

The Defender

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West Virginia has many problems that are not easily solved. Obesity, tobacco use, low educational levels, drug abuse (both prescription and illicit), alcoholism, poverty and geographical isolation are all endemic.

Along with the expansion of mandatory work (mostly in the child abuse and neglect area), many of these chronic problems have led directly to the tripling of the indigent case load over the last twenty years. No easy fix exists to lower this case load.

However, controlling costs and ensuring cost-effective representation are not only possible but easily achievable. During the same twenty year period that costs have escalated at breathtaking rates, Public Defender offices have saved taxpayers in excess of \$150,000,000. While margins have narrowed (spread between Public Defender and private costs), some current cost reduction is still possible in a few Circuits.

Equally important, the 126 lawyers currently working in Public Defender offices represent a core of specialists who are skilled in areas of representation that most lawyers

only occasionally handle. Public Defenders tend to be older and more experienced than private counsel. Turnover in personnel is low, providing continuity of representation.

Despite some compelling arguments for substantial involvement by the private bar, the truth is that full-time Public Defenders clearly benefit both the taxpayers and the clients, as well as providing full-time jobs. Costs per case for private counsel work have increased much faster than Public Defender costs per case. That trend can be expected to continue despite a temporary reduction in private counsel average billing in FY 2010 (partially due to older cases billed during the six month period for submitting older vouchers).

Absent voluntary reductions in private counsel billing per claim, the only way to stabilize costs is to increase the number of Public Defender offices. Despite careful review of private counsel vouchers (over \$1,500,000 in reductions in FY 2010), the reality is that the private system is virtually unmonitored.

The private system has now grown to an annualized cost

of \$25,000,000 on 34,000 claims submitted. For comparison, Public Defender offices, handling approximately the same number of cases as private counsel, are currently budgeted at \$18,200,000, including a substantial part of the costs of retiree health insurance (OPEB liability) as currently apportioned.

The facts are clear. The present system subsidizes private attorneys. Conversely, and ironically, private attorneys are poorly paid in comparison with even a minimal market rate. If the goals are to (a) avoid rapidly escalating costs per case; (b) stabilize the inevitable increase in costs; (c) cut current costs; (d) provide better representation and (e) provide jobs, the answer is clear: more Public Defender offices.

A further incentive is that this office is once more dramatically underfunded. A minimum of an additional \$11,500,000 is needed for this fiscal year; and an additional \$14,500,000 for next fiscal year (FY 2012).

Juvenile Defender Training to Be Held in Charleston

West Virginia Public Defender Services and the National Juvenile Defender Center are sponsoring a one-day Juvenile Defender Training session on **Wednesday, November 17, 2010 at the Charleston House Holiday Inn in Charleston**. This session will feature several nationally renowned speakers who will be discussing many of the key issues that affect juvenile defense.

The training will also feature a review of the new Rules of Juvenile Procedure which were recently enacted by the Supreme Court of Ap-

peals.

For further information, including an Agenda and a registration brochure, please call (304) 558-3905 or log onto our website at www.wvpds.org.

How “Free” is Free? Getting Transcripts and Records for Indigent Clients

In response to some recent inquiries, WVPDS would like to restate the basic requirements on the availability of transcripts and the court record for indigent defendants.

An indigent defendant seeking to appeal his or her conviction is constitutionally entitled to a free copy of the trial transcripts. *W. Va. Code* §51-7-7 (2010); *Rhodes v. Leverette*, 160 W. Va. 781, 239 S.E. 2d 136 (1977); *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585 (1956). The cost of such transcripts shall, according to §51-7-7, be paid out of the treasury of the State.

Rhodes also notes, in Syllabus Point 1, that a defendant is “constitutionally entitled to a copy of the trial court re-

cord...without cost to him.” Thus, a circuit court clerk cannot request fees for the initial copy of the trial record.

The issue of provision of free transcripts of prior proceedings is equally settled. In *State v. England*, 178 W. Va. 648, 363 S.E. 2d 725 (1987) the Court stated that under the Equal Protection Clause a defendant was entitled to the transcripts of prior proceedings when they were needed for an effective defense or appeal.

Thus, if an indigent defendant’s trial results in a mistrial, he/she is entitled at no cost to the transcripts of the trial, if they are required “for an effective defense” in any subsequent trial.

It is, of course, counsel’s duty to verify a defendant’s financial status before requesting the provision of no-cost transcripts and documents. It is suggested that counsel obtain and submit a revised Financial Affidavit at the start of any appeal. See *State v. Bosworth*, 143 W. Va. 725, 105 S.E. 2d 1 (1958).

United States Supreme Court Update



Renico v. Lett, 130 S. Ct. 1855 (05/03/10) - Holding that the Sixth Circuit had erred in granting habeas corpus relief to respondent. Respondent's initial trial ended in a mistrial when the jury was unable to reach a verdict. Respondent was convicted of second degree murder at a later trial and subsequently argued that Double Jeopardy should have prohibited the second trial because there was no "manifest necessity" to grant the mistrial in the first case. (*Roberts, C.J.*)

Graham v. Florida, 130 S. Ct. 2011 (05/17/10) - Imposition of a sentence of life imprisonment without parole for juveniles for non-homicide crimes violates the cruel and unusual punishment clause of the Eighth Amendment. The juvenile offender had been convicted of armed burglary in Florida (which had abolished parole), and after violating his probation the juvenile was sentenced to life imprisonment. The Court examined national trends on the issue and concluded that such sentences are unconstitutional. (*Kennedy, J.*)

United State v. Comstock, 130 S. Ct. 1949 (05/17/10) - The Court held that the Necessary and Proper Clause granted Congress the authority to enact 18 U.S.C. §4248, which permits the civil commitment of mentally ill, sexually dangerous federal prisoners beyond the date of their release from incarceration. (*Breyer, J.*)

Berghuis v. Thompkins, 130 S. Ct. 2250 (06/01/10) - Reversing the Sixth Circuit's decision, the Court determined that Thompkins' silence during an interrogation did not invoke his right to remain silent, and that a suspect's Miranda right to counsel must be invoked in an unambiguous manner. (*Kennedy, J.*)

Holland v. Florida, 130 S. Ct. 2549 (06/14/10) - Petitioner's counsel in a federal habeas corpus matter failed to timely file his petition, despite numerous requests from the petitioner. Reversing the Eleventh Circuit, the Court determined that the statute of limitations on federal habeas petitions is subject to tolling, provided that the petitioner has been diligent and that there are "extraordinary circumstances" justifying tolling. The Court remanded to determine whether extraordinary circumstances were present in the petitioner's action. (*Breyer, J.*)

Skilling v. United States, 130 S. Ct. 2896 (06/24/10) - The Court determined that the petitioner, a former Enron executive, failed to establish sufficient juror prejudice to deny him a fair trial. The Court held, however, that because the petitioner's misconduct did not involve bribery or kickbacks, his conviction for "honest services" fraud could not stand. (*Ginsburg, J.*)

Sears v. Upton, 130 S. Ct. 3259 (06/29/10) - Holding that the Georgia state court had applied an improper standard to determine whether trial counsel's failure to present evidence of petitioner's cognitive impairment constituted ineffective assistance of counsel, the Court remanded for a determination of the effect of trial counsel's performance. (*Per Curiam*).



All West Virginia
Supreme Court
opinions may be
reviewed online at
[www.state.wv.us/
wvscal/
opinions.htm](http://www.state.wv.us/wvscal/opinions.htm)

West Virginia Supreme Court Update

State v. Payne, No. 34889 - 5/6/10 - McHugh, J.

During appellant's trial on sexual abuse charges, the State presented testimony by a forensic nurse as to incriminating statements made by the alleged victim. The appellant objected to the admission of the statements, arguing that the statements were hearsay, that the nurse was not a medical provider and that the victim was not referred for medical purposes but solely for forensic investigation. The trial court denied the motion and the appellant was convicted.

The Court held that the admission of the statements under Rule 803(4) was proper. The Court held that when an evaluation of an alleged victim of sexual abuse has a "dual purpose" of both medical and forensic purposes, admission of testimony of statements of a forensic nurse is not error.

Affirmed.

Cain v. DMV, No. 35013 - 5/6/10 - McHugh, J.

A sheriff's deputy discovered the appellee asleep on the ground in front of his car alongside Route 19 in Marion County. After investigation the officer arrested the appellee and charged him with driving under the influence. The appellee requested an administrative hearing and subsequently appealed the Commissioner's adverse decision to the circuit court. The court determined

that the police officer did not have a sufficient factual basis to make a DUI arrest because the officer could not testify as to whether the appellee had been drinking before or after parking his vehicle, and reversed the revocation. The State appealed.

The Court reversed the lower court, noting that a police officer is not required to actually see a person operate a vehicle in order to sustain a revocation, but only needs "reasonable grounds to believe" that the driver had been operating the vehicle; (2) that the lower court had erroneously applied a "reasonable suspicion" standard utilized in search and seizure cases in its determination; and (3) that the testimony of the officer as to statements of the appellee that he had been drinking and was "just trying to get home", combined with the results of the intoximeter test and the lack of any indication that the appellee had been drinking after he had parked the vehicle, fulfilled the statutory requirement under §17C-5A-2(e) that the State show reasonable grounds to believe that the appellee had been driving while under the influence of alcohol.

Reversed.

Groves v. Cicchirillo, No. 35132 - 5/6/10 - Per Curiam

Responding to a report of an automobile accident, a sheriff's deputy discovered the appellee walking alongside the road near the accident scene. The

appellee was arrested and charged with driving under the influence. The appellee requested an administrative hearing, but presented no evidence and conducted no cross-examination of the police officer. The appellee appealed the Commissioner's revocation order to the circuit court, which reversed the revocation. The court determined that the evidence presented at the administrative hearing did not establish (1) a foundation for the admission of the intoximeter results, (2) the results of any such test; (3) the results of the horizontal gaze nystagmus test; and (4) that the officer had seen the appellee driving a motor vehicle. The State appealed this decision.

Citing the deferential standard of review accorded to administrative officers, the Court determined that the lower court had erred in reversing the revocation order. The Court held that when the officer's somewhat abbreviated testimony was taken into account with the documentation contained in the DMV record (chiefly the DUI Information sheet completed by the officer, the implied consent statement and the intoximeter printout), there were reasonable grounds to believe that the appellee had been driving while under the influence of alcohol.

Reversed.

State v. Smith, No. 35133 – 5/6/10 – Workman, J.

The appellant was accused of sexually abusing his two granddaughters. Prior to trial the appellant sought a “taint” hearing to challenge the reliability of the testimony of the two alleged victims. The appellant presented the findings of an expert psychologist who indicated that the pretrial statements and interviews of the children indicated suggestive questioning and coaching by the mother of the children. The trial court denied the request for the taint hearing, but permitted the appellant to present the expert testimony during trial. The appellant was subsequently convicted and argued (1) that the trial court had erroneously denied his request for a taint hearing, and (2) that the court had failed to grant his motion for a mistrial when one of the alleged victim’s stated before the jury that the appellant had molested a third sister.

The Court, in a new syllabus point, held that the reliability of a child’s testimony is solely a matter for assessment by the trier of fact. The Court refused to adopt the principles of *State v. Michaels*, a 1994 New Jersey opinion, establishing a defendant’s entitlement to a taint hearing. The Court distinguished *Michaels* from the appellant’s case, citing the egregious nature of the violations in *Michaels* in comparison with the techniques utilized in the investigation against the appellant, and also noted the age difference of the alleged victims (preschool children in *Michaels*, as opposed to 12 and 15 year old victims in the appellant’s case). The Court also noted that the appellant had presented expert testimony to the jury as to the improper interview techniques, and concluded by noting that a taint hearing “would more likely become an abused discovery tool” in child sexual assault cases.

The Court also rejected the appellant’s argument that the statement of the child witness as to actions against a third sister constituted improper Rule 404(b) evidence. The Court held that the isolated reference by a single witness, coupled with the court’s instructions to disre-

gard and the other evidence against the appellant, did not establish a “manifest necessity” for a mistrial. *Affirmed.*

State v. Georgius, No. 34807 – 5/12/10 – Per Curiam

The appellant was convicted in March 2005 of first degree sexual assault. During his trial and at his sentencing hearing the appellant denied committing sexual assault against the victim. The appellant subsequently filed a motion for reconsideration under Rule 35(b) of the Rules of Criminal Procedure. A hearing on the motion was conducted three years later, at which time the appellant recanted his previous denials and indicated that he wanted his family to know the truth of the sexual assault.

The court denied the motion, rejecting the appellant’s statements regarding his abusive childhood. The appellant appealed this denial, asserting that he was entitled to reconsideration of his sentence under the Court’s holding in *State v. Arbaugh*, 215 W. Va. 132, 595 S.E. 2d 289 (2004).

The Court rejected the appellant’s argument, noting that the sentence was within statutory limits, was not based on any impermissible factors, did not violate any constitutional principles and that the appellant had set forth no new arguments to support his motion. The Court also flatly rejected the appellant’s reliance on *Arbaugh*, noting that *Arbaugh* was a *per curiam* opinion confined to the very specific facts of that case and set forth no new standards or guidelines to be followed by circuit courts.

Affirmed.

State v. Pannell (consol. with **State v. Turner**), No. 35226 – 6/03/10 – Per Curiam

The appellants were indicted in connection with the July 2006 robbery of three individuals in Huntington. Each appellant was convicted of three counts of first degree robbery and a single count of fleeing. On appeal the appellants argued, *inter alia*, that the trial court

had coerced the jury into a guilty verdict by repeatedly emphasizing the necessity of reaching its verdict in a prompt manner. The argument was based on statements from the trial judge that both he and one of the jurors had vacations scheduled to begin the following day, and the judge’s provision of an *Allen* instruction after only a few hours of deliberation.

The Court rejected the appellant’s argument, noting that the jury had engaged in approximately five hours of deliberations prior to rendering its’ verdict, and that a review of the record indicated that the jury had completed its’ duty in a “careful and considered fashion”..

Affirmed

State ex rel. Games-Neely v. Silver, No. 35499 – June 3, 2010 – McHugh, J.

James L. Blackford was indicted in October 2009 for first degree arson, setting fire to lands, and arson resulting in serious bodily injury. Prior to trial he filed a motion to dismiss the first degree arson charge, arguing that first degree arson was a lesser-included offense of arson resulting in serious bodily injury and that convictions on both charges would violate double jeopardy. The trial court agreed with Mr. Blackford and dismissed the first degree arson charge. The State requested a writ of prohibition.

The Court agreed with the State and granted the writ. The Court initially observed that first degree arson could not be a lesser offense to arson resulting in serious bodily injury because first degree arson carries the greater sentence. The Court also analyzed the elements of each offense, and noted that the Legislature intended the offenses to be separate offenses because each of the elements of arson resulting in serious bodily injury are not required to prove first degree arson.

Writ of Prohibition Granted



In Re: Jessica G., No. 35487 - 6/03/10 - Per Curiam

Morris G., appealed the decision of the circuit court terminating his parental rights to his daughter, Jessica G. The DHHR had received several referrals in 2007 and 2008 regarding prescription drug abuse by Morris G.. The appellant subsequently admitted to the allegations and was placed on a post-adjudicatory improvement period. Despite substantial efforts the appellant was unsuccessful at compliance and the DHHR moved for termination of his parental rights.

At the adjudicatory hearing the court heard testimony from the DHHR regarding the appellant's unsuccessful efforts at rehabilitation, but also noted testimony regarding the strong bond between Jessica and her father and the child's wishes to remain with her father. Despite this testimony the court ordered the termination of the appellant's parental rights.

The Court considered the argument of the appellant that the lower court had failed to properly consider the wishes of his daughter before terminating his parental rights. Citing W. Va. Code §49-6-5(a)(6), the Court determined that the lower court had failed to give full consideration to the wishes of Jessica and vacated and remanded the case for full consideration.

Vacated and Remanded.

In Re: Elizabeth F. and Kyia F., No. 35486 - 6/02/10 - Per Curiam

The guardians *ad litem* for four minor children and the DHHR appealed the decision of the circuit court placing the children in the custody of their maternal grandparents. Citing W. Va. Code §49-3-1 and *Napoleon v. Walker*, 217 W. Va. 254, 617 S.E. 2d 801 (2005), the circuit court held that it had no other alternative but to recognize the statutory "grandparent preference" and place the children with their maternal grandparents.

Citing evidence that the children were not being properly protected

by the grandparents, the guardians and the DHHR objected, arguing that such placement was not in the best interests of the children.

The Court first noted that the circuit court had expressed doubt that, absent the grandparent preference, it would have made the same custodial determination. The Court determined that the circuit court had erroneously "accorded the grandparents an absolute preference... despite its expressed concerns about the propriety of such a placement", and reversed the custody order and remanded the case for full consideration.

Reversed and Remanded.

State v. Dellinger, No. 35273 - 6/03/10 - Per Curiam

The appellant was charged with alleged misappropriation of federal grant funds. Following his conviction, the appellant filed a motion for a new trial, arguing that one of the jurors had committed misconduct by failing to disclose pretrial internet contacts with the appellant and other connections with two state witnesses.

At a hearing on the motion, the juror testified that she had become MySpace "friends" with the appellant prior to his trial but did not disclose this fact during voir dire. The juror further indicated that she had not disclosed her relation (by marriage) to one witness or that her brother-in-law worked for another witness. The circuit court denied the appellant's motion for a new trial, finding that the jurors contact with the appellant was minimal, that her contacts with the State's witnesses were tenuous, and that she had been a fair and im-

partial juror.

The Court noted that the juror's failure to advise the court of her contacts with the appellant and her relationships with the witnesses deprived the appellant of the opportunity to determine the existence of any bias for or against him or the State. The Court further observed that her silence during voir dire, coupled with her testimony during the post-trial hearing, led to the conclusion that she had connections with both the appellant and two State witnesses such that bias could be presumed.

Finding that the circuit court's conclusion that the juror was fair and impartial was clearly erroneous, the Court reversed the appellant's conviction and remanded the case for a new trial.

Reversed and Remanded.

State v. Spade, No. 35275 - June 4, 2010 - Per Curiam

The appellant, was charged with a misdemeanor offense of animal cruelty relating to her operation of a "no-kill" animal shelter. Prior to her trial date, the appellant was required to post substantial cash bonds to cover the estimated costs of care for the large number of dogs seized during the investigation. The magistrate subsequently ordered the bonds disbursed to cover the costs.

The appellant entered into a plea agreement in magistrate court which included, *inter alia*, a provision that she would be entitled to a restitution hearing. The State later objected to the restitution hearing, arguing that the issue of restitution was *res judicata* because the bond disbursement had decided the issue. The magistrate agreed, denied the appellant's request and ordered the appellant to

pay over \$114,000 in restitution for the animal’s care. The magistrate’s order was affirmed by the circuit court.

The Court reversed and remanded the matter to the magistrate court for a restitution hearing. The Court emphasized that the appellant had specifically reserved in her plea agreement the right to a restitution hearing. The appellant’s plea, the Court noted, was contingent upon receiving such a hearing, and the State’s opposition to the hearing may have violated the spirit of the plea agreement.

Reversed and Remanded with Directions.

In Re: Faith C., Sophia S. and Madelyn S., No. 35452 – 6/04/10 – Per Curiam

An abuse/neglect petition was filed against Sarah S. after Sophia S. received second degree burns in a sink at the couple’s home. The DHHR asserted that the burns were the result of an intentional immersion by Sarah S.

During the proceedings the circuit court heard contradictory testimony regarding the injuries. The circuit court determined that Sarah S. had not intentionally abused any of her children, but found that her inattention at the time of her daughter’s injury constituted neglect. Following a hearing, the court granted Sarah S. a six-month dispositional improvement period. The guardian *ad litem* appealed, asserting that the court should have terminated Sarah’s parental rights due to the intentional nature of the injuries.

The Court determined that the circuit court’s findings of fact regarding Sophia’s injuries were not clearly erroneous. The Court cited the contradictory evidence and despite noting that this was “an extremely close and difficult case”, found that the circuit court’s findings were adequately supported in the record. *Affirmed.*

Harrison v. DMV (*consol. with Reese v. DMV*), No. 34970 – 6/03/10 – McHugh, J.

The DMV appealed two orders, each of which concluded that the DMV could not enhance the revocation periods of drivers who had entered *nolo contendere* pleas to DUI offenses prior to *State ex rel. Stump v. Johnson*, 217 W.Va. 733 (2005) and *State ex rel. Baker v. Bolyard*, 221 W.Va. 713 (2007). The appellees were arrested in 2003 and 2002, respectively, and charged with driving under the influence. The drivers entered no contest pleas to the criminal charges, but because the arresting officers failed to appear at the scheduled administrative hearings neither driver received an administrative revocation of their license.

In 2008 each of the appellees were arrested and charged with second offense DUI and received notices from the DMV that their administrative revocations were to be enhanced because of their earlier no contest convictions. The revocations were contested by the appellees, who argued that the prior offenses could not be used to enhance their revocations because, at the time of the earlier convictions, no contest pleas were not considered “convictions” for enhancement purposes. The circuit courts agreed, finding that the *Stump* and *Baker* decisions set forth new points of law, and entered orders holding that the use of the earlier convictions would be a denial of due process.

The Court reversed these determinations, holding that the decisions in *Stump* and *Baker* were not “new” points of law but were merely statements of what West Virginia Code § 17C-5A-1a(e) had meant since enactment. Because these decisions did not set forth new points of law, there was no issue of retroactive application. The Court noted that, in enforcing the “no contest” enhancement provisions, the DMV was merely carrying out a non-discretionary statutory duty. *Reversed.*

State v. Rash, No. 34708 – 6/07/10 – Per Curiam

The appellant was indicted for several sexual offenses involving two minor girls. The first four counts alleged acts against E.C.H., while the remaining counts addressed allegations involving A.L.. The appellant’s motion to sever the first four counts from the remaining two counts was denied. Prior to trial the State notified the appellant that it intended to introduce, pursuant to Rule 404(b), evidence that the appellant had inappropriately touched E.L., the sister of A.L. Following a *McGinnis* hearing, the trial court ruled that the evidence was admissible and that the probative value of the evidence outweighed its prejudicial effect.

During the appellant’s subsequent trial, the State introduced evidence that E.C.H. had received counseling and treatment for several years for sexual abuse. The appellant objected to the admission of this evidence, and was subsequently convicted of three of the counts involving E.C.H. and acquitted on the counts involving A.L. The appellant argued on appeal (1) that the trial court had erroneously denied his motion to sever counts 1 through 4 from the remaining counts; (2) that the trial court erred by admitting Rule 404(b) evidence involving E.L.; and (3) that the trial court erroneously permitted testimony regarding E.C.H.’s treatment for sexual abuse.



The Court rejected the appellant's argument that because the allegations involving E.C.H. had occurred eleven years prior to the acts involving A.L., there was no evidence of a common scheme or plan between the incidents. The Court adopted the State's argument, however, that the offenses were "of the same or similar character" to the extent that the evidence of one would have been admissible as Rule 404(b) evidence in a separate trial for the other. Similarly, the Court noted the numerous consistencies between the appellant's inappropriate touching of E.L. and his acts against E.C.H. and A.L. The Court held that the trial court's determination that this evidence was admissible under Rule 404(b) to show "absence of mistake, opportunity, intent and lustful disposition" was not an abuse of discretion.

Finally, the Court rejected the appellant's argument that because State failed to provide copies of her medical records, E.C.H. should not have been permitted to testify to her treatment for sexual abuse. The Court noted that the treatment notes were no longer in existence and that the evidence was introduced only as proof of the mental effect that the appellant's actions had on E.C.H.

Affirmed.

State ex rel. Kitchen v. Painter, No. 34713 - 6/07/10 - Per Curiam

The appellant was convicted of first degree murder in 1996. The appellant's direct appeal was refused and the appellant subsequently filed a petition for a writ of habeas corpus. After an evidentiary hearing the circuit court determined that the appellant had received ineffective assistance of counsel during portions of his trial, but determined that due to the strength of the State's case there was no reasonable probability that absent the errors, the result of the trial would have been different. The appellant appealed the court's denial of his petition.

The Court affirmed the circuit court's decision, finding the asserted errors to be either without merit or such that they would not have affected the outcome of the case.

Affirmed.

State v. McLaughlin, No. 34860 - 6/08/10 - Workman, J.

The defendant was indicted in 1995 for first degree murder and was subsequently convicted and sentenced to life without mercy. His direct appeal was denied and the defendant filed for a petition for a writ of habeas corpus. The circuit court determined that the jury in the defendant's trial had been improperly instructed as to parole eligibility and granted the defendant's petition, but ordered that a new trial would be granted solely on the issue of whether the defendant should receive mercy.

During pretrial proceedings the trial court certified three questions regarding the procedures for a retrial held solely for mercy determinations.

The Court separated the first question into two questions - one addressing burden of persuasion and the other dealing with jury unanimity. The Court held that neither party in the mercy phase of a bifurcated trial has a specific burden of proof, and accordingly determined that there was no constitutional shift of the burden of proof under W. Va. Code § 62-3-15. The Court also determined jury verdicts in a bifurcated mercy phase must be unanimous.

As to the second, the Court

held that the jury in a mercy-phase-only proceeding does not have to be the same jury that made the determination of guilt. The Court based its ruling on the language of §62-3-15, which contains no language requiring that the *same* jury determine guilt and sentence.

In regard to the final question, the Court determined that the type of evidence admissible in a penalty-phase proceeding is much broader than that admissible in the guilt phase and may include evidence of a defendant's character and nature of the crime. The Court suggested that a defendant should proceed first in offering argument and evidence to support a finding of mercy, with the State following with impeachment or rebuttal evidence. The defendant would then be entitled to offer rebuttal evidence.

Certified Questions Answered.

LDB v. Stanton, No. 34257 - 6/10/10 - Per Curiam

The respondent attorney was the subject of a disciplinary complaint involving a sexual encounter with a former client, who was an inmate at Pruntytown Correctional Center at the time of the incident. The respondent did not challenge the findings of fact or conclusions of law and agreed to the recommended sanction of admonishment, along with additional continuing education in ethics and payment of costs. The Court rejected the recommended sanctions.

The Court classified the respondent's actions as "the deliberate misrepresentations of a member of the State Bar to correctional officers...in order to gain access to an incarcerated person...[and] the subsequent abuse of trust occasioned by the attorney's taking advantage of the inmate." Noting that such conduct was a matter of first impression, the Court announced that any sanction short of disbarment would not send a "clear and resounding message" that similar conduct could not be tolerated.

Law License Annulled.

In Re: Nelson B., No. 35307 - 6/10/10 - Per Curiam

An abuse/neglect petition was filed in 2008 alleging that Nelson B. was at risk of imminent danger due to his father's mental illness and alcohol abuse. The appellant subsequently entered into a stipulation wherein he acknowledged the allegations in the petition and was granted a post-adjudicatory improvement period. The circuit court later entered a dispositional order, finding that the appellant had not fully complied with the requirements of the case plan. The court did not, however, terminate the appellant's parental rights but ordered that the child be placed in the legal and physical custody of his maternal aunt and uncle pending the filing of legal guardianship, subject to regular contact and visitation with the appellant.

The Court found that the DHHR had made all reasonable efforts to reunify the appellant and his child, but that the appellant's mental illness was such that he was presently unable to care for the child. The Court observed that the circuit court had employed a less restrictive alternative than termination of the appellant's parental rights, and had thus provided the appellant with the potential of an increased role if his conditions could improve and an opportunity to remain active with his child.

Affirmed.

In the Matter of Bryanna H. and Skylar H., No. 35306 - 6/09/10 - Per Curiam

The DHHR filed an abuse/neglect petition against the children's custodial mother, Robin M. The petition was based in part on allegations of domestic violence on the part of Robin's husband, and upon allegations that Robin M.'s new boyfriend had lost his rights to his own children because of a child abuse conviction in Florida.

Robin M. eventually entered into written stipulations regarding the abuse/neglect allegations and was granted a post-adjudicatory improvement period. The DHHR also amended the petition to include allegations that the appellant father had committed domestic violence against Robin M. in 1997 and had committed "emotional abuse" by helping to limit contact between the children and Robin M. The amended allegations eventually led to the appellant being adjudicated as an abusive parent. At a final dispositional hearing, the court ordered that the children be placed in the legal and physical custody of Robin M. The appellant appealed this ruling, arguing that the evidence was insufficient to support the abuse/neglect finding and that placement with Robin M. would not be in the best interests of the children.

The Court determined that there was no error in the court's finding that the appellant's conduct in permitting interference between the children and their mother constituted abuse/neglect. However, the Court noted that there was insufficient evidence on the record to explain why the appellant's home was not considered as an appropriate placement for the children, and that it was error to summarily place the children with Robin M. without consideration of the alternative of the appellant's home.

Affirmed in part, Reversed in part, and Remanded.

LDB v. Cavendish, No. 34259 - June 15, 2010 - Per Curiam

The respondent attorney entered into a series of stipulations with the Lawyer Disciplinary Board regarding his handling of a number of criminal cases. The respondent stipulated that while employed as a full-time public defender, he had represented private clients in contravention of W. Va. Code §29-21-17 (b). The respondent also admitted to receiving advance payments from a finance company for court-appointed casework that was not performed, performed while he was engaged at a former office, or performed for privately retained clients.

The respondent asserted that his misconduct was not intentional but was the result of memory loss caused by a cognitive impairment. He also indicated that he had lost many of his client records in an automobile accident, and that a computer malfunction had caused some of the false billing information.

The Hearing Panel Subcommittee determined that the respondent's conduct constituted violations of Rules 1.15 and 8.4(c) of the Rules of Professional Conduct. The Panel recommended a three-year license suspension, along with restitution and psychological testing as sanctions for his conduct. The Court adopted the recommendations and suspended the respondent's law license.

License Suspended.

State v. Larry T., No. 34744 - June 15, 2010 - Benjamin, J.

Juvenile petitions were filed against Larry T. charging sexual abuse in the first degree and sexual assault in the first degree. A juvenile referee found probable cause on the sexual abuse charge and the juvenile was then arraigned before the circuit court, at which time he entered a plea of "not guilty". The court then inquired whether the State planned to transfer the petition to adult jurisdiction, but the State indicated that such a decision was not planned.

The State later reversed its position (after dismissal of the sexual assault petition) and filed a motion to transfer the sexual abuse charge to adult jurisdiction. The motion was

granted and the appellant objected on three grounds: that it was improper to transfer after the appellant had entered a plea to the sexual abuse charge; that the court had failed to consider all of the required factors under W. Va. Code §49-5-10(g) for transfer; and that the court erred in finding probable cause on the sexual abuse charge.

The Court reversed and agreed with the appellant that it was improper to proceed on a transfer motion after the appellant had entered a plea on the sexual abuse charge. The Court noted that §49-5-10(b) bars a court from requesting an admission or denial from a juvenile until a transfer decision has been made.

Reversed and Remanded to Juvenile Jurisdiction.

State v. Lively, No. 34856 - 6/16/10 - Per Curiam

The appellant was convicted of felony murder with a recommendation of mercy in connection with a March 2005 fire at the home of a McDowell County physician. The State alleged that the appellant, along with an individual named Tommy Owens, had set the fire in apparent retaliation for the physician's dismissal of the appellant's mother from her job at the physician's office.

The appellant's primary contention on appeal was that the trial court had erroneously admitted evidence under Rule 404(b). The evidence included (1) testimony that the appellant and Owens had attacked and fought two men in October 2002; (2) the involvement of the appellant and Owens in an arson attempt in January of 2001; and (3) the theft by the appellant of a laptop computer from the arson victim on the day of the fire.

The Court determined that there was no error in the admission of

this evidence. The Court found that the trial court had not abused its discretion in concluding that evidence of the 2002 fist-fight and the 2001 arson attempt was admissible to show a common scheme or plan of the appellant and Mr. Owens to act in concert with one another to carry out crimes of violence. The Court rejected the appellant's argument that the 2001 and 2002 incidents were too remote in time to be admissible, noting that remoteness goes to the weight of the evidence and not its admissibility.

Affirmed.

State v. Day, No. 34723 - 6/18/10 - Per Curiam

The appellant was convicted of first degree murder and conspiracy in connection with the June 2002 beating death of Gerald King along a riverbank in Huntington. The State argued that the appellant and two co-defendants attacked Mr. King and that the appellant was the instigator of the attack. The appellant testified that his co-defendants were the aggressors and had struck the fatal blows to Mr. King.

The appellant asserted on appeal (1) that the trial court erred in admitting expert testimony from an unqualified witness; (2) that the State had introduced photographs which were later deemed inadmissible; and (3) the trial court had improperly denied his motion for a jury view of the crime scene.

The Court rejected the appellant's argument that testimony from a crime scene reconstruction expert witness should have been excluded. The Court noted that the appellant had assented to the witness's qualifications, stating that he had "absolutely

no objection" to his qualification. The Court also denied the appellant's argument that the State had failed to provide a summary of the witness's qualifications and opinions, noting that the appellant had not lodged his objection until the witness' direct testimony had been completed. (The Court also held that the appellant's argument regarding an opinion rendered by the expert was "invited error" because trial counsel had questioned the expert as to his opinion on the issue).

The Court also determined that the display to the jury of a series of black and white photographs of Mr. King's campsite, taken over one year prior to the murder but never admitted into evidence, was harmless error. The Court evaluated the issue of the photos under the "harmless error" analysis in *State v. Doonan*, 220 W. Va. 8 (2006) and held that the remaining evidence in the case was more than sufficient to convince the jury of the appellant's guilt beyond a reasonable doubt. The Court also rejected the appellant's argument that the trial court had improperly denied his motion for a jury view. The Court noted that the appellant had failed to properly preserve the alleged error for review and declined to address the issue.

Affirmed.

State v. Phillip and Nathaniel Barnett, No. 34806 – July 13, 2010 – Per Curiam

The appellants were indicted along with two co-defendants in connection with the August 2002 murder of a Cabell County woman. The appellants were tried jointly. At trial, co-defendant Brian Dement testified as to both his and the appellant’s involvement in the strangulation death of the victim. During direct examination, Dement admitted to having made prior inconsistent statements to the police and to private investigators retained by the appellants. In an audiotaped statement to one of the investigators, Dement denied any involvement in the homicide, telling the investigator that he and all of the co-defendants were innocent. Dement admitted to this statement during cross examination.

The trial court refused to permit the appellants to play the tape of Dement’s inconsistent statement, reasoning that since Dement had admitted to lying in the statement there was no need to play the tape.

The appellants were convicted of second degree murder and sentenced to lengthy prison terms. On appeal they presented a number of issues, but the Court limited its review to the appellant’s assertion that the trial court had erroneously denied them permission to play the actual tape of Dement’s inconsistent statement.

The Court determined that the appellant’s should have been allowed to present the taped statement to the jury. The Court noted that Dement was the sole witness to place the appellant’s at the scene of Ms. Crawford’s murder, and therefore his credibility was crucial to the State’s case. Reviewing the issue under the three-part test set forth in *State v. Blake*, 197 W. Va. 700 (1996), the Court determined (1) the prior statement was inconsistent with Dement’s trial testimony; (2) the area of impeachment was relevant and comported with the requirements of

Rule 613(b) of the rules of Evidence; and (3) the evidence would have been offered to address the pivotal issue of the credibility of the State’s key witness.

Reversed and Remanded.



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