

# The Defender

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## From The Executive Director's Chair

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### MANDATORY ON-LINE VOUCHER PREPARATION: THE TIME HAS COME

During grade school, I consumed the entire Erle Stanley Gardner library and stubbornly laid out a career path that led to the emulation of Perry Mason's dogged representation of the innocent. Reality chipped away at idealism and, upon graduation from law school, my specialty became bankruptcy and commercial litigation, rather than criminal defense. The inspiration of Perry Mason's literary exploits was suppressed. But as I aged, the old idealism vividly resurfaced, and, during the past several years, I undertook representation of the indigent as a member of the federal Criminal Justice Act panel for the Southern District of West Virginia.

But, again, reality chipped away at idealism. The clients are not always innocent. The courtroom rarely beckons. And a defense attorney's exploit that warrants novelization is a rare occurrence. Moreover, mundane facts of business pushed this solo practitioner beyond endurance.

The result is that I have nothing but admiration, and envy, for attorneys who remain committed to protecting the constitutional rights of, and ensuring due process for, those individuals who are charged with crimes.

Nonetheless, in my current position, I remain connected to the noble purpose of indigent defense. As the Executive Director of the West Virginia Public Defender Services, I am charged with ensuring that, in a fiscal year, almost 27 million dollars of the state's general revenue is properly dispersed for the payment of services that have been provided to indigent individuals.

The harshest reality that I have faced in this new position is that, as of this date, six (6) attorneys and one (1) office administrator have been convicted of fraud in connection with the payment of vouchers for indigent defense services. The enumerated loss exceeds \$685,000,

and the damage to the public confidence is immeasurable. Dishearteningly, investigations continue into other potential instances of fraud.

So, how does this background lead to the discussion of the on-line voucher system maintained by this office? In my opinion, the on-line preparation of vouchers is a benefit that is unrealized by hundreds of dedicated appointed counsel and is a means by which losses from fraud can be minimized.

What are the benefits that can be realized from use of this on-line system? First, this on-line system does calculations automatically and eliminates mathematical errors for attorneys and ensures that the final printed product is accurate and complete. Second, this on-line system eliminates this office's need to input data into its management system, thus quickening the processing of vouchers and eliminating errors. Third, the preparation can be done at any location that has internet access, including the courthouse, and can be done with a laptop, i-pad, smart phone or other device. Fourth, this system permits day-to-day entry of time into multiple vouchers until the respective vouchers are ready for completion and submission. Fifth, this on-line system allows the attorney to track the processing of the vouchers from submission to payment. These benefits to the practitioner are tangible and should be sufficient, without any further discussion, to overcome any resistance to the use of the system.

Currently, 304 appointed attorneys are using this system. Consequently, 459 appointed attorneys are not ( notwithstanding the obvious advantages of doing so).

(See *Chair*, Continued on Page 7)



All West Virginia  
Supreme Court  
opinions may be  
reviewed online at  
[www.courtswv.gov](http://www.courtswv.gov)

## West Virginia Supreme Court Update

**LDB v. Sullivan**, \_\_\_ W. Va. \_\_\_, 740 S.E. 2d 55 (01/17/13)

The Court imposed a 30-day suspension of the respondent's law license as part of the sanctions for the respondent's failure to diligently represent a criminal defense client.

**Law License Suspended and other Sanctions.** (PC).

**State v. Hypes**, 230 W. Va. 390, 738 S.E. 2d 554 (02/07/13)

Affirming the petitioner's conviction for operating a methamphetamine lab, the Court rejected the petitioner's argument that a statement made by the defendant that he was "addicted to cooking meth" was irrelevant because it was made two years later and during an unrelated criminal investigation.

**Affirmed.** (PC)

**SER DHHR v. Sims**, 230 W. Va. 542, 741 S.E. 2d 100 (02/07/13)

The Court declined to issue a writ of prohibition in this abuse/neglect case. The writ was sought by the DHHR and the guardian ad litem to prohibit enforcement of an order granting the parents a post-adjudicatory improvement period. The court found no abuse of discretion in the circuit court's order.

**Writ of Prohibition Denied.** (PC)

**State v. Wilkerson**, 230 W. Va. 366, 738 S.E. 2d 32 (02/21/13)

The petitioner, convicted of two counts of first degree robbery, argued on appeal that the circuit court erred in refusing to instruct the jury as to the elements of misdemeanor assault and battery,

which the petitioner alleged were lesser included offenses of robbery. The Court rejected this argument under the "strict elements" test set forth in *State v. Louk*, 169 W. Va. 24 (1981).

**Affirmed.** (Loughry, J.)

**State v. Baker**, 230 W. Va. 407, 738 S.E. 2d 909 (02/21/13)

The Court reversed the petitioner's convictions for second degree robbery and attempted robbery, holding that evidence that the petitioner had a prior felony conviction and was on parole at the time of the alleged robbery should not have been admitted.

**Reversed and Remanded for New Trial.** (Davis, J.)

**State v. Robertson**, 230 W. Va. 548, 741 S.E. 2d 106 (02/21/13)

The petitioner was found not guilty by reason of mental illness in 2002 to a charge of first degree arson. After several years of hospitalization and treatment, the petitioner was ordered to a treatment facility in South Carolina. The Court rejected the petitioner's claim that such a placement violated the "transportation clause" of the West Virginia Constitution and other statutory provisions.

**Affirmed.** (Ketchum, J.)

**Elder v. Scolapia**, 230 W. Va. 422, 738 S.E. 2d 924 (02/22/13)

The Court rejected the petitioner's argument that the circuit court had erroneously denied his petition for a writ of habeas corpus. The Court did find, however, that a person placed on home incarceration is under sufficient restraint to permit

filing of a post-conviction habeas corpus claim.

**Affirmed.** (Loughry, J.)

**Ballard v. Dilworth**, 230 W. Va. 449, 739 S.E. 2d 643 (02/22/13)

The Court reversed the circuit court's grant of habeas corpus relief to the respondent, finding that (1) the indictment was not fatally defective because of the lack of specific dates for each count, and (2) the respondent had waived the indictment issue by failing to raise the issue prior to trial.

**Reversed.** (PC)

**State v. McGill**, 230 W. Va. 569, 741 S.E. 2d 127 (03/12/13)

The Court held that a legal proceeding must be actively pending before a subpoena *duces tecum* can be issued pursuant to W. Va. Code 57-5-4 and R. Cr. P. 17. The Court determined that the lack of such a proceeding in this matter was harmless error given the remaining evidence and testimony.

**Affirmed.** (Davis, J.)

**LDB v. Nace**, # 11-0812 (03/28/13)

The law license of the respondent attorney was suspended for 120 days based on the respondent's failure to diligently represent the interests of his client, a bankruptcy estate. The Court also rejected the respondent's argument that supervision of his representation was controlled by the bankruptcy court and not by the Court.

**Law License Suspended.** (PC)

**Dale v. Veltri**, 230 W. Va. 598, 741 S.E. 2d 823 (04/01/13)

The DMV appealed the order of the circuit court reversing the revocation of the respondent's driver's license. The Court agreed with the DMV, noting *inter alia* that it was not necessary for the DMV to establish the respondent's BAC at the exact moment of his arrest on a DUI charge.

**Reversed and Remanded.** (PC)

**State v. Boyce**, 742 S.E. 2d 413 (04/18/13)

The Court rejected the petitioner's argument that both the State and the trial court had failed to advise him, during his guilty plea to a first degree murder charge, that the arrest of a co-defendant may have been illegal. The Court held that the trial court had fully complied with the requirements of R. Cr. P. 11 during the plea colloquy.

**Affirmed.** (PC)

**SER Games-Neely v. Overington**, 742 S.E. 2d 427 (04/22/13)

The State sought a writ of prohibition from the circuit court to prohibit enforcement of a magistrate court order requiring disclosure of extensive discovery of secondary breath test data. The circuit court denied the requested writ and the State appealed, arguing that the requested data was outside the scope of R. Cr. P. Mag. Ct. 29. The Court affirmed the circuit court's decision, holding that the requested information was within the scope of Rule 29 and was also potentially exculpatory evidence under *Brady v. Maryland*.

**Affirmed.** (PC)

**SER DMV v. Swope**, 742 S.E. 2d 438 (04/25/13)

In granting the petitioner's request for a writ of prohibition, the Court clarified that the 30-day appeal period set forth in W. Va. Code 29A-5-4(b) begins to run on the date that a driver receives notice of a license revocation.

**Writ of Prohibition Granted.** (PC)

**State v. Meadows**, # 12-0075 (05/16/13)

The Court affirmed the petitioner's convictions for first degree murder and other offenses finding, *inter alia*, that a witness' references to a polygraph examination that the witness had taken and passed did not require a mistrial. The Court also held that issues regarding the testimony of a play therapist and a change of venue were waived by counsel's lack of objection.

**Affirmed.** (PC)

**SER Miller v. Karl**, # 12-1213 (05/17/13)

In considering a writ of prohibition sought in three consolidated cases, the Court held that absent a stipulation, a proffer was insufficient to meet the evidentiary burden required for a stay of license revocation proceedings. The Court also clarified that any stays issued pursuant to the relevant statute could not exceed 150 days in duration.

**Writ of Prohibition Granted.** (Benjamin, J.)

**In Re: Brandi B.**, # 12-0100 (05/17/13)

The Court upheld the circuit court's ruling adjudicating the petitioner as a truant, holding that absences resulting from out of school suspensions could be used as a basis for truancy. The Court held, however, that the circuit court erred in extending the petitioner's probation past her eighteenth birthday.

**Affirmed in Part and Reversed in Part.** (Workman, J.)

**In Re: Darrien B. and Andrew B.**, # 12-0994 (05/17/13)

The Court reversed the termination of the parental rights of the parents, finding (1) that the circuit court's order did not contain sufficient findings of fact and conclusions of law, and (2) that the circuit court's refusal to permit the testimony of two witnesses for the parents frustrated the issue of final disposition.

**Vacated and Remanded.** (PC)

**State v. Fitzsimmons**, #11-0977 (05/17/13)

The petitioner argued that the circuit court erred in denying his requests for discovery and a continuance of his final sentencing hearing following his return as unfit from the Anthony Center. The Court denied the petitioner's argument regarding discovery but held that the petitioner was entitled to credit on his sentence for time served at the Center.

**Affirmed in Part and Reversed in Part.** (PC)

**State v. Blevins**, #11-1014 (05/20/13)

The Court affirmed the convictions of the petitioner for the murders of an elderly couple, rejecting his claims that the court erred, *inter alia*, in (1) denying his request for a change of venue; (2) denying his motion to suppress items recovered during a search of his girlfriend's residence; and (3) denying his motion to suppress an inculpatory statement made when the petitioner was fatigued.

**Affirmed.** (PC)

**State v. Moffitt**, 230 W. Va. 635, 741 S.E. 2d 860 (04/11/13)

In affirming the petitioner's convictions for counterfeiting offenses, the Court rejected the argument that the statute (W. Va. Code 61-4-3) applied only to notes issued by private banks and not to currency issued by the United States government.

**Affirmed.** (Ketchum, J.)

**In Re: Walter G.**, # 12-0973 (05/23/13)

The petitioner's parental rights to Walter G. were terminated following the death of his infant twin. The petitioner appealed, arguing that there was no evidence to support the finding that she had abused her children. The Court agreed, finding that the only evidence presented at the adjudicatory hearing indicated that the children were healthy and cared for, that the petitioner was an attentive parent and that there was no evidence indicating that the death of the child was anything other than an accident.

**Reversed.** (PC)

**State v. Sutherland**, # 11-0799 (06/05/13)

The Court affirmed the petitioner's conviction for the murder of his cousin, holding in a new syllabus point that a trial court's failure to remove a biased juror from the panel does not automatically violate a defendant's right to an impartial jury. The Court held that in order to obtain a new trial for such failure, the defendant must show prejudice.

*Affirmed.* (Davis, J.)

**State v. Rogers**, #11-0621 (06/05/13)

Affirming the petitioner's conviction for first degree murder, the Court held that a statement made by the petitioner to the police several hours after his arrest was not taken in violation of the prompt presentment rule. The Court also rejected the petitioner's argument that the court erred in denying his trial counsel's motion to withdraw from the case, holding that there was no actual conflict of interest and that the petitioner had waived the issue.

*Affirmed.* (PC)

**In Re Timber M. and Reuben M.**, #12-1138 (06/05/13)

The Court affirmed the termination of the parental rights of Norma G. on the grounds that she had knowingly exposed her daughter to sexual abuse by her stepfather. The Court rejected the mother's argument that the court erred in denying her request for an improvement period. The Court reversed, however, that portion of the lower court's decision placing the children with their biological father.

*Affirmed in Part and Reversed in Part.* (Loughry, J.)

**SER York v. ODC**, #12-1410 (06/05/13)

The Court rejected the request of the petitioner, a patent attorney not licensed to practice in West Virginia,

for a writ of prohibition to prohibit the respondent from pursuing ethical investigations. The Court rejected the petitioner's argument that his practice of patent law did not constitute the "practice of law" in West Virginia.

*Writ of Prohibition Denied.* (Workman, J.)

**In Re: Lilith H., et. al.**, #12-1178 (06/05/13)

Reversing the court's adjudication of the parents as abusive/neglectful parents, the Court held that exposure of the children to an incident of domestic violence between the father and the grandfather was not sufficient to permit adjudication. The Court remanded for filing of an amended petition to permit consideration of other issues which emerged during the proceedings.

*Reversed and Remanded.* (PC)

**State v. White**, #11-1336 (06/07/13)

The Court affirmed the petitioner's conviction for first degree murder, holding *inter alia* that the jury was properly instructed as to self defense; that the evidence was sufficient to sustain the conviction; and that there was sufficient evidence to show malice, premeditation or deliberation.

*Affirmed.* (PC)

**SER Clifford v. ODC**, #13-0009 (06/07/13)

The petitioner sought a writ of prohibition to prevent the respondents from pursuing disciplinary action. The respondents alleged that the petitioner's past service as a prosecuting attorney in a criminal investigation created a conflict of interest in his subsequent representation of a civil client. Although the Court rejected the petitioner's claim that the respondents did not have authority to pursue the investigation, the Court held that disciplinary sanctions were unwarranted in the petitioner's case.

*Writ of Prohibition Granted.* (Loughry, J.)

**State v. Bevel**, #11-1675 (06/13/13)

The petitioner entered a conditional plea to a sexual abuse charge. On appeal he challenged the admissibility of a statement that he had provided to the police after his arrest and after he had requested counsel. Declining to adopt the reasoning of *Montejo v. Louisiana*, the Court held that article III section 14 of the West Virginia Constitution prohibits use of a statement taken by the police from a suspect after the suspect has asserted his/her right to counsel.

*Reversed and Remanded.* (Benjamin, J.)

**LDB v. Grindo**, #12-0228 (06/13/13)

The Court imposed a public reprimand and other sanctions in response to the respondent's failure to meet deadlines in representing two clients in appellate matters.

*Public Reprimand and Other Sanctions.* (PC)

**ODC V. Rogers**, #12-0195 (06/17/13)

The Court annulled the law license of the respondent, citing the respondent's *nolo contendere* pleas to two criminal offenses. The charges stemmed from the respondent's conduct in filing a false mental hygiene petition against an individual with whom the respondent had argued.

*Law License Annulled.* (PC)

**State v. Bruffey**, #12-0189 (06/18/13)

Affirming the petitioner's conviction for bank robbery, the Court held that the trial court did not err in admitting evidence of a bank robbery committed subsequent to the charged offense. The Court also rejected the petitioner's claims that the State had improperly commented on his post-Miranda silence; that the testimony of a police officer as to extrajudicial statements made by a non-testifying witness was not error; and the affidavit for a search warrant was sufficiently detailed to permit issuance of the warrant.

*Affirmed.* (PC)

**In Re: Marley M.**, #12-0957 (06/19/13)

The court terminated parental rights following a relinquishment of custody by the biological mother. The mother appealed, arguing the court erred in (1) denying her motion to dismiss the petition and (2) denying her motion for post-termination visitation. The Court held that the circuit court erred in failing to conduct adjudicatory and dispositional hearings as required under *In Re: T.W.*, 230 W. Va. 172 (2012), and held that a relinquishment could be considered as a basis for subsequent adjudication. The Court also held that the circuit court's failure to consider post-termination visitation was error.

***Reversed and Remanded.*** (Benjamin, J. )

**Leeper-El v. Hoke.** 230 W. Va. 641, 741 S.E. 2d 866 (04/11/13)

The petitioner appealed the decision of the circuit court denying his petition for a writ of habeas corpus. He alleged in his petition that his guilty plea was improperly induced by a promise that his sentence would run concurrently with the sentence to be imposed in a federal case. The Court dismissed the appeal, noting that the federal authorities had provided the petitioner with a concurrent sentencing structure prior to his release from prison, which occurred during the pendency of the appeal.

***Dismissed.*** (PC)

**State v. Larry A.H.**, 742 S.E. 2d 125 (04/11/13)

The Court rejected the petitioner's arguments (1) that the court erred by permitting amendment of the indictment because the petitioner could not show prejudice resulting from the amendment, and (2) that the petitioner could not show prejudice in the late disclosure of a witness not listed on the State's witness list.

***Affirmed.*** (PC)

**State v. Jones.** 742 S.E. 2d 108 (04/11/13)

The petitioner was convicted of numerous sexual offenses involving a child. On appeal he argued, *inter alia*, that the circuit court erred by refusing to permit him to present testimony that the victim had made statements that other persons had sexually abused her. The Court held that the petitioner had failed to make a demonstrable showing that the statements were false, and that any statements regarding potentially true statements were merely speculative.

***Affirmed.*** (PC)

**State v. Harris.** 742 S.E. 2d 133 (04/11/13)

Convicted of two sexual offenses, the petitioner argued

that the victim's testimony that the petitioner had abused her "more than twice" constituted improper Rule 404(b) character evidence. The Court rejected this argument, holding that the evidence was direct evidence intrinsic to the crimes charged in the indictment and was inextricably intertwined with the two offenses which were the subject of the trial.

***Affirmed.*** (PC)

**Dale, Comm'r, v. Knopp.** #12-0202 (05/17/13)

The Division of Motor Vehicles appealed the circuit court's ruling finding that the "rescission" of an initial order suspending a driver's license revocation proceeding acted to bar a later revocation. The Court held that the purpose of 17C-5A-1a(d) is to prevent a driver from having a license revoked after it has been revoked and reinstated. Finding that the "rescission" of the original order upon request for a hearing did not constitute a "revocation", the Court reversed the circuit court's ruling.

***Reversed.*** (Workman, J.)

**In Re: Jessica M. and Shawnta M.**, #12-0808 (06/05/13)

The petitioner argued that the evidence relied on by the court was not sufficient to warrant termination of her parental rights. The petitioner also noted that the court had cited in its order the petitioner's failure to call a witness to rebut evidence that was not introduced in the case. The Court reversed, citing the lack of a specific factual basis in the order and the circuit court's reliance upon evidence that was not admitted during the adjudicatory hearing.

***Reversed and Remanded.*** (PC)



## West Virginia Public Defender Services News and Information

- Welcome! On July 1 2013 Dana Eddy became the new Executive Director of West Virginia Public Defender Services. Dana brings a wealth of litigation and governmental experience to the position, having worked extensively in private practice and having served as Chief Counsel to Governor Gaston Caperton. Dana most recently operated the Eddy Law Office in Charleston and also argued the case of *State v. Robertson*, 230 W. Va. 548 (2013) before the West Virginia Supreme Court of Appeals.
- Annual Conference. WVPDS presented our Annual Conference at Glade Springs Resort on June 6-7, 2013. The Conference was attended by approximately 200 attorneys and support staff and featured presentations on such topics as DUI litigation, sexual crimes and audio/video forensic evidence.
- Departures. After eleven years PDS bids farewell to Erin Fink, who has served as the Administrative Assistant to the Criminal Law Research Center since July 2002. If you have attended a CLRC sponsored-event in the past 10+ years you have more than likely spoken or met with Erin. We thank Erin for her exemplary work over the years and wish her all the best.

(Chair— Continued from Page 1)

If preparation of the vouchers on-line were mandatory, three additional benefits would be realized. First, this office's manual entry of voucher information can be eliminated, thus reducing the costs of administration and decreasing the period of time that is required before payment of a voucher. Second, statistical information can be more readily and accurately obtained, thus enhancing this office's effort to advocate for other reforms for the benefit of the attorneys who provide these constitutionally mandated services. Third, fraud in the submission of vouchers can be more readily discerned, thus curtailing the loss of revenue at a nominal amount and regaining the public's confidence in the integrity of the system.

These cumulative benefits of the on-line system mandate its use.

So, the time has come. Soon, a timetable for implementation of the requirement of on-line voucher preparation by all attorneys will be published on this office's website. A video tutorial on the use of the system will be made available. If deemed to be necessary, "in person" training sessions will be arranged. And, as always, members of this office will be available to assist an attorney or office representative by telephone or electronic messaging. Your feedback is encouraged, but, bluntly, no compelling reason exists for not imposing this requirement. And, again, this system is for the preparation of a voucher. You will still be required, at this time, to submit "hard copies" of your voucher to the court for the entry of an order approving payment.

In short, the time has come for mandatory on-line voucher preparation.

Dana F. Eddy

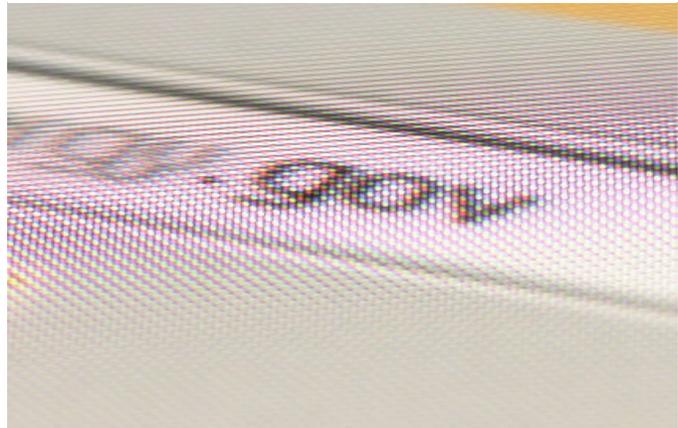


## New WVPDS Website Launched!

West Virginia Public Defender Services has launched its new website. The new address is [www.pds.wv.gov](http://www.pds.wv.gov).

The redesign makes the website more user-friendly and will better integrate numerous PDS functions, including the new OVS system, into the website.

The new site features clearly designated sections designed for the Voucher Processing Section, Criminal Law Research Center, Appellate Advocacy Section and Administrative-Public Defender Operations Section.



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