, so it was not a “critical stage.” Essentially, the defendant need not be present “at a conference or argument upon a technical question of law *not depending upon the facts within the personal knowledge of the defendant.*” W. Va. R. Crim. Pro. 43(c)(3) [emphasis added]. Because the referenced discussion “primarily concerned the technical question of omitting inadmissible portions of the prior transcripts,” the defendant’s presence was not required.

For these reasons, the order denying the petition for *habeas corpus* was denied.

State v. Fannin:

In the memorandum decision of *State v. Fannin*, 2015WL2364295, the defendant was convicted of the offense of death of a child by a parent, guardian, custodian or other person by child abuse. The defendant had a relationship with a mother of a four month old infant. The mother, who worked at a hospital, had not yet made daycare arrangements, so the defendant babysat the child for a few days when the mother returned to work.

One hour and a half after the baby was brought to the defendant one morning, the defendant reported to the mother that the baby was not acting normally and was acting like “she had a cold or was congested.” The baby was brought to the hospital and was found to be unresponsive. Four days later, the baby died. The baby’s head was swollen, the pupils were enlarged, the retina was covered in blood, and the blood covered the eye from front to back.

The defendant told different stories regarding the baby’s injuries. The first story was that the baby had fallen from his arms onto the sofa, without hitting anything hard. The second story was that the baby had been dropped onto a concrete floor, head first.

The testimony of medical experts was that the injuries were consistent with violently shaking the baby.

A next door neighbor testified that, on the morning of the tragedy, the defendant had been yelling and screaming at the baby to shut up and stop “getting on his nerves.”

The defendant was convicted by the jury.

The first issue was the defendant’s request that the Supreme Court reverse its precedent that the use of a preemptory challenge to

remove a biased juror requires prejudice before relief will be granted. The defendant had to use a preemptory challenge to remove the husband of an employee in the very prosecutor’s office that was prosecuting the matter. The Supreme Court refused to reverse its precedent, stating that the defendant admitted that the remaining jurors were unbiased and, therefore, the defendant got what he is promised constitutionally, a trial by unbiased jurors.

The second issue is one that is not so clearly resolved. The circuit court permitted a medical doctor to discuss a study that was a “historical reporting of injuries that were diagnosed as shaken baby syndrome, the age of the baby, the inconsistency in the reported cause with physical findings, and a high proportion of male perpetrators.” Each of these factors coincided with the actions of the defendant in this matter, thus supporting the conclusion that the baby’s injuries were not the result of an accident. Yet, the Supreme Court of Appeals did not find this testimony to be scientific in nature and subject to the requirements for admission of such testimony. Instead, the Supreme Court treated the testimony as neither novel nor scientific and thus its admission was a matter within the discretion of the circuit court. The Court did note that the doctor “offered no opinion derived from the study and

petitioner did not object to its relevance.”

Moreover, “in any event, we believe any error in the admission of the study is harmless.” Essentially, “there was ample evidence that Emma died from being shaken and slammed and that petitioner was the only person who could have inflicted the trauma that killed her.” In other words, the defendant was guilty, so the evidence of the study was not prejudicial.

Finally, the defendant correctly pointed out that the court denied his motion for acquittal on the grounds that malice had not been shown by incorrectly stating that “the State has met its burden, which is obviously not beyond a reasonable doubt, it’s simply a preponderance of the evidence.” The lower court may have inartfully articulated the standard which is that the court does not have to believe that proof beyond a reasonable doubt exists, but the court must find that enough evidence existed to justify a jury’s finding that proof beyond a reasonable doubt existed. The Supreme Court excused the unartful phrasing of the circuit court and found that the motion for a judgment of acquittal was properly denied. A finding of malice was deemed to be justifiably found by the jury by reason of the neighbor’s testimony and the medical testimony that the baby was not accidentally

dropped.

You can throw Mud against the Wall, but the Court will Simply clean the Wall.

In the memorandum decision of *State v. Medley*, 2015WL2364302, the appeal was taken from the defendant’s conviction of first degree murder with mercy and the concealment of a human body.

The defendant gave a statement to the police that detailed the crime as follows: “he and the victim had been arguing and that the victim slapped him. ... He just flew off ... grabbed her neck an [sic] choked her.” Defendant further admitted that he hit the victim in the head and, upon realizing she was dead, defendant put her on the floor of her Jeep and pushed the Jeep into a lake. The defendant was arrested because his brother recounted to the police that the defendant came to him and sought assistance in the dumping of the body and because the defendant’s friends saw him push the Jeep into the lake.

One ground for error was that the State had failed to prove malice or premeditation. Because death was by strangulation, the defendant stressed no time existed for premeditation. The Supreme Court noted that “regarding premeditation, we have stated that direct proof

thereof is seldom possible and that generally it can be proved only by circumstantial evidence.” Accordingly, testimony that trouble existed between the petitioner and the victim for days before the victim’s death; the petitioner’s statement that there was an argument and it escalated before he strangled her; and the petitioner’s disposal of the body (presumably evidence of a plan) supported, in the circumstances, a finding of malice and premeditation.

A second ground for error was purportedly conflicting instructions on the definition of premeditation. Indeed, the jury asked, again, for the definition of premeditation in the course of its deliberations. The standard instructions spoke about “any interval of time between the forming of the intent to kill and the execution of that intent, which is of sufficient duration for the accused to be fully conscious of what he intended, is sufficient to support a conviction for first degree murder.” The prosecution had submitted another instruction, which was given, that “in order to constitute a premeditated murder and [sic] intent to kill need exist for only an instant.” The language came from *Billotti v. Dodrill*, 394 S.E.2d 32 (W. Va. 1990). The Supreme Court found that the instructions were not inconsistent and that giving the prosecution’s instruction was not error.

A third ground was that the prosecution had made several *Brady* violations by failing to produce fingernail clippings taken from the body during the autopsy; failing to test blood splatter in the residence to determine whose blood made the splatters; and failing to test fingerprints from the Jeep. The defendant’s problem on appeal was that he could not inform the Court whether the evidence was favorable; whether the suppression was willful; and whether the evidence was material. Accordingly, the defendant failed to meet even one component of the test for a *Brady* violation.

A fourth ground was the State’s failure to preserve the victim’s cellphone. The cellphone had been examined by the police and returned to the victim’s daughter who then discarded it. The defendant’s counsel boldly stated that this was error. Notably, the Supreme Court commented that defendant’s counsel had failed to even cite to the controlling precedent on the matter, *i.e.*, *State v. Osakalumi*, 461 S.E.2d 504 (W.Va. 1995). Upon review, however, the Court found no error in the failure to preserve the phone because, essentially, it was of no moment. It was a prepaid Walmart flip phone used weeks before the murder and rarely used because reception was poor at the victim’s residence. Without any argument regarding the significance of the phone and its contents, no error would be found.

The gist of the memorandum decision was, if you are going to raise errors, you need to consider the findings that must follow, i.e., prejudice to the defendant or materiality of the conclusion. If you just raise issues hoping the Supreme Court will develop the arguments for you, you will be routinely disappointed.

Habeas Corpus just doesn't have quite the Necessary Appeal.

In the memorandum decision of *Lively v. Ballard*, 2015WL3388309, the appeal was taken from an order denying the petitioner's requested *habeas corpus* relief. The petitioner and a co-defendant were both tried for first degree murder and arson; however, their trials were separate and in different venues. The victim was a well-known doctor and both had moved for a change of venue. The same judge presided over both trials.

In their respective trials, the petitioner was convicted, but the co-defendant was acquitted. The petitioner received mercy and was sentenced to life with the possibility of parole.

The Supreme Court first emphasized that "a habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed."

The first point of error concerned the actions of the Circuit Clerk of McDowell County. The prosecuting attorney had shared details of the case with the Clerk. In this manner, the Clerk became aware that a potential witness had recanted a previous statement and further became aware that the prosecuting attorney was having trouble reaching the witness. The Clerk reached the witness' girlfriend and apparently questioned her about the witness' recantation and "reportedly admonished" the girlfriend, "stating that [the witness] ... recantation could cause problems for [him] ... and his family." The petitioner asserted that this was "misconduct that constitutes defiant impropriety." This was purportedly compounded by the prosecuting attorney's "suborning" the intimidation of a material witness and "disregarding his affirmative duty to disclose potentially exculpatory information to defense counsel."

The Court's emphasis on what can be considered in a *habeas corpus* proceeding proved to be foreshadowing. The Court refused to consider these issues because they were known to defense counsel before trial and were not raised in his criminal appeal and did not, in the Supreme Court's opinion, rise to the level of constitutional error.

A second point of error was the State's failure to disclose the identity of a confidential informant. Because the petitioner failed to explain how the evidence would be or could be favorable or exculpatory, the Supreme Court refused to consider whether a *Brady* violation occurred.

The third point of error concerned the relationship of the trial judge with the victim. Apparently the victim was "long-time figure in McDowell County politics." While the trial judge did, in fact, have a relationship with the victim that he did not disclose on the record, the Supreme Court opined that it is a relationship with a "litigant" that must be affirmatively disclosed, not a relationship with the victim. The Court's seemingly sarcastic, yet literally true, remark is that the murder victim, if he made contributions to the judge, was not going to "gain any advantage from favorable rulings from the trial judge in the proceedings below." Moreover, the petitioner had the opportunity to move for the judge's recusal, but failed to do so, and the Supreme Court did not find that the risk of actual bias in these circumstances warranted a voluntary recusal.

Other issues were summarily dismissed as not supported by the record. The order denying the petition for a writ of *habeas corpus* was affirmed.

Nothing Like Seasoning your Narcotics with Bath Salts.

In the memorandum decision of *State v. Smith*, 2015WL3388353, the defendant had been convicted of violating W. Va. Code §61-2-5a(a), which makes it a felony for "any person who, by any means, knowingly and willfully conceals, attempts to conceal or who otherwise aids and abets any person to conceal a deceased human body where death occurred as a result of criminal activity..." [emphasis added].

The deceased in this matter had ingested a deadly cocktail of bath salts, heroin, codeine, and other narcotics. The defendant and others were found to have taken the body and dump it at a carwash after the not surprising overdose. After a trial by jury, the defendant was found to have conspired to conceal a human body in violation of the criminal statutes.

First, the Supreme Court made note that the defendant was incorrectly referring to the motion in the trial proceeding as one for a directed verdict when, instead, under Rule 29 of the Rules of Criminal Procedure, motions for judgment of acquittal are to be used in place of motions for directed verdict, which "are abolished."

Second, the defendant argued that neither she nor any other co-defendant caused the death. Also, the statute when first

drafted made reference to its purpose as creating a “crime for concealing a human body of a victim of a murder, voluntary manslaughter, or involuntary manslaughter.” The defendant’s argument is that it is intended to apply to a person committing the crime causing the death. The Supreme Court rejected the arguments noting that the statute referred to “criminal activity” and did not limit the scope.

However, the Supreme Court did not directly address the more nuanced argument of whether the deceased had to be a victim of the defendant’s criminal activity. Understandably, the concealment of a body to hide a crime is not tolerated, but does this extend to hiding a body when the crime was committed by the victim? In this case, the victim overdosed on self-administered narcotics and drugs. The defendant was merely involved with relocating the body after the victim’s criminal activity had ceased.

The Supreme Court further found sufficient evidence of an agreement to support a conviction for conspiracy to commit the crime. The following cryptic comment led to this opinion: “Petitioner’s statements to police generally established that she knew she was transporting Ms. Adams’ body but had convinced herself that she was not, in

part because petitioner also used illegal bath salts during the time in question.” It is not clear whether this is the defendant’s statement to the police or the Supreme Court’s commentary on the defendant’s psychological break from reality at the time.

The sentencing of the defendant on the conviction was affirmed.

You Understand that You are a Resident and Not a Guest, Right?

In the memorandum decision of *State v. Hedrick*, 2015WL2364249, the defendant was convicted of charges of robbery in the first degree, assault in the commission of a felony, malicious assault, burglary, and conspiracy. Due to a recidivist information, the defendant was eventually sentenced to life imprisonment.

The defendant appealed on the basis of whether his rights to a “speedy trial” had been violated. Specifically, the defendant had moved to be tried in the same term within which he was indicted pursuant to W. Va. Code §62-3-1. This is the “one-term rule.” The rule applies, however, only when a defendant is in custody. The defendant was in the custody of the Division of Corrections but not because of the pending charges. The defendant’s parole on a previous conviction had been revoked.

The State moved to dismiss the charges because it intended to re-indict the defendant due to a possible flaw in the original indictment and to add additional conspiracy charges. The defendant opposed the motion and emphasized that a motion for a “speedy trial” had been filed and that he was in custody. The lower court denied the motion, noting that his custodial situation was unrelated to these charges and no harm could be found in allowing the State to re-indict the defendant.

Upon reviewing the matter, the Supreme Court noted that, “this Court has previously acknowledged that a dismissal of an indictment and a subsequent re-indictment constitute a continuance under West Virginia Code §62-3-1.” Accordingly, the matter was reviewed under the standard for determining whether good cause had been shown for the continuance of the trial date, acknowledging, however, that this was a matter within the “sound discretion of the trial court.” The standard requires a showing that the “state has deliberately or oppressively sought to delay a trial”; “such delay has resulted in substantial prejudice to the accused” and the dismissal of the indictment should only be done “in furtherance of the prompt administration of justice.”

In this matter, the court found

no substantial prejudice to the defendant considering that the defendant was going to remain in custody no matter what the resolution of the pending charges was.

If you Did the Crime, Don’t Blame your Disbarred Attorney for the Time.

In the memorandum decision of *Kristopher V. v. Ballard*, 2015WL2069412, the circuit court denied a *habeas corpus* petition asserting ineffective assistance of counsel and the failure of the circuit court to continue a plea hearing in order to evaluate the petitioner’s competency.

The petitioner was charged with 108 counts arising out of his anal intercourse with a ten year old. The defense counsel negotiated a plea agreement in which the petitioner pled guilty to two counts. At the plea hearing, the court informed the petitioner he was probably going to prison, but the petitioner continued with the plea. The resulting sentence was consecutive terms of fifteen to thirty-five years and ten to twenty years. The potential sentence for all the charges in the indictment was 936 years to 2,340 years. As the Supreme Court noted, the plea agreement made the petitioner “capable of discharging his sentences and being released from prison instead of serving a virtual life sentence.” However, the petitioner was seemingly surprised that he had not been

given probation or an alternative sentence.

The petitioner attributed his apparent surprise to his counsel. The takeaway from the resulting decision is that such issues simply cannot be raised if in conflict with the plea colloquy. You cannot allege that counsel promised your client would get probation or an alternative sentence when the client informed the judge, on the record, that no such promise was made. You cannot allege that counsel acted contrary to your client's instructions when the client informed the judge, on the record, that he was satisfied with his representation.

The potential motivation for these allegations was that the trial counsel subsequently had his or her license annulled. Perhaps the reasoning was that the court would deem the counsel's testimony at the evidentiary hearing not credible due to the disbarment. However, the Supreme Court had no trouble finding that the perpetrator of a "horrific" crime was less credible than a disbarred attorney.

The other ground for relief was that the sentencing court should have ordered a competency evaluation when, in the course of the plea colloquy, the defendant disclosed that he had been awarded a social security disability. The disability was

seemingly tied to learning disabilities and behavioral problems. But, again, in the course of the colloquy, the petitioner acknowledged his understanding of the plea and stated, affirmatively, that he had placed his "sex organ in her butt." The court found this to be sufficiently indicative that the defendant knew his actions were wrong. The Supreme Court summarily found that the "test for competency to plead guilty is different than the standard used to determine disability for social security purposes." Simply stated, a competency hearing will not be triggered by the fact of a disability award alone.

The order denying the habeas relief was affirmed.

Before you Relieve Yourself, Consider Whether Your Client could then Get Relief.

In the memorandum decision of *Parsons v. Farmer*, 2015WL2069374, the issue was whether the trial counsel's seemingly acknowledged deficient performance satisfied the "prejudice" prong of the two pronged test for ineffective assistance of counsel claims.

During jury deliberations, a request was made by the jury to review, again, a tape recording of the robbery that was the subject matter of the criminal charges against the petitioner. The recording had to be played, for technical reasons, in the courtroom.

Counsel was present for the selection and setting-up of the recording, but went to the bathroom "to avoid an emergency" while the recording was watched by the jury. The record reflects that nothing was said by anyone during the counsel's absence. Again, the recording was shown during the actual trial and was actually moved into the record by defense counsel because no weapon was seemingly reflected, so counsel knew its contents.

The lower court found that this constituted a lack of counsel at a "critical stage," but found this constitutional violation to be harmless "beyond a reasonable doubt" in the circumstances.

The Supreme Court refused to adopt this analysis and reviewed it under the ineffective of assistance claim. Assuming that the counsel's bathroom trip constituted deficient performance under an objective standard of reasonableness, did this result in prejudice that satisfied the remaining prong of the test for ineffective assistance of counsel, that is: "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different."

The argument then became whether such prejudice should be presumed when counsel is absent from a critical stage of trial. The Supreme Court

rejected this assertion, stating "the timing of counsel's deficient performance – whether it occurred at a critical stage of the proceedings – was not as important as whether the deficiency allowed the State's case to move forward without meaningful adversarial testing." Or, as restated by the Supreme Court, "a petitioner must demonstrate that he or she suffered the equivalent of a complete absence of counsel." In the circumstances of this matter, no adversarial moment occurred in which the petitioner was left without counsel, so no prejudice arose to justify the claim for ineffective assistance of counsel.

Busting up a Car is an Automatic Felony Conviction.

In the memorandum decision of *State v. Kenney*, 2015WL1259555, the sufficiency of the evidence to convict the defendant of a felony destruction of property was at issue. The conviction resulted in a sentence of one to ten years in prison.

The underlying facts were that the defendant was charged with striking another person's vehicle with a tire iron and threatening the owner with the tire iron as well. The defendant was acquitted of charges relating, apparently, to threatening the owner.

No direct evidence was presented that all the damage to the car was done by the defendant and his tire iron. Moreover, an expert testified

that the damage was \$3,200, but the opinion was based only upon the viewing of photographs and an assumption that the vehicle's condition was average.

The Supreme Court essentially held that the guilt of the defendant was solely within the province of the jury to decide based upon the circumstantial evidence. Moreover, the defense counsel never challenged the expert at the trial on the questions of value. With eyewitness testimony from the owner, the testimony regarding the breaking of glass, and the expert's years of experience as an appraiser, the Supreme Court felt that the "heavy burden" to challenge the sufficiency of evidence for the jury to convict had not been borne. The order sentencing the defendant was affirmed.

Brevity may be the Soul of Wit, But it is Not Grounds for Appeal.

In the memorandum decision of *State v. King*, 2015WL1741394, an appeal was taken from the defendant's conviction in magistrate court of misdemeanor charges of domestic battery and domestic assault. The circuit court denied the appeal in a one page order. The appeal to the Supreme Court of Appeals ensued.

The first assignment of error is that the circuit court's single-page order demonstrated

"a lack of appropriate consideration of the merits of [counsel's] ... arguments." Ironically, the one page order was found proper in a one paragraph opinion from the Supreme Court.

The second and third assignments of error concerned the dismissal of an African-American male from the jury venire. The resulting jury in the trial of the domestic offenses consisted of five female jurors and one male juror. The defendant was a white male, which, as the Supreme Court notes, is no longer relevant to the *Batson* challenge.

The defendant asserted that the State failed to offer a non-discriminatory reason for the preemptory strike. The Supreme Court found, however, that the defendant had to offer more than the fact of the potential juror's race to invoke the requirement that the State offer a non-discriminatory reason for the strike. Specifically, the Supreme Court would require that the defendant at least offer that the State failed to strike other similarly situated jurors. The Court does not explain what this means, but it must refer to other jurors who were write and who were not struck and who had similar responses in voir dire as the person who was struck. Only then would a *prima facie* case of discrimination be raised, thus requiring the State to articulate its reason for the

strike. No such evidence was presented and, accordingly, the mere assertion that the person struck was African-American is insufficient to mount a challenge.

Another assignment of error was based on the victim's remarks, during cross-examination, that the defendant was acting like a "madman," "maybe ... because of the drugs they found in his closet." The trial court did not grant the motion for a mistrial. Resulting questions established that the victim had no knowledge of any actual drug use by the defendant. No curative instruction was requested and the record shows no other reference to the drugs.

The Supreme Court opined that "the prejudicial effect of the ... [victim's] statement, if any, would have been easily cured by a limiting instruction, which petitioner did not request, and which the trial court was not required to give sua sponte." Without the drugs being mentioned again, the statement was viewed as harmless. No error was found.

Another assignment of error was whether the trial court permitted the improper vouching of testimony by the victim. A police officer testified that he found the victim to be "trustworthy" and found her story to be "consistent." The Supreme Court deemed the first statement to be reviewable

because an objection was made and overruled, but refused to review the second statement because no objection was made. Notably, "a litigant may not silently acquiesce to an alleged error ... and then raise that error as a reason for reversal."

And, as is commonplace, the Supreme Court found that cross-examination opened the door to the question of "trustworthiness." The defense counsel had specifically asked the investigating officer if the victim had recounted her own violent behavior toward the defendant, thus raising an attack on the victim's character and thus making the officer's testimony on redirect "appropriate rehabilitative evidence." No error was found.

Error was further raised regarding the failure of the disciplinary records of the investigating officer and the juvenile record of the victim to be produced, purportedly as ordered by the court. The Supreme Court found no error principally because the appellate counsel had provided no citations to the record to establish what had been requested and why. With respect to the juvenile records specifically, the Supreme Court observed that, if expunged, the juvenile record technically does not exist and may create barriers to its use in evidence generally.

It's not that We are Doubting

Thomases; We are Skeptical Solomons.

In the memorandum decision of *State v. Alexander*, 2015WL1741114, the defendant was convicted of DUI, third offense, and obstructing an officer.

The rather compelling and compounding facts were: defendant was found by a refuse worker unconscious in his truck at 5:30 a.m. in a Wendy's restaurant parking lot, which was straddling the lane between the drive-through and the parking lot and blocking access to the garbage dumpster; the truck engine was running, the truck was in gear, the defendant's foot was on the brake; the defendant did not awaken despite the refuse worker's and then the police officers' knocking on the truck window and flashing a light; the defendant awoke and passed out several times before finally arousing and turning off the truck engine; the defendant had vomit on his shirt and the truck had a stench of vomit; the defendant smelled of alcohol; an empty liquor bottle was found inside the truck; and the defendant failed three field sobriety tests.

So, what was the BAC of the defendant? Well, the story on this is interesting. The first two preliminary tests were unsuccessful and the police officer advised the defendant that "he was not making an

effort to blow into the machine because the machine was not making the sound it usually makes when air is blowing into it." On the third attempt, the petitioner than blew so hard that the straw was blown out of the machine. The machine could not register a result as no air still entered.

An arrest was then made and the defendant resisted. After restraint, the defendant was transported to the station where an Intoximeter was employed. Three more tests were attempted and the recorded result was an insufficient breath sample.

At trial, the defendant denied that he was drunk and denied that he smelled of alcohol or vomit. He claimed that he could not provide a breath sample because the police had broken his ribs. The incident at Wendy's was a result of his troubled sleeping patterns. He claimed to have actually passed the field sobriety tests.

Again, the defendant was convicted on all counts. The resulting appeal was based on three grounds. The first ground was the court's denial of his discovery request for the voluminous material relating to the operation and maintenance of, and the training with respect to, the Intoximeter. The defendant sought to prove that he had, in fact, provided a sufficient breath sample which would have been obviously

exculpatory since he had not been drinking. This was a *Brady* violation, therefore.

The Supreme Court found this ground to be baseless since the defendant refused to even provide a breath sample. But this somewhat ignores the defendant's claim, which is that he gave a sufficient sample but it was either mechanical or operator's error that resulted in the failure to obtain a result. Obviously, the Supreme Court did not believe the defendant tried to provide a sufficient sample, but does not state this or explain this.

The Supreme Court's real focus was on the "overwhelming evidence that petitioner was intoxicated at the time he was discovered unconscious in his truck in the Wendy's parking lot at 5:30 a.m. ... [and] the truck's engine was running and the vehicle was in gear." The belief that the requested material would have been exculpatory was "speculative at best." Accordingly, the Supreme Court found no reason to criticize the lower court's refusal to compel production of the voluminous material. The underlying rejoinder might be, but what was the harm in producing the material if defendant bore the cost of its reproduction?

The second ground was that the circuit court abused its discretion in refusing to permit the defendant to present evidence regarding the

"extent of physical injuries he allegedly sustained when he was restrained by the police." According to the defendant, if the jury did not believe the Intoximeter was not working properly, perhaps his peers would buy the argument that his injuries kept him from providing a sufficient breath sample.

The defendant's problem is that, at trial, he did not have copies of the medical records and failed to "proffer to the circuit court the purpose or importance of the medical records." Noting that it is "manifestly unfair for a party to raise new issues on appeal," this ground was rejected.

The final ground was that the magistrate court had failed to electronically record the preliminary hearing and, therefore, the potentially exculpatory statements of the investigating officer were not able to be presented at the trial for purposes of impeachment. The recording equipment was seemingly functional at the time of the hearing, but, subsequently, it was determined that the hearing was not recorded and the magistrate had not made a written summary of the hearing. Rule 5.1(c) of the Rules of Criminal Procedure for Magistrate Courts sets forth the requirement of a recording or a written summary.

The circuit court made it the defense counsel's obligation to ensure the working order of the

recording equipment, although this would seemingly be beyond the defense counsel's access to the courtroom and its equipment. The Supreme Court again refused to consider this ground because the appellate counsel failed to identify the "nature" of the officer's testimony that would make it "very important" and exculpatory. "Error will not be presumed," held the Supreme Court.

The order imposing the sentence after conviction was affirmed.

The Naked Truth is That I was Making a Sex Tape at the Time of the Murder.

In the memorandum decision of *State v. Click*, 2015WL1741409, the crime was the murder of the mayor of War, West Virginia, accomplished by the placement of a plastic bag over the victim's head while lying in bed. Evidence existed that the victim had struggled during the asphyxiation. The defendant and his sister were charged with the crime. The motive was that the sister, who was the victim's daughter-in-law, was about to be charged by the victim with the unauthorized use of his bank account. Notably, the sister was separately tried and was acquitted of murder, but the jury deadlocked on the issue of the conspiracy. A subsequent *Kennedy* plea was entered and the defendant's sister received a sentence of

one to three years in prison.

The defendant's alibi was that, at the time of the murder, he was making a sex tape with a woman who testified at the trial and who refuted the alibi. The sex tape was allegedly destroyed prior to trial. The defendant also sought to impeach a material witness, his uncle, on the grounds that the uncle had sexually assaulted his sister and was testifying for the State in order to thwart an investigation of the assault.

The defendant was tried and convicted of both murder in the first degree, with a recommendation of mercy, and conspiracy. A life sentence was imposed together with a term of one to five years of incarceration.

The defendant's appeal included the ground that he should have been permitted to impeach the uncle with the sexual assault allegation. While a complaint had been made by the co-defendant sister, no charges resulted or were even investigated. The Supreme Court summarily found that the circuit court did not abuse its discretion in refusing to permit cross examination on the charges because the charges were uncorroborated and would have confused and misled the jury.

The second ground was insufficiency of the evidence. The Supreme Court recited its

precedent that "the corpus delicti may not be established solely with an accused's extrajudicial confession or admission." Instead, the "confession or admission must be corroborated in a material and substantial manner by independent evidence." Finally, "the corroborating evidence need not of itself be conclusive but, rather, is sufficient if, when taken in connection with the confession or admission, the crime is established beyond a reasonable doubt." The Supreme Court found sufficient corroborating evidence.

The defendant pointed out that the evidence consistent primarily of statements by numerous witnesses about the defendant's incriminating statements. No less than six witnesses testified to separate incidents of statements by the defendant, the most pointed of which was, "I'll put it this way, the mother*****r is dead." However, the Supreme Court then pointed to the following corroborative testimony: medical testimony regarding the manner of death; the testimony regarding the motive; the missing money from the victim's home; the petitioner's activities on the morning of the crime; and the discovery of burned debris, including burned boots, at a location described by witnesses who accompanied the defendant to get rid of the evidence. The Supreme Court found, therefore, no error in the trial proceedings.

Why are you treating me like a Convicted Criminal in my Recidivist Trial?

In the memorandum decision of *State v. Cearley*, 2015WL1244437, the defendant's conviction on charges of second degree sexual assault and unlawful wounding resulted in a life sentence due to the application of the recidivist provisions. The underlying incident involved the defendant grabbing the adult victim, slamming her head against a concrete wall several times, and then forcibly having sexual intercourse.

The defendant claimed the circuit court erred because it did not give an instruction on a lesser included offense of first degree sexual abuse with respect to the second degree sexual assault charge. The Supreme Court reiterated its holdings that "instructions must be based upon the evidence and an instruction which is not supported by evidence should not be given." The defendant presented no evidence that he had not engaged in sexual intercourse with the purported victim but, instead, acknowledged intercourse and claimed it to be consensual. Because the assault is based on penetration and the lesser included offense involves only contact, the Supreme Court found that no evidentiary basis existed for the lesser included offense. The defendant noted that he had "licked the victim's nipple," but the Supreme Court held that, while this might have supported a charge of first

degree sexual abuse, it did not absolve the defendant of the assault charge based on the actual intercourse.

The defendant then argued that the recidivist information is to be filed “immediately” after conviction, which, in his case, was not done. While the statute does impose this requirement, the Supreme Court opined that the defendant was “too narrowly” interpreting the language. The Supreme Court reiterated its previous holding that the immediacy requirement was met by a filing made before the end of the term of court in which the conviction was obtained and before sentencing. Accordingly, the filing of the information in the defendant’s matter was found to be compliant with the statute.

Additionally, the defendant pointed out that the recidivist information did not state the dates on which the prior offenses occurred. The Supreme Court reiterated that a recidivist information is sufficient if it gives “reasonable notice to the defendant” of the “nature and character of the previous conviction,” “the court wherein the previous conviction occurred,” and the “identity of the person previously convicted.” Because the State had provided these details in the information regarding the prior convictions, including the dates of the convictions, the information was sufficient.

Finally, the defendant argued it was error for him to be in shackles during the recidivist trial. However, the defendant had been in shackles during the criminal trial due to his multiple outbursts in prior proceedings. The hearing held on that determination was deemed sufficient to warrant continuation of the shackles during the recidivist proceedings. Moreover, the presence of shackles was deemed to be harmless as the defense table was covered with a cloth skirt so that the shackles could not be seen.

The order of the circuit court imposing a sentence on the defendant was affirmed.

The More you Serve, the More you Moot.

In the memorandum decision of *Brennan v. Dingus*, 2015WL1236060, the Supreme Court continued its adherence to its precedent that “because petitioner fully discharged his sentence and was released from incarceration shortly after filing his petition for writ of habeas corpus, we find no error in the circuit court granting the State’s motion to dismiss the same as moot.” *But see, State v. Hutton*, -- S.E.2d --, 2015 WL 3822814 (W. Va. 2015)(regarding the viability of a writ of *coram nobis* in West Virginia.).

Why couldn’t you see what the Jury saw – My Heart was Filled with Joy, not Larceny.

In the memorandum decision of *State v. Hawkins*, 2015WL1238802, the appeal was based on the fact that the defendant had beat charges of grand larceny. Instead, the jury found him guilty of joyriding and conspiracy to unlawfully take a vehicle.. The defendant was sentenced to a two year term of probation and was ordered to pay \$9,612 in restitution.

On appeal, the defendant argued that no basis existed for the charge of grand larceny and the conspiracy to commit grand larceny because no evidence was presented that he intended to permanently deprive the owner of the possession of the vehicle. The Supreme Court noted that the jury did not find him guilty of grand larceny, so denying the motion for a directed verdict on grand larceny did not prejudice the defendant and no relief needed to be given.

The defendant was seemingly arguing that if the court had granted the motion for a directed verdict, then the lesser included offense of joyriding would not have become an issue at the jury instruction stage. While the Supreme Court did not directly address this issue, the Supreme Court noted that, while the jury ultimately agreed on the insufficiency of the evidence, evidence did support the submission of the question of grand larceny to the jury in the

first place. The petitioner admitted to the theft of the car and setting it on fire. Simply because the jury decided the charge in the defendant’s favor did not mean the evidence could not have supported a conviction if the jury had decided otherwise.

Finally, the defendant tied the restitution obligation to the grand larceny charge. The Supreme Court noted that the loss of the vehicle occurred during the joyriding, so it was properly the subject of restitution under W. Va. Code §61-11A-4 for this misdemeanor offense.

I’m Ready to Act My Age.

In the memorandum decision of *State v. Hambleton*, 2015WL1244386, the appeal was taken from the denial of a Rule 35(b) motion for reduction of sentence.

The defendant was a juvenile who, with others, robbed and shot a man, who subsequently died. The defendant pled guilty as an adult to second degree murder and first degree robbery in exchange for a forty-year determinate sentence, which sentence was then imposed. At age 18, petitioner was to be reevaluated for potential transfer to a penitentiary. A motion was then filed to be resentenced as a youthful offender. The court did not transfer the defendant to a penitentiary but did not rule on the resentencing motion. The defendant returned to his placement

at the Salem Industrial Home for Youth. Three years later, the court entered an order transferring the defendant to the Division of Corrections on his twenty-first birthday. Another motion was filed to obtain a ruling on the previous motion for resentencing. After a hearing the original sentence was deemed to be proper.

The Supreme Court simply found no basis for finding that the circuit court abused its discretion. Specifically, “the circuit court’s conclusion is based on sound reasoning, practical considerations of the crime, notions of consistency and fairness, and justice for the victim.” The Supreme Court did acknowledge the defendant’s achievements, including his continued education, but further acknowledged the

severity of the crime.

A potentially deciding factor in the analysis was the “petitioner’s upcoming parole date.”

The Supreme Court also refused to find that a 40 year determinate sentence for robbery, for which no statutory maximum sentence exists, shocked the conscience of society and, therefore, violated the proportionality principle. The order denying the Rule 35(b) motion was affirmed.

The Default was Denied Decidedly as De-Faulty.

In the memorandum decision of *Balkard v. Mahood*, 2015WL1244343, the petitioner argued that a default should have issued on his petition for a writ of

habeas corpus due to the State’s failure to respond within the timeframe ordered by the circuit court.

The Supreme Court first commented on the labelling of the motion as one for a “default judgment.” The Supreme Court noted that the actual request was for a “default” and not a default judgment since no sum was sought. Instead, the petitioner was seeking to have his conviction declared void. The Supreme also pointed out that “the rules of procedure in criminal and civil cases do not apply in post-conviction habeas corpus proceedings.”

With respect to the requested relief, therefore, the Supreme Court acknowledged that the State did not file a response to the petition by the

date set forth in the court’s order, but noted that after filing the petition, the petitioner then filed a supplemental amended petition and “supplemental claims.” Accordingly, the Supreme Court held that “petitioner’s own actions prevented respondent from filing a response to the original petition.” Finally, the Supreme Court applied the provisions of W. Va. Code §55-17-4(2) which provides that a “judgment by default may not be entered against a government agency in an action...” However, this seemingly contradicts the Supreme Court’s earlier comment that this was not a motion for a default judgment. In any event, the order denying the petitioner’s *habeas corpus* petitioner was affirmed.

VOUCHER UPDATE

For the period of July 1, 2014 through June 30, 2015, West Virginia Public Defender Services has processed 36,226 vouchers for payment in a total amount of \$ 25,980,025.30



Most Highly Compensated Counsel

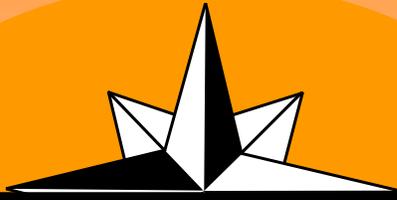
For the period of July 1, 2014, through June 30, 2015:

Law Office of Daniel R. Grindo, PLLC	\$ 254,047.60
Gerald Jacovetty, Jr., LC	\$ 183,792.50
Ruth Law Offices, PLLC	\$ 182,334.50
Law Office of David B. Kelley	\$ 181,634.00
Christopher G. Moffatt	\$ 165,422.74

Most Highly Compensated Service Providers

For the period of July 1, 2014, through June 30, 2015:

Tri S Investigations, Inc.	\$ 108,492.28
Jones, Dykstra & Associates, Inc.	\$ 60,807.36
Forensic Psychiatry, PLLC	\$ 52,900.00
Paul E. Kradel	\$ 45,850.00
Woods Investigations	\$ 35,924.86



Honorable Earl Ray Tomblin - Governor

Jason Pizatella - Secretary of Administration

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“QUOTES” TO NOTE

“Given the abbreviated factual and legal discussion set forth in this Court’s memorandum decisions [issued in workers’ compensations appeals], we cannot say that such prior decisions have fully considered and analyzed the applicable statutory and jurisprudential law as thoroughly and thoughtfully as does our extensive discussion of the issue herein.” Justice Robin Jean Davis, *Hammons v. West Virginia Office of Ins. Com’r*, -- S.E.2d-- (W. Va. 2015), 2015WL3386875, *17.

“I am dumbfounded by the message that this statement sends to all of the litigants that come before this Court. For the majority to indicate that this court does not give full consideration and attention to cases that are decided through memorandum decisions is absolutely appalling and inaccurate.” Justice Allen H. Loughry II, *Hammon, supra*, *23.



POINTS OF INTEREST

Did you know?.....

Relief from a state court conviction was granted on a federal petition for habeas corpus in *Barbe v. McBride*, 521 F.3d 443 (4th Cir. 2008) by reason of the “Rock-Lucas Principle” established by the Supreme Court of the United States. The “Rock-Lucas Principle” derives from the holding in *Rock v. Arkansas*, 483 U.S. 44 (1987) in which it was held that, “in applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant’s constitutional right to testify.” Any “restrictions imposed may not be arbitrary or disproportionate to the purposes they are designed to serve.” In *Michigan v. Lucas*, 500 U.S. 145 (1991), this was extended to rape shield laws. Specifically, “restrictions on a criminal defendant’s rights to confront adverse witnesses and to present evidence may not be arbitrary or disproportionate to the purposes they are designed to serve.” As a result, the *Rock-Lucas* Principle was articulated as follows: “The *Rock-Lucas* Principle clearly mandates that a state court, in ruling on the admissibility of evidence under a rape shield law, must eschew the application of any per se rule in favor of a case-by-case assessment of whether the relevant exclusionary rule is arbitrary or disproportionate to the State’s legitimate interests.” *Barbe*, 521 F.3d, *supra* at 458.

“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)