

THE CAPITOL LETTER

*A Publication of the State of West Virginia
Public Defender Services
Criminal Law Research Center*

WHO ARE WE KIDDING? From the Executive Director

My tenure as the Executive Director of the West Virginia Public Defender Services has passed the six (6) months' mark. I thought it appropriate, therefore, to share my reflections as the calendar year ends.

My most poignant thought is that the system of appointment of private counsel is reaching a state of entropy. The general perception is that the system is being abused. And, indeed, this office is in the midst of a dozen investigations into potential voucher fraud.

And who are we kidding? If one reviews the published list of attorneys and the amounts that are paid, the pure mathematical analysis is that many attorneys in this state are consistently billing in excess of three thousand hours a year. As a former practitioner, I know this to be virtually impossible, especially over a three or four year period. And, sadly, I know of certain attorneys whose vouchers, when combined, have billable days in excess of thirty and forty hours, which, obviously, is impossible except perhaps on another planet. And I have reviewed hundreds of flagged vouchers and I am left with the impression that time entries are routinely exaggerated.

So, again, I ask: who are we kidding? Undeniable abuse exists. The math does not lie. Whatever the motivation, this is an unacceptable practice, both ethically and lawfully. And the practice is inherently unfair to the majority of attorneys who are accurate and honest in their submissions.

The entropy is this: If vouchers are routinely over-inflated and if the investigations into fraud continue to escalate, the system will have to change. The nature of the change is left to speculation, but this is one objective factor that weighs in favor of creating public defender corporations and, perhaps, expanding the existing offices. And one additional result is inevitable. The agency will be more aggressive in the review of vouchers, especially with respect to attorneys who are among the highest compensated. Unfortunately, more investigations into voucher fraud may then be commenced. And, notably, this certainly distracts from any discussion of increasing the rates of compensation.

As the new year begins, I ask that the attorneys who are involved with indigent defense reflect on this matter as well. I ask that everyone recommit to the preparation of vouchers that accurately and honestly reflect the legal services that were provided. Only through this recommitment will the emphasis be redirected from stopping the abuse of the system to the necessity of rewarding those who are committed as professionals to, and who act ethically in providing, indigent defense.

BABY STEPS: Stumbling & Bumbling

The date of November 30, 2013, was the deadline for completing the first step in the use of the agency's on-line voucher preparation program. However, as of this date, almost one-half of the panel attorneys have failed to take this first step, which was the creation of a "WV.gov" account. Baby's first steps are the most difficult ones, so the deadline is now extended to January 31, 2014. At that point, vouchers may be returned as improperly submitted if attorneys have not established the "WV.gov" account.

Why all the stumbling and bumbling on this first step?

First, the agency may not have reached you. A cross-check between the agency's voucher listings and the e-mail listings suggests that two hundred attorneys may not have received the communication. Accordingly, the agency is trying again.

Second, confusion may exist about what the "WV.gov" account is. The WV.gov account is no more than a means of identifying you. Every state employee has a "wv.gov" designation. Because you will be logging into a state maintained program, you are merely asked to adopt this uniform system for

Volume 2, Issue 1
January / February 2014

Inside this issue:

WHO ARE WE KIDDING? From the Executive Director	1
BABY STEPS: Stumbling & Bumbling	1 - 2
2013 Legislative Update	2 - 3
Supreme Court Recap	3 - 6
Notable Quotes / Voucher Updates	7
Points of Interest	8

identifying yourself when you log into the program. Indeed, this identification system was developed by West Virginia Interactive, an outside consultant, as a means of logging into any eGovernment application to which you might have access. Roughly stated, this is your "user id" for the voucher program and any other state government program to which you may have access.

Because it is your unique identifier, several restrictions exist. You must have a unique e-mail address. If the e-mail address is used by any other person in the system, it will not be accepted. Again, it is to be a "unique" identifier for you. The identifier must be in your individual

name, not in a firm name. It is identifying you as the “user,” and is not identifying the entity to be eventually paid. When you use the program under your identifier, the payee can be a firm or other entity, but the identifier must be related to you – the individual.

Third, security is a concern.

This “WV.gov” designation is merely an identifier. You cannot get into the on-line voucher system until you have submitted an access form, with this identifier, to West Virginia Public Defender Services. At that point, the users with access to the on-line program will be identified and their roles assigned.

Accordingly, if your secretary is going to be using the program, he or she needs a “WV.gov” account. But, again, this is merely for identification purposes. The actual privileges that this person will have in the preparation and processing of vouchers will be determined by you when you complete the access form. And, at any time, you can revoke these privileges.

Because this is a merely an identifier, the resignation of a person from your employment has no effect. The voucher system will note the resignation upon your entry of the fact into the system, but the “WV.gov” account will not be affected. The individual can use this identifier in the future to access other programs for other attorneys when privileges are afforded. But the “WV.gov” will remain that individual’s identification. At this stage, no security concerns are invoked.

Fourth, I can simply use another person’s “WV.gov” designation. No!!!! No!!!! No!!!! This is a means of identifying you. If you use another person’s designation, the agency will assume that the other person is the one using the program under

that “WV.gov” designation. Again, you can grant other persons limited privileges on your behalf when you submit your access application, but each of you needs a unique identifier.

So, hopefully, you now understand. You need to be identified to our system. This is the identification that will be used. It is unique to you. It is unique to each other user. It affords no privileges to the system. It is nothing more than an “ID.” More steps have to be taken before anyone can process a voucher for you.

Take the “baby step,” therefore, and create your identifier by going to <http://apps.wv.gov/accounts>. Sign up. Then you will start taking the steps necessary to establish access to, and to enjoy the privileges associated with, the agency’s on-line program for processing vouchers.

The deadline is now January 31, 2014, and if you have not established an account, then the processing of your vouchers will be affected. If you need assistance, you need only to contact the agency at (304) 558-3905 and ask for help. The website offers assistance as well.

**2013
Legislative Update**

By Ronni M. Sheets, Managing Deputy, Kanawha County Public Defender’s Office

Risk Assessments. The largest piece of legislation relating to criminal matters was Senate Bill 371, referred to as the Justice Reinvestment Legislation. A large part of this legislation involved the implementation of risk assessments. Risk assessments will now be done at many phases in the criminal justice process. They are first to be performed by regional jails within three days of arrest and placement in jail. W. Va. Code § 31-20-5g. The risk assessment currently used in the

regional jails is an abbreviated assessment. Under the statute, the confidential results of those tests are to be provided to the court, court personnel, the prosecuting attorney, defense counsel, and the person who is the subject of the pretrial risk assessment. Probation officers are to perform assessments “for any probationer for whom an assessment has not been conducted either prior to placement on probation or by a specialized assessment officer.” W. Va. Code § 62-12-6. These assessments are more extensive - generally the LSCMI is being used. The results are “confidential” but the statute is silent on who should receive probation officers’ assessments. Day Report Centers are also to perform these assessments.

W. Va. Code § 62-11C-10. The results are again “confidential” and the statute is again silent on who should receive Day Report Centers’ assessments. These assessments are to be used in determining sentence, suitability for Day Report (including Day Report as a condition of probation for up to a year or as a condition of parole), services in prison, etc.

(Example: A defendant may not be sentenced to Day Report unless he has a moderate to high risk of reoffending and a moderate to high criminogenic need. Departures from this rule are permitted only upon specific, written findings of fact justifying the departure. W. Va. Code § 62-11A-1g.)

Graduated Sanctions. Probation and parole now have statutorily set graduated sanctions. W. Va. Code §§ 62-12-10; 62-12-19. Arguably, graduated sanctions also apply to home confinement as the revocation procedures mirror those of probation. W. Va. Code § 62-11B-9. However, regarding probation (and, again, arguably home confinement) the court can depart from the guidelines if they make a specific written finding as to why a departure is necessary.

Expansion of Good Time Credit. Jail inmates sentenced to serve a 6

month sentence are now eligible to receive 5 days of good time credit for taking classes (domestic violence, parenting, substance abuse, life skills, etc.) This credit was previously available only to inmates sentenced to **more** than 6 months. W. Va. Code § 31-20-5d. General good time credit, however, is still available only for sentences of more than six months.

THE RULES OF ENGAGEMENT – W. Va. R. Crim. P. 17(b)

Rule 17(b) of the West Virginia Rules of Criminal Procedure, entitled “Subpoena”, provides:

“Defendants Unable to Pay.”

The court shall order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. If the court orders the subpoena to be issued, the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fee are paid in case of a witness subpoenaed in behalf of the state. “[emphasis added].”

Public defenders and panel attorneys should take notice that the fees of witnesses and the accompanying fees for service of process are not expenses to be submitted to the West Virginia Public Defender Services, but, instead, are fees and expenses to be paid in the same manner as, and from the same fund as, fees and expenses incurred by the prosecutor’s offices. The fees and expenses that are payable to witnesses, as a matter of law, are set forth in the provisions of W. Va. Code §59-1-16.

SUPREME COURT RECAP

The Ghosts of Offenses Past.

In the case of *State v. Fred S. Jr.*, ___ S.E.2d ___ (W. Va. 2013), 2013 WL 6605199, a memorandum decision was issued. The case is included for discussion because it can be used to demonstrate the effect that certain proposed revisions to the West Virginia Rules of Evidence will have. The defendant was charged with fifteen counts of sexual offenses involving a fourteen year old stepdaughter. At issue was Rule 404(b) evidence that had been admitted of a similar charge and another uncharged incident in North Carolina involving a different stepdaughter.

The trial court gave the cautionary instruction regarding the North Carolina charge and incident which provided that “other crimes, wrongs or acts, evidence of crimes ... is not admissible to prove the character of a person in order to show that he acted in conformity therein” but it could be used to show “motive, opportunity and intent, and your consideration is only limited to those things only and nothing else as far as that evidence is concerned.” The Supreme Court found that “a reasonable juror would have clearly understood this instruction” and “would not have been influenced, or misled by petitioner’s prior conduct in North Carolina.” While this view of the world can be debated, the Supreme Court went on to find that, even if it was an error, the “error was ultimately harmless” because “the jury would have come to the same conclusion.”

The analysis of such issues will change if the proposed revisions are adopted because, under the

provisions of the new Rule 414, “in a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation” and the “evidence may be considered on any matter to which it is relevant.” Rule 413 provides for the same “permitted use” in a sexual assault case.

Simply, no issue under Rule 404 (b) would have existed for appeal in this matter under these new rules of evidence.

A Defendant with a Cinematic Appeal.

In the case of *State v. Clark*, ___ S.E.2d ___, (W. Va. 2013), 2013 WL 6224345, the Supreme Court of Appeals of West Virginia scrutinized the use of the federal “investigative subpoena” that the United States Attorney General is empowered to issue under the provisions of 21 U.S.C. §876(a) in order to further the government’s investigation with respect to “controlled substances.” Numerous federal officials are authorized to issue “DEA” subpoenas and the resulting information is permitted to be released to “State and local officials engaged in the enforcement of laws related to controlled substances.” 28 C.F.R. §9.103.

The cinema was robbed by a lone individual on several occasions. The conclusion was reached by the investigating officer that the robber was aided and abetted by a cinema employee. Cell phone records obtained through a DEA subpoena established the link between an employee, who was the defendant, and another individual, who later confessed. The issue on appeal arose over the manner in which the cellular phone records were obtained and then distributed to the officer investigating only the robbery.

A motion was made to suppress all information obtained through the DEA subpoena. And the argument was simple: No drug-related activity was being investigated and, therefore, the subpoena was improperly obtained and the information from the cellular phone records was improperly released to the local police officers.

The State’s principal witness in the suppression hearing was a local officer who was a part-time security officer at the cinema. Because the defendant, a fellow employee, had a new helmet, jacket, and motorcycle but lived in subsidized housing, the officer suspected illicit income was the source. He asked an assistant manager who informed the officer that the defendant sold marijuana.

The part-time security officer happened to be a deputized federal agent as part of a federal-state task force. So, the State’s testimony was that the part-time security officer, who worked at the cinema that was robbed, was actually involved in a drug investigation and was not involved in the robbery investigation, which was handled by another local police officer. The officer then became a conduit for information from the federal agency on the drug investigation to the local police force on the robbery investigation.

A majority of the Supreme Court saw through the ruse. The subpoena was issued to assist in the robbery investigation and any drug nexus was attenuated. Essentially, the State failed to provide a “believable” explanation for the issuance of the subpoena.

So, did the exclusionary rule preclude the use of the cellular phone records? “No,” says the Supreme Court because the defendant “had no reasonable expectation of privacy in the phone records under the Fourth Amendment to the United States Constitution ... and under the West Virginia Constitution ...” Even the dissenting opinion agreed with this conclusion.

But the Supreme Court further reasoned that the critical issue in the case was that a local officer “purposefully misused the federal administrative subpoena to shortcut the procedural requirements for appropriately obtaining a search warrant for the phone records from a state judicial officer.” The Supreme Court concluded, therefore, that the “prosecution of this case has been tainted by the Huntington police department’s egregious conduct.”

But, again, the Supreme Court highlighted that it was not the defendant that had suffered from the “wrongdoing,” but, instead, it was the “DEA” and the “integrity of the court system.”

The Court then found, therefore, that its inherent power to protect and preserve the integrity of the judicial system would enable it to exclude the evidence even though the defendant’s constitutional rights had not been violated.

But, guess what? After determining that it could exclude the evidence *even though no constitutional rights were violated*, the Court then determined that it would not suppress the evidence because the “integrity” of the judicial process was preserved, principally because, in somewhat circular reasoning, *no constitutional rights were violated*. The Court also found that a proper warrant could have been obtained and, even though the discussion was about the “integrity” of the court system, the failure to do so was not fatal. Essentially, the entire discussion about the Court’s exclusionary power was purely academic and, indeed, the dissent described it as “academic puffery.” The end result was that the defendant’s conviction was affirmed.

Why are you only now causing Flack?

In the case of *State v. Flack*, ___ S.E.2d ___ (W. Va. 2013), 2013 WL 6224332, the defendant and three men conspired to commit a burglary of the home of the defendant's uncle. In the course of the burglary, the defendant's second cousin was shot and mortally wounded by one of the defendant's accomplices.

The accomplice who shot and killed the defendant's cousin testified at the defendant's trial. He specifically testified about his own guilty plea. The defendant's counsel did not request a limiting or cautionary instruction regarding what weight should be given to the fact that the witness had pled guilty to the murder on which the defendant was being tried as an accomplice.

The issue was whether the trial court had to, *sua sponte*, give a limiting instruction that the issue of the guilty plea went only to the credibility of the witness and was not for the purpose of proving the guilt of the defendant. In a previous opinion, reported in *State v. Caudill*, Syl. Pt. 3, 289 S.E.2d 748 (W. Va. 1982), the Supreme Court had stated that "a failure by a trial judge to give a jury instruction so limiting such testimony is ... reversible error."

The Court limited its previous syllabus point to only the situation in which the defendant has requested such an instruction. The reasoning was that, as a matter of defense strategy, a counsel might not want the limiting instruction because "such an instruction could emphasize the damaging testimony." Intriguingly, the Court cited to a legal scholar's opinion that "research shows that the typical limiting instruction has little chance of being understood by a jury" and "research shows that that the jurors are more prone to listen to the inadmissible evidence after they have been told to disregard it." Admittedly, the

Supreme Court was citing to the scholarly work to demonstrate why a "defense counsel" might not want the limiting instruction and was not adopting the research or the conclusions. But it is nonetheless ironic that, in many other opinions in which objections were made, the Supreme Court found the "error" of allowing inadmissible evidence "harmless," especially when a cautionary instruction had been given.

The Court affirmed the conviction.

There is no Place like Home.

In the case of *State v. Davis*, ___ S.E.2d ___ (W. Va. 2013), 2013 WL 6184033, the Court determined in a memorandum decision that the defendant was not entitled to credit against his sentence for the time he served in home confinement during his participation in the drug court program. The Court reasoned that the confinement for the drug court's purposes did not meet the requirements of the Home Incarceration Act, W. Va. Code §§62-11B-1, *et seq.* The provisions of the Act require the defendant to be subject to oversight by a probation officer (rather than a drug court treatment team), to pay the home incarceration fee (rather than having the drug court program pay the costs), and to not be eligible for days off for good behavior and performing community service (rather than being rewarded by the treatment team). Accordingly, the defendant was not entitled to the credit against his later sentence for the time he served in home confinement under the auspices of the drug court.

Don't end your Sentences with a Probation.

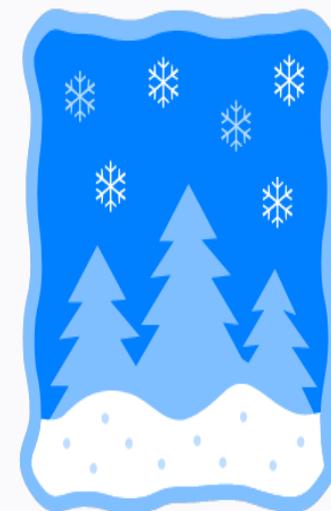
In the case of *State v. Workman*, ___ S.E.2d ___ (W. Va. 2013), 2013 WL 6183989, the defendant "allege[d] that the circuit court violated his due process rights by imposing a harsher sentence on appeal from magistrate court." The

magistrate court had found the defendant guilty of domestic battery and suspended the resulting one year jail term in lieu of one year of *unsupervised probation*. On appeal, the circuit court affirmed the conviction and imposed the one year jail term, but suspended the term in lieu of one year of *supervised probation*. The governing syllabus point dictates that due process is denied when the sentencing judge in the trial *de novo* "imposes a heavier penalty than the original sentence." The Court found, however, that probation was not a penalty. Specifically, "probation is not a sentence for a crime but instead is an act of grace upon the part of the State to a person who has been convicted of a crime." Accordingly, the harsher terms of probation did not constitute a harsher penalty.

A Jury of Whose Peers?

In the case of *State v. Smith*, ___ S.E.2d ___ (W. Va. 2013), 2013 WL 6152397, the defendant had been charged with the sexual abuse of his three nieces. The defense counsel challenged the failure to remove several jury members from the panel who "divulged during voir dire that either they were victims of sexual abuse/molestation, or they had a close family member who was sexually abused." Indeed, the jury foreperson had stated that she was molested as a child and that her father had been prosecuted for the crime. The Supreme Court found that no "statutory or common law per se disqualification based on victimhood" existed. Instead, the defendant had to show "bias or prejudice to justify a strike for cause." The Supreme Court then found that voir dire had been conducted in a manner "which safeguarded petitioner's right to be tried by a jury free of bias and prejudice."

The case also discussed the exclusion of all the defendant's witnesses for violation of the sequestration order. A brother-in-law had been taking notes during



the trial and then discussed the testimony with the defendant's brother and sister, who were to be witnesses. The defendant's motion for mistrial was denied, and the State's motion to exclude the witnesses was granted. The Supreme Court upheld the trial court's exclusion of the witnesses because the violation was "very deliberate and planned" and "was so egregious it rendered any potential testimony from these witnesses not credible."

Notably, the general rule is that merely violating the sequestration order does not result in exclusion. The purpose of the sequestration order is to "gain assurance of credibility, and its violation is a legitimate subject of comment in this respect." For the witness to be disqualified from testifying, therefore, "the violation has [to have] so discredited the witness to render his or her testimony incredible as a matter of law." And, in this matter, the trial court did not even speak to the witnesses, so it is difficult to discern why the ultimate sanction was imposed, especially when no evidence was adduced that the defendant had encouraged this violation, except for the sterile fact that the defendant was related. Perhaps attention should be paid to the footnote in which the Court stated, "we note that petitioner made no proffer as to what the testimony of the witnesses would have been had they testified." Simply, it is not clear from this memorandum decision what line was crossed that required exclusion, rather than an instruction from the judge to the jury that the jury could consider the witnesses' credibility as compromised. If you are in this situation, you must make a proffer of the evidence that is being excluded so that the prejudice can be ascertained.

A Lullaby for an Alibi.

In the case of *State v. Adkins* __ S.E.2d __ (W. Va. 2013), 2013 WL 6183991, the prosecutor, in the rebuttal portion of his closing statement about the defendant's

guilt on drug charges, made reference to the defendant's failure to call an alibi witness that had been mentioned in the defendant's testimony. No instruction to the jury was given to disregard the failure to call an alibi witness. The Court found that the prosecutor's remarks did not amount to the "unlawful shifting of the burden of proof" because the remarks were merely a "reasonable inference based upon testimony introduced by the defense and intended to question the veracity of testimony by the defense and intended to question the veracity of testimony from petitioner and her husband." In other words, the prosecutor could not argue that the defendant failed to provide an alibi, but once she did provide an alibi, the prosecutor could comment on the lack of evidence about the alibi.

The Court further found the prosecutor's comments to be isolated and overwhelmed by the remaining testimony from a confidential informant regarding her sale of drugs. The Court finally found that the prosecutor did not intend to divert the jury's attention to extraneous matters, even though the remarks were reserved for rebuttal. Instead, the remarks related directly to an issue raised in the defendant's closing argument

Your Jail Time ain't Over Till it's Over.

In the consolidated appeal of *State v. Hargus* and *State v. Lester*, __ S.E.2d __ (W. Va. 2013), 2013 WL 6050695, constitutional challenges were made to the "extended supervision statute for certain sex offenders" set forth in W. Va. Code §62-12-26(g)(3). Defendant Hargus "pled guilty to one count of possession of materials depicting a minor engaged in sexually explicit conduct" and was sentenced to "two years of incarceration, a period of thirty years extended supervision, and lifetime registration as a sex offender." Defendant Hargus was held in violation of his supervised release by failing to provide an

alias to the state police, failing to provide his social security number, and providing a false date of birth. Defendant Hargus was then sentenced to serve five years of his supervised release period of thirty years in the penitentiary and, upon release, was to serve a supervised release period of twenty-five years.

Mr. Lester was found to have violated a sex offender condition and was sentenced to serve two years of his supervised release period by incarceration.

Again, the primary issue was "the constitutionality of the portion of W. Va. Code §62-12-26 that permits the revocation of supervised release and additional incarceration when a sex offender violates a condition of supervised release." The statute providing for a period of supervised release had been held to be constitutional in *State v. James*, 710 S.E.2d 98 (W. Va. 2011). This appeal concerned, however, the "modification, termination, or revocation of the supervised release portions of the defendants' sentences."

Simply, by a finding of a violation by "clear and convincing evidence," revocations of the period of supervised release can result in additional periods of incarceration.

The first notation was that this punishment was attributable to the original crime and not the activities that resulted in the violation. Restated, "treating postrevocation sanctions as part of the penalty for the initial offense" avoids many constitutional issues, such as the lack of a requirement of guilt beyond a reasonable doubt.

Moreover, the Court found that equal protection was not denied simply because the statute only applied to sex offenses. The legislature had the authority "to criminalize certain conduct and to determine punishment for that conduct." The defendant could not complain "that those who violate

different criminal statutes are punished differently than he is." Only if someone committing the same crime was treated differently would equal protection be a consideration.

Finally, the Court refused to find that the sanctions for violating conditions of supervised release were disproportionate to the crime and constituted, therefore, cruel and unusual punishment. The Court stated that child pornography was a "heinous" offense and the violations constituted a pattern of dishonesty. Accordingly, the sanction was not disproportionate to the crime and did not "shock the conscience or offend fundamental notions of human dignity." The other defendant was similarly denied relief.

An additional issue raised was the complete ban on the use of the computer, which one defendant argued was a first amendment violation. Indeed, federal cases found that a lifetime ban on the use of social media was too restrictive and constituted a "greater deprivation of liberty than was reasonably necessary." The Court found that because the defendant "has shown a propensity for downloading sexually explicit material involving minors onto his computer," a restriction of use of the internet, "while in his residence," was not unreasonable, especially because the provision did not indicate it was in effect for the remainder of his life. The opinion does raise the possibility, therefore, that conditions might be imposed that would be unconstitutionally restrictive, such as the banning of "all" computer usage or the "lifetime" restriction against such use.

Words can hurt you.

In the case of *State ex rel. Ash v. Swope*, __ S.E.2d __ (W. Va. 2013), 2013 WL 5976106, the issue of the guardian ad litem's ethical duties to his or her ward was decided. In this case, the

guardian ad litem was appointed for the incarcerated defendant for proceedings in family court, which involved a domestic violence petition against the defendant. The guardian ad litem met with the incarcerated defendant and was instructed to deliver a message to the family court that if the petitioner did not leave him alone, he would go to her place of employment and kill her. When the message was delivered at the proceeding, the incarcerated defendant was then charged with intimidation of, and retaliation against, a witness. The prosecutor subpoenaed the guardian ad litem, who moved to have the subpoena quashed because the "statement was a confidential communication protected by the attorney-client privilege." The circuit court quashed the subpoena.

The Supreme Court affirmed that, similar to its holding with respect to guardians ad litem for children in abuse and neglect proceedings, "because many aspects of a guardian ad litem's representation of an incarcerated person in a family court proceeding comprise duties that are performed by a lawyer on behalf of a client, the rules of professional conduct generally apply to that representation." However, the rule of confidentiality of information is one which is "under the exclusive control of the client rather than the attorney." Moreover, the information "must be intended to be confidential." Accordingly, the incarcerated defendant's statement to the guardian ad litem was not confidential because the defendant directed the attorney to "disseminate his statement to everyone at the family court hearing." The Supreme Court found, therefore, that the circuit court should not have quashed the subpoena and granted the writ of prohibition.

Doubling a Sentence is Not

Necessarily Doubling the Jeopardy.

In the case of *Tony T. Gerlach v. David Ballard, Warden*, ___ S.E.2d ___, 2013 WL 5814115, an issue of Double Jeopardy was raised. The issue arose because the petitioner in this habeas proceeding had been convicted of two offenses arising out of one incident. The convictions were for the offense of second degree murder and the offense of the death of a child by a parent, guardian or custodian. For each conviction, the petitioner received a 40 year sentence, which was to be served consecutively.

Justice Loughery explained that the Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and Article III, Section 5 of the West Virginia Constitution afforded protection against multiple punishments for the same offense. See Syl. Pt. 1, *State v. Gill*, 416 S.E.2d 253 (W. Va. 1992) and Syl. Pt. 1, *Conner v. Griffith*, 238 S.E.2d 529 (W. Va. 1977).

The resolution of the issue required the determination of legislative intent. Because the legislature has the substantive power to define crimes and prescribe punishments, the sentencing court cannot exceed the legislative limits on an offense by imposing multiple punishments for the same offense. So, was this one offense or two separate and distinct offenses, warranting multiple punishments?

The petitioner's main point was that the legislature had expressly declared "sexual abuse" and "sexual abuse by a parent, guardian or custodian" to be "separate and distinct offenses," but had not done so for the offense of the death of a child and the offense of second degree murder. Moreover, the identical penalty for both

offenses further indicated in the petitioner's opinion that the legislature intended the offenses to be alternative offenses.

The interesting facet of this argument is that the legislature had expressly provided that, if the malicious and intentional actions of a parent, guardian or custodian in depriving a child of food, clothing, shelter or medical care resulted in death, then these acts constituted murder in the first degree. W. Va. Code §61-8D-2. But if the actions involved infliction of pain, illness, or impairment upon the child which resulted in death, the governing statute provided that it resulted in a "felony" with a specified penalty of ten to forty years of imprisonment. W. Va. Code §61-8D-2a. Justice Loughery found that by defining the offense as a felony, rather than specifically designating it as an offense of murder as it did in the other statute, the legislature clearly intended it to be a separate offense from second degree murder.

In reviewing the statutes, the explanation might be that a life sentence for the death of a child in certain instances, without an accompanying intent to kill, should be imposed, while, in others, a lesser penalty should be imposed. The intent of the legislature might have been to simply attribute differing degrees of penalty for the death of a child, such as first and second degrees for murder, but accomplishing the same purpose in all the statutes: the elimination of the required element of "intent to kill."

The unanimous opinion of the court, however, was that this difference in language meant that this was to be a separate offense from second degree murder, which would require

"intent to kill," and the penalty could be imposed in addition to the penalty for second degree murder, if the additional element of "intent to kill" was, in fact, proved.



CELEBRATE SUCCESSES

The agency wants to celebrate the successes of the Criminal Defense Bar.



Accordingly, if you have had a success in a case, you are asked to send the information to the West Virginia Public Defender Services.

VOUCHER UPDATE

Totals paid during the period of July 1, 2013 – December 16, 2013

Total Vouchers Processed - 13,894

Most Highly Compensated Counsel

R. Keith Flinchum	\$110,273.00
Kurelac Law Office, PLLC	\$103,796.14
William M. Lester	\$90,883.50

Most Highly Compensated Service Providers

Tri S Investigations, Inc.	\$73,396.94
Forensic Psychology Center, Inc.	\$63,427.24
Forensic Psychiatry, PLLC	\$18,000.00

NOTABLE QUOTES

“While I appreciate a thoroughly reasoned opinion which may serve as an academic primer on particular points of law, the majority’s final analysis more closely approximates academic puffery. Such an endeavor is particularly dangerous where constitutional concerns are present and such pontification results in two syllabus points which purport to allow this Court to supplant the rule of law in the name of amorphous ‘societal interests.’”

Justice Margaret L. Workman, Supreme Court of Appeals of West Virginia, dissenting opinion in *State v. Clark*, ___ S.E.2d ___, (W. Va. 2013), 2013 WL 6224345. Justice Allen H. Loughry joined in the dissent.

Honorable Earl Ray Tomblin - Governor

Ross Taylor - Secretary of Administration

Dana F. Eddy - Executive Director,
Public Defender Services

Pamela Clark - Criminal Law Research Center
Coordinator/ Newsletter Design

State of West Virginia
Public Defender Services

One Players Club Drive, Suite 301
Charleston, WV 25311

Phone: (304) 558-3905
Main Office Fax: (304) 558-1098
Voucher Processing Fax: (304) 558-6612



Visit our website for contact information or to print a copy of this newsletter at:
www.pds.wv.gov

POINTS OF INTEREST.....



Did you know that the State of West Virginia has adopted the *Eyewitness Identification Act*, which is codified at W. Va. Code §§62-1E-1, et seq. The Act sets forth “eyewitness identification procedures.” The procedures include the requirement that “all lineups should be conducted blind unless to do so would place an undue burden on law enforcement or the investigation,” at which time the “folder shuffle method” is to be used, and “all lineups should be conducted in a sequential presentation.” W. Va. Code §62-1E-2(d), (e). By January 1, 2014, “any West Virginia law-enforcement agency ... shall adopt specific written procedures for conducting photo lineups, live lineups and showups that comply with this article.” The line of questioning of investigating officers when 2014 commences should be obvious. For “insight” into eyewitness issues, generally, you should review the article entitled *Protecting West Virginia’s Innocent*, which was written by Valena Beety, Chair of the West Virginia Innocence Project, and Ifeoma Ike, Policy Advocate with the Innocence Project, published in the October-December 2013 issue of the West Virginia Lawyer.

“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)