

# THE CAPITOL LETTER

A Publication of Public Defender Services  
Criminal Law Research Center

## From the Executive Director

Volume 3, Issue 1  
Jan/Feb 2015

### THE LAMENT:

I really want this column to be about positive accomplishments, heroic efforts, or professional milestones. However, the matter discussed below is so important and so critical that I must devote space in the newsletter to its thorough discussion.

### THIS HAS TO STOP!!!!

The agency is meeting with attorneys on the Watchlist to determine the resolution of the issue of billing in excess of reasonable hours. The startling revelation is that substantial time that is being billed as attorney time is actually the time of non-attorney staff. In this manner, 24 hour days billed by an attorney represent, instead, the time of the attorney and other staff. This is described as an "accepted practice." However, this is not an "acceptable practice."

A not as startling, but nonetheless disturbing revelation, is that records are not maintained that permit a meaningful discussion of vouchers. In fact, the agency is apparently many attorneys' default record-keeper.

The billing by panel attorneys is governed by statute, so whatever may be the norm in private practice or

with paying clients is not the norm for court-appointed attorneys. If you have not read the provisions of W. Va. Code §29-21-13a, you should and, frankly, you must. Your obligations are not subject to negotiation or agreement. The obligations are set in statutory stone.

Entitled "Compensation and expenses for panel attorneys," the section's very first directive is that "all panel attorneys shall maintain detailed and accurate records of the time expended and expenses incurred on behalf of eligible clients." This does not support the practice of completing a case and then going back to the file to reconstruct the time. Instead, this requires a contemporaneous recording of time, together with a detailed description of services, that can be consulted when the voucher is prepared. In this manner, the itemization of legal services attached to the voucher is both "detailed and accurate." If you do not have such a system, the online voucher system would be a useful tool, because you can enter your time into the system on a daily basis and save the accumulating entries until the time comes to submit the voucher. You would use the comments section to record the detail for each entry of time. Whatever system you use, the reality is that it must be fairly contemporaneous with the

delivery of the services in order for it to comply with the requirement that it be "detailed and accurate."

Notably, the reviewing court's obligation under the governing statute is to ensure that the vouchers are "valid." Accordingly, any submission that you make to the court is your representation that the entries are valid. If, instead, the time is someone else's and this is not disclosed, your submission constitutes a fraud upon the court and invokes a myriad ethical obligations and responsibilities.

The governing statute in subsection (d) provides that "the panel attorney shall be compensated at the following rates for **ACTUAL** and necessary **TIME EXPENDED** for services performed." In *Frasher v. Ferguson*, 355 S.E.2d 39 (W. Va. 1987), the Supreme Court of Appeals of West Virginia opined in a terse opinion that the statutory requirement of actual means the "actual" time spent representing a client.

The same subsection sets the rates of compensation for "attorney's work performed out of court" and "attorneys work performed in court." It is the attorney's work that is being compensation, not a staff member's work.

However, a reasonable billing opportunity for attorneys remains. If a staff person is performing a task that is more than administrative, the task might be considered as "paralegal" work, notwithstanding the person's actual title in the office. The governing statute provides for the reimbursement of the attorney for the time expended by the staff person on that paralegal task. The compensation is the hourly rate of compensation of the paralegal, but is not to exceed twenty dollars an hour.

So, if a staff person drafts (i.e., is not simply typing dictation of a draft) a motion for the attorney's review, then the attorney may submit as an expense with the voucher the compensation paid to the staff person for this work on an

### Inside this issue:

From the Executive Director	Cover - Pg. 2
Agency News & Information	Pg. 2, 3
Appellate Advocacy: AADvice column	Pg. 2-4
WV Supreme Court	Pg. 4, 9
Voucher Update	Pg. 10
"Quotes to Note" & Points of Interest	Pg. 11

# AGENCY NEWS & INFORMATION

hourly basis (not to exceed twenty dollars). The agency should be contacted for further instruction in submitting such claims for compensation.

Again, the agency is meeting with the attorneys' on the Watchlist. While the resolution of the meetings cannot be predicted with any certainty, one such meeting has resulted, in principle, to a conciliatory agreement. This may serve as blueprint for future meetings depending upon the circumstances of each case.

One aggravating circumstance in any such meeting will be the continuation of the practice of billing staff time as attorney time after the date of publication of this newsletter.

If you have engaged in this practice, you have an opportunity to contact the agency and to engage in discussions. If you are a highly compensated attorney with anomalies in billing that can only be explained by such a practice, you will eventually be asked by the agency to meet. Obviously, self-reporting would be a mitigation factor that might serve you well.

In conclusion, **THIS HAS TO STOP.** The agency is considering additional steps to take to broadcast this message. Eventually, panel attorneys may be required to certify with the submission of any voucher that the time set forth in the itemization of legal services is actually the attorney's work and not the work of a staff person. You should be alert for any further

communications from the agency on this subject.

## THE WATCHLIST

A fourth attorney has been added to the agency's watchlist, requiring the attorney to explain previous billing submissions and imposing additional requirements on future billing submissions. The grounds for placing the attorney on the watchlist were: "Since January 1, 2013, you have exceeded fifteen (15) hours of billing on ninety-six (96) separate dates. On forty-seven (47) of those dates, your daily billing exceeded twenty (20) hours. On sixteen (16) of those dates, your daily billing exceeded twenty-four (24) hours. And on five (5) of those dates, your daily billing exceeded thirty (30) hours.

## WANTED

The agency is seeking a contributor of juvenile related material. If you would be interested in providing summaries of significant cases relating to juveniles or providing summaries of legislation affecting juveniles, you are encouraged to contact the agency and express your interest.

## LET THE PAYMENTS BEGIN

HB 2933 has completed legislative action and has been signed by the Governor. The bill makes a supplementary appropriation to Public Defender Services for Fiscal Year 2014-2015. Accordingly, the agency anticipates resuming payments to panel attorneys very soon.

## ANNOUNCEMENT

The Board of Directors for the Public Defender Corporation for the Fourth Judicial Circuit of West Virginia is now fully configured. The chair of the Board is C. Blaine Myers, a practicing attorney with offices in Parkersburg, West Virginia. The remaining members of the Board are Darrin Campbell, George Cosenza, John Ellem, and Randy Snider. At this time, the Board is in the process of selecting the chief public defender for the office.

## WELCOME ABOARD

The agency is pleased to announce the employment of two persons. Brenda K. Thompson has been hired as the agency's general counsel. Brenda will assist the agency in developing legislative rules, in investigating billing issues, and in resolving legal issues. Brenda has twenty years of experience in the legislative process as an attorney for the House Committee on Government Operations. Kimberly Bennett has been hired as an Accounting Technician III for the agency and will be involved in the agency's processing of vouchers submitted by attorneys for payment.

## AADvice: Brainstorming can be a Mind-blowing exercise.

(from the Appellate Advocacy Division)

All is not lost if your client is found guilty after a trial. Hopefully, you will have developed areas for an appeal that will convince the Supreme Court that your

client's trial was unfair in some respect. When you are writing a petition for appeal, be sure that your fact section focuses not only upon the facts of the crime, but also upon the facts relating to adverse rulings from the trial court that denied your client a fair trial. Unfavorable facts cannot be ignored, but they can be presented in a way that minimizes their impact on your argument regarding the unfairness of the trial.

Sometimes, what we see as unfavorable facts are seen differently by others, and this can help you develop new ideas and perspectives about the presentation of your case on appeal. This is the purpose of brainstorming your case with other people, whether they are lawyers or non-lawyers. Another person's perspective may help you develop a different and possibly better way to present your facts and theory of unfairness.

The process of brainstorming should involve at least four people, including you. You should plan to schedule at least an hour for your brainstorming session so that you have adequate time to present the facts and get everyone's perspective. At least a few days in advance, you should provide everyone with a list of facts that are relevant to the unfairness of your case. When drafting this list, do not avoid what you think are bad facts because the State will certainly bring them up in their answer to your petition. Your fact list should err on the side of being over-inclusive rather than under-inclusive, because you may not think some facts are relevant, but someone else in your group may see them differently. Try

not to put your own spin on the facts, because the purpose of brainstorming is to get other people's opinions about your case. In advance of the session, you should also give everyone copies of documents that are relevant to the unfair rulings, e.g., excerpts of transcripts, witness statements, and police reports.

Once everyone is together in a room, you may plan to spend 5-10 minutes describing your facts, and 10 minutes for people to ask you questions about your case. Once the time for questions is over, you need to stop talking and allow everyone else to talk about your case. The group discussion should be a free-ranging, non-judgmental discussion of the issues and facts in your case. You should take notes of what is said during the discussion and resist the temptation to speak up and defend your original ideas, because the purpose of brainstorming is to receive other people's ideas about your case.

Everyone wants to win cases for their clients, and if you are willing to open up your case for discussion with others, you may get a better idea of how to win your case. Since the purpose of brainstorming is not to reinforce your own ideas, it is a good thing if the discussion ultimately convinces you to revise your strategy for the fact presentation and the argument that your client had an unfair trial.

### **AADvice: Preserving Error or, Don't fall Short of the Long Game**

by Matthew Brummond, Appellate Advocate

At each stage of a defendant's journey through the criminal justice system, he or she faces new and more difficult obstacles. At whatever

stage we enter their lives, we represent their best chance for relief and are obliged to make the best case we can, be it at trial, appeal, or habeas.

But in representing a defendant at one stage, we should not ignore the impact our decisions will have on his or her future prospects. Many actions (or worse, inactions) will have lasting consequences for our clients, and we owe it to them to consider the long game.

This means we must preserve error. There is no need to object to every minor technicality and there are good reasons for not doing so. However, if you choose to forego an objection or motion, it should be for an articulable tactical reason, because failure to provide the court an opportunity to correct the error prejudices your client in the moment and may also preclude your client from seeking relief later. At a minimum, not objecting will require future counsel to raise the issue as plain error or ineffective assistance of counsel.

When possible, object on specific state and federal constitutional provisions in addition to evidentiary or statutory grounds. As Jason Parmer, an Appellate Advocate, touched upon in an earlier article, this ensures violations of the United States Constitution can be raised in a petition for certiorari to the Supreme Court. Not every case will be cert-worthy, but if counsel does not preserve the issue on federal grounds early, there is little chance of getting relief even on an otherwise meritorious petition.

Filing motions and objecting on constitutional grounds also preserves errors for habeas

corpus. In both state and federal practice, habeas counsel can only raise constitutional violations. Especially in federal habeas, a district court cannot consider issues that the United States Supreme Court has not already addressed on constitutional grounds and which were not exhausted at the state level.

If trial and appeal do not go as planned, the next step may be a cert. petition to the United States Supreme Court. If this is not part of your normal practice but you believe your client has a cert-worthy issue, please do not hesitate to call Public Defender Services' Appellate Advocacy Division. We can help you evaluate the case for cert and possibly serve as counsel of record if you are not yet a member of the Supreme Court bar. We will also provide any other assistance you would like.

In any event, contact us early. Petitions for Certiorari are due 90 days after the West Virginia Supreme Court of Appeals decides the case or denies a petition for rehearing. For this reason it is prudent to file a petition for rehearing even if you do not expect the court to grant it. Doing so will buy more time to evaluate a potentially cert-worthy case, solicit amici, and prepare the petition. The best practice would be to contact the Appellate Advocacy Division before you even file your client's appeal (or better still, before trial) if you think you have a meritorious issue under the United States Constitution so we can help package it for eventual cert. if necessary.

Whether you forego certiorari or your petition is one of the 99.98% that are denied, the next step is state

habeas. There is no statute of limitations for filing a habeas petition in West Virginia, but there is a one year limit on filing the federal habeas that runs whenever there is no state procedure pending. It is therefore vital to file the state habeas quickly, or else the defendant may be time-barred for federal relief. Thomas J. Gillooly addressed the tolling of federal time in Volume 2, Issue 6 of the Capitol Letter in a must-read article for anyone doing post-conviction work in West Virginia. I will not repeat it here, but will add that an appointment order is not enough to toll the federal statute of limitations. The one year limit will continue to run until your client files a pro se petition. Therefore if a court appoints you to a habeas case make sure it did so pursuant to a habeas petition from the client. If no petition was filed, get the forms (available on the Supreme Court of Appeals' website) to your client as soon as possible and explain the importance of filing quickly.

One more consideration about federal habeas: without getting into too much detail about AEDPA, recall that federal courts can only grant relief on clearly decided constitutional law. If your cert petition argues that the Supreme Court should address an issue because it is unclear, this can negatively impact your client's ability to assert the issue in federal habeas even if the Supreme Court denied your petition. If the issue truly is unclear then this will not matter, but if you have a borderline case where you could argue the cert as an error correction case or as asking the Supreme Court to weigh in on an unclear area of law, consider the impact your petition could have later. If you claim the law is unclear, you may prevent your client from seeking federal habeas relief on that ground.



As lawyers it is our obligation to make the best case we can for getting our clients relief. That means thinking beyond the immediate procedural stage. So make sure to consider the long game, and when in doubt do not hesitate to contact the Appellate Advocacy Division. We will do what we can to provide any assistance you need.

*The Public Defender Services Appellate Advocacy Division can be reached at 304-558-3905.*

#### IT IS SO ORDERED:

*Hall v. Florida*, 572 U.S. \_\_\_, 134 S.Ct. 1986 (2014).

In a 5-4 decision, the United States Supreme Court of Appeals held that the State of Florida's statute violated the Eighth and Fourteenth Amendments of the United States Constitution because a person was required by the provisions of the statute to demonstrate an IQ below 70 before presenting further evidence regarding an intellectual disability that would preclude the person's execution for a capital offense.

In this matter, the defendant Hall and an accomplice kidnapped, beat, raped and murdered a pregnant 21 year old newlywed. The defendant and his accomplice then planned to rob a convenience store, but they encountered a deputy's sheriff who tried to apprehend them. The deputy's sheriff was killed. Hall was convicted of the murders and, for one of the murders, received the death penalty.

The defendant's IQ had been measured at 71 and, as

a result, the Florida state court refused to vacate his sentence of execution because the governing statute established that the threshold for any showing of intellectual disability was an IQ of 70. Florida's Supreme Court upheld the constitutionality of the statute.

As a quick aside, the opinion recognizes the change in the applicable nomenclature from "mental retardation" to "intellectual disability."

The first stage in Hall's journey to the United States Supreme Court began in 1987 when the United States Supreme Court held "that capital defendants must be permitted to present nonstatutory mitigating evidence in death penalty proceedings." See *Hitchcock v. Dugger*, 481 U.S. 393, 398 -99 (1987). Hall was resentenced and the horrific circumstances of his life were recounted to a jury, including the fact that his "mother would strap [Hall] to his bed at night, with a rope thrown over a rafter [and] in the morning, she would awaken Hall by hoisting him up and whipping him with a belt, rope, or cord." This was mostly attributed to the fact that he was "slow" or "made simple mistakes." The expert testimony included the fact that Hall had "levels of understanding 'typically [seen] with toddlers.'"

In the resentencing, the trial court stated, poignantly, it "suspect[ed] that the defense experts [were] guilty of some professional overkill,' because '[n]othing of which the experts testified could explain how a psychotic, mentally-retarded, brain-damaged, learning-disabled, speech-impaired person could formulate a plan

whereby a car was stolen and a convenience store was robbed.'" Not surprisingly, therefore, Hall was again sentenced to death.

The second stage in Hall's journey to the Supreme Court began with the United States Supreme Court's ruling that "the Eighth Amendment prohibited the execution of persons with intellectual disability." *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Five years later, a hearing was held in the state court to determine if Hall had an intellectual disability. IQ tests had been administered which established that Hall had an IQ ranging from 60 to 80. Two tests were eliminated for "evidentiary reasons," resulting in a range of scores from 71 to 80, placing Hall above Florida's threshold of 70. The State's stark assessment was, "under the law, if an I.Q. is above 70, a person is not mentally retarded."

Admittedly, the State of Florida was not endorsing the execution of individuals with intellectual disabilities, but was prescribing a standard that defined who was or was not intellectually disabled. The question on appeal was the constitutionality of this standard.

In resolving the constitutional question, the Supreme Court deemed it to be "proper to consult the medical community's opinions." The Supreme Court noted that "the medical community defines intellectual disability according to three criteria: significantly sub-average intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to

changing circumstances), and onset of these deficits during the developmental period."

The Supreme Court critiqued the Florida standard, thusly: "Florida's rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise." The Supreme Court noted that "the professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range." It was further noted that "because the test itself may be flawed, or administered in a consistently flawed manner, multiple examinations may result in repeated similar scores, so that even a consistent score is not conclusive evidence of intellectual functioning." It was repeated that "IQ tests are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks." Essentially, "intellectual disability is a condition, not a number."

Accordingly, the Supreme Court held, "This Court agrees with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." For this reason, the Florida procedure was

unconstitutional because it did not utilize the “range” assessment, but, instead, relied on a precise number that was imprecise.

The State of West Virginia does not have the death penalty, of course. But the central issue in this case and its precedent was what determines an intellectual disability. As stated by the Supreme Court, “those persons who meet the ‘clinical definition’ of intellectual disability ‘by definition ... have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.’ Thus, they bear ‘diminish[ed] ... personal culpability.’” These findings and these opinions should serve the criminal defense lawyer very well in not only the defense of certain criminal charges, but in the mitigation of sentences.

**Don't Xbox yourself into a Corner; or, I'll believe it when I see it or when I hear it from law enforcement.**

In the case of *State v. Taneyhill*, 2015WL570160 (W. Va.), the defendant was prosecuted for the theft of an Xbox gaming system and two games. After the theft was reported to police, the owner was advised to contact several pawn shops in the area. The owner found the Xbox gaming system and games at one of the identified pawn shops. The police discovered that the owner's cousin had signed the pawn shop receipt. The owner's cousin said she received the Xbox from the defendant with instructions to pawn the system. When questioned, the defendant made a recorded statement that he bought the

system from a friend. When questioned again after further investigation, the defendant elaborated in a recorded statement that he had received the Xbox system in exchange for his delivery of one-half ounce of marijuana.

Subsequently, the defendant was indicted. The defendant was convicted of burglary, petit larceny, conspiracy and obtaining money by false pretenses, for which he received consecutive sentences of one to fifteen years, one to five years, and one year for each of the remaining two charges. He was acquitted of the charge of delivery of a controlled substance.

The defendant appealed because the relatively undisputed facts were that he did not break into, or enter, the apartment from which the system was stolen.

But the defendant had informed his buyer where he could find gaming systems to steal and then trade for drugs. The Court opined that the defendant was an accessory before the fact because “he incited” the buyer to steal the system. Also, the defendant's conduct and actions were said to support a conspiracy even if no actual agreement existed.

The intriguing aspect of this case is that the defendant was acquitted of the delivery of drugs count, but was convicted of the theft of the gaming system as an accessory or conspirator. But the only reason the theft was tied to the defendant was that it constituted a suggested means of payment for delivery of the drugs. And the system apparently came into the defendant's possession. Nonetheless, the defendant was deemed to be a thief and not a drug dealer. If the jury

did not believe the defendant delivered any controlled substances, then was the defendant guilty of anything other than the receipt of stolen goods?

An additional fact was that the defendant's videotaped statements had been lost. Yet, at trial, the police testified regarding the defendant's statements.

The defendant argued that his due process rights under *Brady* were violated because the videotapes were potentially exculpatory or impeachment evidence. The Court dismissed the claim, in part, because it would not speculate about whether the videotaped statements had exculpatory or impeachment value. The Court cited to a published opinion as support for this proposition, but, in the other opinion, the motion to suppress was denied on other grounds, not on the grounds that the Court could only speculate about the materiality of the evidence.

Seemingly, the Court has engaged in circular logic. Potentially exculpatory or impeachment evidence was lost by the investigating officers. The motion to suppress is made on the grounds that purportedly exculpatory or impeachment evidence is unavailable to the defendant due to the actions of the investigating officers. The motion to suppress is denied because the Court cannot examine the evidence to determine if it is potentially exculpatory or impeachment evidence. Why is the Court unable to view the evidence? It was lost (through no fault of the defendant).

The Court further supported its decision, however, by finding that the loss was not willful, which is a required component of a *Brady*

violation.

The convictions were affirmed.

**Two Wrongs Don't Make A Constitutional Right.**

In the case of *State v. Sykes*, 2015WL508188 (W. Va.), the defendant entered a *Kennedy* plea to a count of “attempt to commit child abuse causing serious bodily injury” and a count of “attempt to commit child neglect causing serious bodily injury.” The charges arose out of the defendant's alleged physical abuse of his son that was noted by the mother when the defendant returned the son to the mother's North Carolina residence. At that time, a physical altercation occurred and afterward, both the mother and son had to be treated at a hospital. Presumably, the son's injuries were suffered in West Virginia and the mother's injuries were suffered in the altercation over the son's injuries.

The defendant was charged with the alleged abuse in West Virginia. The conviction of an “attempt” to commit the felonies by reason of the defendant's plea, rather than a conviction on the actual felonies, reduced the indeterminate sentence to one to three years in a penitentiary. The Court denied the defendant's application for probation and sentenced the defendant to consecutive terms of one to three years.

The defendant argued that the imposition of “consecutive” sentences violated the double jeopardy clauses of the United States and West Virginia constitutions. The reasoning was that the two counts related to the same “factual scenario” and the same “incident and injuries” and, therefore, he was receiving multiple punishments for the same act.

The Court then recited the applicable test for determining whether double jeopardy exists

when the same “act or transaction” violates two “distinct statutory provisions.” The test is “whether each provision requires proof of an additional fact which the other does not.” The Court determined that the defendant had “abused” the child by injuring him physically, thus supporting one charge, and “neglected” him by not getting medical attention for the resulting injuries, thus supporting the second charge.

The Court’s reasoning is inconsistent with its legal analysis, however. The Court seemingly reasoned that two different acts occurred which gave rise to two different violations while the double jeopardy analysis cited by the Court looked at one act supporting two charges. In any event, double jeopardy was not invoked by the circumstances.

The imposition of consecutive sentences was upheld.

**What’s in a Title? Certainly not grounds for an appeal.**

In the case of *State v. Ferguson*, 2015WL508172 (W. Va.), the defendant was convicted of five counts of child abuse resulting in injury under the provisions of W. Va. Code §61-8D-3(a). The defendant was sentenced to one to five years of home incarceration. The defendant was also subjected to ten years of supervised release.

The incidents of child abuse involved each of the defendant’s five children and consisted of the following: Striking the face of a child; striking three of the children with a belt; and grabbing a child. No sexual abuse was alleged.

The defendant emphasized that the title of the statutory provision governing supervised release, i.e.,

W. Va. Code 62-12-26, is, “Extended supervision for certain sex offenders....” Accordingly, the defendant postulated that the statute was not applicable to the defendant because she was not a “sex offender.”

The Supreme Court of Appeals noted, however, that subsection (a) provides for a period of supervised release for “a felony violation of the provisions of article eight-b, eight-c or eight-d” of Chapter 61 of the West Virginia Code. The defendant’s plea was to a conviction under the provisions of section eight-d. Accordingly, the statute was applicable.

The defendant argued that the inclusion of such an offense in the statute, in light of the title, must have been by “legislative accident or mistake.” The judicial response: “We decline to draw such a conclusion in this case.”

The appeal was denied.

**If you let the liquor talk, you could face sobering consequences.**

In the case of *State v. Pustovarh*, 2015WL148673 (W. Va.), the defendant appealed on the basis that he had been unwarrantably blocked from presenting a defense of either diminished capacity or voluntary intoxication. The defendant was convicted on one count of malicious assault and one count of domestic battery.

The defendant had become upset with his girlfriend because she had taken a phone call from someone and, as a result, the defendant threw the girlfriend’s chairs into a fire pit and then stabbed her pool with a knife. The physical altercation then ensued.

The Supreme Court of Appeals opined that the defendant’s defenses were not supported by the evidence and, therefore, the circuit court was not required to give instructions on either the diminished capacity defense or the voluntary intoxication defense.

The defendant did testify, however, that “he consumed several quarts of a highly alcoholic beverage.”

The Court did not consider this sufficient evidence to put the issue before the jury. First, the Court reaffirmed that diminished capacity is a defense that requires “expert testimony regarding a mental disease or defect that rendered the defendant incapable, at the time the crime was committed, of forming a mental state that is an element of the crime charged.” The defendant had failed to retained an expert by the court imposed deadline, even after a continuance had been granted for that express purpose.

Second, the Court reviewed “whether the facts are sufficient to justify the delivery of a particular instruction” under an “abuse of discretion standard” and, due to the defendant’s conviction, the evidence was to be “considered in the light most favorable to the prosecution.”

The significance is that the standard is not that some evidence must exist but, instead, that “sufficient” evidence must exist, which determination is made by a court before the issue is ever submitted to the jury. In this case, the defendant had admitted in his testimony that he “was not so drunk that [he] did not know what [he] was doing.” Moreover, the defendant had attributed his actions to being upset with his

girlfriend, thus contradicting the claim that the actions were attributable to the intoxication.

The lower court’s rulings were affirmed.

**How do you really feel about me?**

In the case of *Shrout v. Murphy*, 2015WL424901 (W.Va.), the petitioner was serving a sentence of life in prison, but with the possibility of parole. The petitioner had been denied parole due to “extremely negative” community and official sentiment and due to failing to complete “recommended programming.” The petitioner requested the West Virginia Parole Board to “provide him all documents the Board relied on in determining community and official sentiment.” The Board refused to do so based upon its governing regulation that, generally, compelled disclosure commensurate with the provisions of the West Virginia Freedom of Information Act, W. Va. Code §29B-1-1, et seq. A stated example of documents that would not be subject to disclosure, however, included “official, judicial, or community sentiment of any form.”

The petitioner relied upon precedent of the Court that “if no security concern exists to prevent disclosure, [an] inmate is entitled to access to information which will be used to determine whether he is paroled.” See Syl. Pt. 4, *Tasker v. Mohn*, 267 S.E.2d 183 (W. Va. 1980).

So, should the documents have been disclosed under this precedent?

The Court says, no, but bases its ruling on the grounds that the petitioner had failed to “carry his burden of showing that he was prejudiced by the non-disclosure of documents

regarding community and official sentiment.” The reason was that parole could have been independently denied due to the petitioner’s failure to complete the “recommended programming.”

Accordingly, the Court did not answer the basic question of whether the documents relating to “official, judicial or community sentiment” should be produced generally, but, instead, determined that because other grounds existed for denial of parole, “no clear legal right to those documents existed.”

#### **Age is just a number.**

In the case of *State v. Givens*, 2015WL148687 (W. Va.), the defendant appealed the sentence for his conviction, by plea, to first degree robbery. The defendant was sentenced to seventy-four years. The victim of the robbery, who was left in a vegetative state, was seventy-four years of age. The defendant argued, therefore, that the sentence was arbitrary since it was obviously based on the victim’s age.

The Court noted that the sentence would be reviewed under the “deferential” abuse of discretion standard. The record was said to have shown that the circuit court had considered other factors, such as the defendant’s criminal history, age, and culpability for the victim’s serious injuries. The Court especially took note of the seriousness of the injuries suffered by the victim including a fractured back, fractured facial bones, and punctured lungs. No discussion is had, however, regarding how the lower court arrived at the length of seventy-four years, a length equal to the victim’s age.

The Court found no error in the defendant’s sentence.

#### **If I acquitted myself so well at trial, why did you convict me?**

In the case of *State v. Cleveland*, 2015WL148681 (W. Va.), the defendant was acquitted of malicious assault, but convicted of the lesser included offense of misdemeanor battery. The defendant appealed on the ground that the jury verdicts were inconsistent. The defendant’s conclusion was based on the fact that the acquittal was due to the jury’s belief in his claims of self-defense, so how could they then convict him of battery?

The Court reiterated that “appellate review of a claim of inconsistent verdicts is not generally available.” However, the Court opined that, in this instance, “it is clear from a review of the record that the verdict was not inconsistent.” The Court then explained that the jury could have rejected the claim of self-defense, but determined that the prosecutor had simply not proved a case for malicious assault. The Court does not explain how this conclusion is “clear from the record,” but concludes that “the jury’s guilty verdict of battery is not inconsistent with its acquittal of malicious assault and unlawful assault.”

The appeal was denied.

#### **My word’s not good enough?**

In the case of *John C. v. Pszczolkowski*, 2015WL148690 (W. Va.), the petitioner appealed the denial of his *habeas corpus* petition on the grounds that he had the ineffective assistance of counsel. Specifically, the petitioner alleged that the trial counsel had failed to present to him an offer that was

indisputably made by the State.

The petitioner testified that he had not been told about the plea before trial and he would have accepted the plea if he had known. The petitioner was neither contradicted by, nor supported by, the trial counsel as counsel did not testify. The State confirmed that a verbal plea offer had been made.

The Court determined that the lower court could properly find that the petitioner’s testimony alone, even though not contradicted, was insufficient to prove that the plea offer had not been communicated. The circuit court found the petitioner’s uncontradicted testimony unreliable due to the petitioner’s lack of credibility. The Supreme Court stated it could not be expected to “assess witness credibility through a record.” Accordingly, the circuit court would not be “second guess [ed].”

Moreover, the Supreme Court stated that the second prong of the analysis was not met, which was that the outcome would have been different if trial counsel had been effective. Because the petitioner maintained his innocence throughout the trial and because the State would not have offered a *Kennedy* plea due to the fact that a child was mutilated, the petitioner would obviously “not have accepted the State’s plea offer because he believed he was innocent.” So, the failure to communicate the plea offer was of no consequence.

The circuit court’s denial of the petition was affirmed.

#### **I thought Missouri had Steamboats, not Steamrollers.**

In *Prokop v. Francis*, 2015WL508196 (W. Va.), the petitioner, a West Virginia resident, was facing extradition to the State of Missouri for failure to pay child support. The petitioner had not been to Missouri.

First, the petitioner argued that he should not be extradited because he was not present in Missouri when the alleged crime was committed. However, W. Va. Code §5-1-7 (g) expressly provides for the governor’s surrender of a person “even though the accused was not in that state at the time of the commission of the crime.” The only requirement is that the person committed an act in this state “intentionally resulting in a crime in the [other] state.” In this matter, the petitioner, while residing in West Virginia, refused to pay child support pursuant to a Missouri court order.

Second, the petitioner argued that he was not sufficiently identified as the person in the Missouri arrest warrant. Specifically, that person was described as 6’ 6” while the petitioner was only 6’ 2”. However, the arrest warrant had the following information correct: name, address, social security number, date of birth, gender, race and weight. Overall, the Supreme Court felt the identification of petitioner was sufficiently proved.

Third, the petitioner argued that he had been unlawfully incarcerated for one hundred and five days which is “beyond the ninety-day limit allowed by law.” However, the Supreme Court noted that for a portion of the period, the petitioner had been incarcerated on an additional firearms charge. Accordingly, the period for which he was only held on the fugitive warrant was less than ninety days. Moreover, even if he had been released, he

would have been immediately subject to re-arrest. By statute, the petitioner remains a fugitive subject to arrest even after release due to the expiration of the ninety-day period.

Fourth, the petitioner argued that he was being extradited for the collection of a civil debt which is precluded by the provisions of W. Va. Code §5-1-7(b). However, Missouri had charged the petition with a criminal offense based on “knowingly” failing to provide adequate support as a parent.

Fifth, the petitioner argued that Missouri had not exhausted all civil remedies because Missouri had not registered the child support order with the State of West Virginia under the Uniform Interstate Family Support Act. The circuit court simply took on its face the affirmation in the extradition documentation that all civil remedies had been exhausted. The Supreme Court agreed, stating that West Virginia was limited to ensuring the documents were in proper form and that the petitioner was the person named in the extradition papers.

Finally, the petitioner tried to argue that the Missouri criminal statute was unconstitutional because it shifted the burden to the defendant to prove an inability to pay the child support. The Supreme Court affirmed the circuit court’s refusal to consider such a constitutional issue as that remained the province of the demanding state.

In short, the Court affirmed the petitioner’s all- expenses paid trip to the State of Missouri.

**Could you use it in a sentence, please?**

In the case of *State v. Rogers*, 2015WL869323 (W. Va.), the defendant appealed the denial of a motion for reconsideration of his sentence on the grounds that he had been sentenced without a “Level of Service/Case Management Inventory (‘LS/CMI’) risk and needs assessment.” The defendant referred to the language of W. Va. Code §62-12-6(a) which provides that “each probation officer shall: ... conduct a standardized risk and needs assessment.” (Emphasis added). While the language refers to the duties of the probation officer, the defendant argued that the lower court improperly sentenced him in the absence of the LS/CMI assessment.

The Supreme Court upheld the lower court’s ruling that any error or irregularity in the pretrial sentence report was waived when the defendant and his counsel represented at the sentencing hearing that no additions or correction to the report were necessary and the petitioner represented that the report was accurate. Notably, the Supreme Court recited previous language that “silence may operate as a waiver of objections to error and irregularities at the trial which, if seasonably made and presented, might have been regarded as prejudicial.”

The opinion does leave open the question of whether the absence of the LS/CMI was, in fact, an error or irregularity that, if not waived, would have supported resentencing. In a concurring opinion, Justice Loughery proffers that the LS/CMI is one tool to be used by the sentencing court, but its absence would not have an impact on the sentencing in this matter due to the nature of the crime. Essentially, the use

of the information is, and should be, “entirely left to [the circuit court judges] discretion.”

**When is a door not a door? When it’s ajar and permits everything to come in.**

In the case of *State v. Lobb*, 2015WL135036 (W. Va.), the defendant appealed from his conviction, after a jury trial, of (i) domestic battery and (ii) battery as a lesser included offense of the charge of malicious assault.

The first ground for appeal arose out of the cross-examination of an investigating officer about whether any other suspects had been identified. The officer replied that he did not recall. The defense counsel presented a copy of the investigative report to the officer that was used to refresh the officer’s recollection and, in fact, it did because the officer identified another suspect at the time.

The State then moved for admission of the police report into evidence, to which defense counsel objected because it contained statements from witnesses who did not testify and referenced a prior domestic violence conviction. The trial court admitted the statement in its entirety.

The memorandum decision is somewhat confusing. Based upon these facts, defense counsel never moved the report into evidence and, accordingly, Rule 106 would not be applicable because it involves the admission of an entire writing when fairness requires this to be done upon a motion for admission of a portion of the writing. Defense counsel did not make such a motion, apparently.

However, the memorandum

decision does refer to defense counsel’s attempt to cross-examine the investigating officer regarding witness statements contained within the police report. It is unclear whether this is more than the mere refreshing of recollection sequence described previously, but it must have been. The Supreme Court held that, because the defense counsel was allowed to refer to favorable testimony, fairness dictated that the State should be able to introduce the entire report notwithstanding the hearsay nature of the statements.

Actually, defense counsel was hoisted on his or her own petard. The cross-examination regarding other witnesses’ statements was permitted on the basis of defense counsel’s argument that the statements were not hearsay based on a “police report exception.” If it was not hearsay in the defense counsel’s hand, then it could not be hearsay in the State’s hands.

Another issue concerned whether a trial on both a domestic battery charge and a malicious assault charge was proper. The Supreme Court found it to be proper because each charge contained elements requiring proof of facts that the other did not. Due to this, the charges were distinct and did not give rise to double jeopardy issues.

The remaining issue was whether the medical service providers that treated the victim should have been able to testify about the victim’s identification to them of who had inflicted the injuries. The State argued that the exception to hearsay for statements made in the course of a medical examination applied. The Supreme Court did not discuss the nature of the statements at all, but stated without discussion that the Court did not abuse its discretion in admitting the

evidence. The Supreme Court did state that any error was harmless because the victim testified at trial and identified the defendant as her attacker.

Interestingly, Justice Davis dissented, but no opinion is provided.

**If spitting is a battery, is slobbering an assault?**

In the case of *Libert v. Kuhl*, 2014WL4650921 (W. Va.), a magistrate declared a mistrial and ordered a new trial. The petitioner requested a writ of prohibition against the magistrate court to prevent the court from proceeding with a new trial. The trial was over a battery charge (no pun intended) involving the petitioner’s alleged spitting in the eye of a neighbor in the course of an altercation with another neighbor. The petitioner had made a video recording of the incident. The magistrate court ruled that the videotaped recording could not be played for the jury because, somewhat quizzically, the recording did not have a time stamp on it. This is quizzical because, presumably, the very contents of the recording would have provided the timeframe and certainly the witnesses could

have authenticated the recording. Apparently, defense counsel experienced a similar frustration and in his opening stated, “[my client] has a video camera in his hand to record the incident ... That video you will not see due to the court’s ruling.” Upon objection, the jury was instructed “to disregard the mention to [sic] the videotape.” The state’s first victim, i.e., the spittee, volunteers in an answer that the petitioner “had his video camera on his shoulder.” The State moves for a mistrial which is granted.

The Supreme Court recited its precedent that “a trial court is empowered to exercise this discretion [i.e., to declare a mistrial and order a new trial in a criminal case] when there is a ‘manifest necessity’ for discharging the jury before it has rendered its verdict.” Without the existence of “manifest necessity,” “a trial court’s discharge of the jury without rendering a verdict has the effect of an acquittal of the accused and gives rise to a plea of double jeopardy.”

The Supreme Court determined “the inadmissible evidence was referenced

intentionally, during opening statements, the most impressionable time for a jury, creating an irreparable prejudicial scenario.” Moreover, a limiting instruction was found to be unavailing as “permitting the reference to inadmissible evidence frustrates the public interest by tainting the jury and prejudicing the State through the obvious implication that evidence was being withheld. [Therefore] the damage was already complete and irreversible.”

Accordingly, the order denying the writ of prohibition was affirmed.

The case is included for the reason that some editorializing is appropriate. For spitting in someone’s eye, a trial is held, a writ of prohibition is prosecuted, an appeal is taken, a decision is issued, and a retrial is granted. Surely, judicial resources could be better allocated.

**You should have just listened to me to begin with.**

The reported opinion of *State v. Coles*, 763 S.E.2d 843 (W. Va. 2014), is significant for two reasons. First, the

Supreme Court of Appeals of West Virginia affirmed that state law would comport with federal law as follows: “if a guilty plea is shown to have been intelligently and voluntarily entered into, generally it cannot be directly or collaterally attacked on double jeopardy grounds.” In other words, the entry of a plea constitutes a waiver of many potential constitutional deficiencies, including “double jeopardy.”

Second, the Court took the opportunity to overturn its decision in 2001 reported as *State v. Rogers*, 547 S.E.2d 910 (W. Va. 2001). In *Rogers*, the Court found that conviction and sentencing of a defendant for false pretense, which existed in common law, and for a fraudulent scheme, created in 1995, violated the double jeopardy prohibition. Justice Davis wrote a dissenting opinion. In this matter, Justice Davis wrote the majority opinion and the Court held that *Rogers* should be overturned because under the Court’s general analysis, each offense required proof of an act or acts that the other did not require. Accordingly, double jeopardy is not involved even though the offenses relate, generally, to the same transaction or

**VOUCHER UPDATE**

For the period of July 1, 2014 through February 28, 2015, West Virginia Public Defender Services has processed 18,182 vouchers for payment in a total amount of \$13,272,935.18



**Most Highly Compensated Counsel**

**For the period of July 1, 2014, through February 28, 2015:**

Christopher G. Moffatt	\$ 110,486.50
Law Office of David B. Kelley	\$ 110,128.50
William T. Rice	\$ 109,758.50
William R. Whitt	\$ 101,673.50
R. Keith Flinchum	\$ 101,010.50

**Most Highly Compensated Service Providers**

**For the period of July 1, 2014, through February 28, 2015:**

Tri S Investigations, Inc.	\$ 65,090.93
Jones, Dykstra & Associates, Inc..	\$ 60,807.36
Forensic Psychiatry, PLLC	\$ 32,700.00

# Save the Date

**PUBLIC DEFENDER SERVICES**

**2015 ANNUAL CONFERENCE**

**STONEWALL RESORT IN ROANOKE, WV**

**JUNE 18 & 19**

**Honorable Earl Ray Tomblin - Governor**

**Jason Pizatella - Acting Secretary of Administration**

**Dana F. Eddy - Executive Director**

**Public Defender Services**

**Donald L. Stennett - Deputy Director**

**Criminal Law Research Center**

**Pamela Clark - Coordinator/ Newsletter Design**

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

Website: [www.pds.wv.gov](http://www.pds.wv.gov)

### HOW DO YOU SPEND YOUR TIME?

Entry from an approved voucher:

"Poo hit fan at school, threaten Mr. \_, conf with Principal."

### "Quotes" to Note

"In their misguided quixotic chivalry toward dogs, the three members of this Court constituting the majority have not only perverted the law, but have forgotten that human beings also have value; and when an animal is vicious, people need protection from them. ... We all love dogs. I love and remember my dogs, Skippy, Jordy, Toby, Lucky, and Godzilla, like they were my family. And certainly vicious dogs are usually the result of mistreatment by a human. By way of analogy, the root of adult criminal activity often has its origin in severe child abuse. I will fight long and hard to protect abused children and to make our system more effective in intervening in their lives before they grow up and potentially become violent themselves. But once they have become violent, society at large must be protected. Similarly, once a dog has become vicious, human beings (and especially children) must be protected from death or injury from dog attacks." Justice Workman, dissenting opinion, *Robinson v. City of Bluefield*, 764 S.E.2d 740 (W. Va. 2014).

"In complete disregard of the unfortunate truth that not all dogs are like the beloved Lassie, a vicious dog has been granted a pardon by the highest court of this State. ... While I, too, love animals, and have fond memories of my childhood companion and faithful dog, 'Bozo,' my affinity does not blind me to the sad reality that some dogs are dangerous and vicious, and inflict serious injuries, and even death, on innocent victims." Justice Loughry, dissenting opinion, *Robinson v. City of Bluefield*, 764 S.E.2d 740 (W. Va. 2014).

"I fully understand my dissenting colleagues' reliance on emotion in reaching their conclusions in this case. Cases involving dogs generate a great deal of emotions. This is especially true when, as here, a dog has seriously injured someone. It is important, however, that we, as a Court, maintain our focus on the law of the case, not what we wish the law to be – but isn't. While it is tempting to want to expand our role into that of policy, rather than that of law, the policy determinations herein are those of the Legislature, not this Court. It is the Legislature which has set forth the law which determines this case and it is for the Legislature to change that law if a change is warranted." Justice Benjamin, concurring opinion, *Robinson v. City of Bluefield*, 764 S.E.2d 740 (W. Va. 2014).

### POINTS OF INTEREST



### Did you know....

W. Va. Code §27-6A-6 provides: "If a defendant who has been found to be not competent to stand trial believes that he or she can establish a defense of not guilty to the charges pending against him or her, other than the defense of not guilty by reason of mental illness, the defendant may request an opportunity to offer a defense thereto on the merits before the court which has criminal jurisdiction." In *State v. Gum*, 764 S.E.2d 794 (W. Va. 2014), the Supreme Court of Appeals of West Virginia noted that the courts in the States of Ohio and Illinois had determined these proceedings to be "civil proceedings" rather than "criminal proceedings." The Supreme Court of Appeals of West Virginia then held "we have no difficulty concluding that the hearing sanctioned by West Virginia Code § 27-6A-6 is civil in nature." Specifically, "instead of seeking retribution or deterrence, our statute is directed at the joint purposes of protecting the public and ensuring appropriate treatment for individuals who are both incompetent and criminally violent." For this reason, the statute's further provision that "the evidence of the defendant and of the State shall be heard by the court of record sitting without a jury" is not unconstitutional because the "right to a speedy trial, an impartial jury, and the confrontation of witnesses" are not invoked in a civil proceeding.

"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)