



# THE CAPITOL LETTER

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



## From the Executive Director

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### OASIS AND YOU:

The State converted to a new financial system for the first time since 1993. As of July 8, 2014, the State converted to a web-based financial system known as Financial Advantage and branded by the State as OASIS, or, rather, Our Advanced Solution with Integrated Systems.

The financial system had to be adopted and had to be implemented in order to modernize the way in which the State does its business. As with any change of such magnitude, however, issues have arisen since the conversion to the system on July 8, 2014.

Public Defender Services submission of vouchers for payment is done through ACCTS or the Appointed Counsel Claims Tracking System. ACCTS interfaced with FIMS, the State's previous system, and must now interface with OASIS. The proposed interface between ACCTS and OASIS had to be designed and tested and, when OASIS was made live, had to be tested, retested, modified and adapted.

The relevant news for you is that the agency has not been able to submit vouchers for

payment in the month of July. However, recent tests suggest that the agency may soon be able to resume the submission of batches of vouchers for payment.

Another factor influences this resumption of business, however, and it is a factor over which you have control. As a payee of the agency, you are a "vendor" for purposes of the financial system. The transfer of "vendor" information from FIMS to OASIS failed in some instances for a substantial number of vendors.

The agency will attempt to supply the vendor information as it is determined to be missing or incomplete, but if you were to "self-register," the process would be expedited considerably. Moreover, OASIS anticipates that any future changes to your "vendor" information will be made by you and not by the state. Accordingly, you should become familiar with your vendor file in any event. But, for the agency's purposes, if you were to do this immediately, you could ensure that you are in the system and that your information is correct and complete. If you are willing to do this, you should contact Sheila Coughlin at [Sheila.J.Coughlin@wv.gov](mailto:Sheila.J.Coughlin@wv.gov) who will send to you

instructions for doing so. Again, you will now be maintaining your vendor file with the State so this would be an excellent opportunity to become familiar with your file.

### NOTICE!!!!

The agency's online voucher system ("OVS") is not affected by OASIS. You are to continue to prepare vouchers using OVS and the login to OVS remains unchanged. When you submit an online voucher, it interfaces with the agency's internal program and not OASIS. The only information regarding you that is affected by OASIS is the information used to transmit payments to you or on your behalf once the agency submits your voucher for payment. Again, you must continue to use OVS as you have always done.

**SURVEY:** The agency is working on a relationship with West Virginia University Forensic and Investigative Science program to provide programs, education and expert services to criminal defense attorneys throughout

the state. You are asked to go to [www.pds.wv.gov](http://www.pds.wv.gov) and click on the "Research Center" tab, then click on "WVPDS Training Questionnaire." You will have to print the questionnaire, complete the questions, and return the completed form to the agency by regular or electronic mail. This effort would assist the agency in forming the relationship with the WVU program.

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**CONTRIBUTIONS ....** If you have an article that is consistent with the purpose of this newsletter or if you have a suggestion as to content for the newsletter, your input is encouraged. You should contact Pamela Clark, Coordinator of the Criminal Law Research Center, at [Pam.R.Clark@wv.gov](mailto:Pam.R.Clark@wv.gov).

# AGENCY NEWS & INFORMATION

## APPELLATE ADVOCACY DIVISION

A new feature of the newsletter will be a column authored by members of the Public Defender Services Appellate Advocacy Division ("AAD"). The column will feature advice from the AAD's attorneys regarding trial practices that will benefit the client, hone the trial attorney's advocacy skills, and aid any appellate effort.

The following is the first installment of the column.

### AADvice – THE DEATH OF BOILERPLATE MOTION PRACTICE.

Substantial revisions to the West Virginia Rules of Evidence have been made and will become effective September 2, 2014. Notably, no substantive changes were made to Rule 103, which is entitled *Rulings on Evidence*. However, a new comment was added to Rule 103 which should not be ignored by trial attorneys. The new comment is as follows: "Motions *in limine* on legal issues presented in a vacuum are often **frivolous**. Boilerplate, generalized objections in motions *in limine* are **inadequate and tantamount to not making an objection at all and will not preserve error**. For example, a motion that simply asks the

trial court to prohibit the adverse party from presenting hearsay evidence or mentioning insurance at trial is a **waste of judicial resources.**" [emphasis added].

At the annual conference, the presenters on the topic of the common errors made by defense counsel also referenced the improper use of boilerplate motions.

The signal has been given, therefore, that generic motions are useless and are considered a waste of everyone's time, especially the court's time. Moreover, the motions do not serve the client's interests in any manner as the motions will not be considered to be proper objections and will not "preserve error."

A trial attorney must, therefore, draft case specific motions so that the trial attorney's efforts are in harmony with the revised rules of evidence and will actually serve the client's interests.

### THE 2014 ANNUAL CONFERENCE

Public Defender Services held its annual conference at Oglebay Resort & Conference Center in Wheeling, West Virginia, on the dates of June 12 and 13, 2014. The one and one-half day conference included presentations on

many issues affecting the criminal defense lawyer's practice, including presentations on eyewitness identification and on preserving the record for appeal. One hundred and fifty one counsel attended the conference and earned over eleven continuing legal education credits, including credits for ethics.

The conference was well received, but one disappointment was that only thirty-nine private counsel attended. The remaining counsel were employees of the state's 17 public defender corporations.

The theme of the conference was "We're in This Together," which was intended to emphasize that both public defender corporations and private counsel are an integral part of any system of delivering legal services to the state's indigent population.

The agency wants to know what can be done to increase the attendance by private counsel. Or, if you would rather, the agency would like to know why you chose not to attend. Accordingly, if you have any thoughts on this subject which you are willing to share, you should send an email to Pamela Clark at [Pam.R.Clark@wv.gov](mailto:Pam.R.Clark@wv.gov).

## COMING SOON - NEW ADDITION TO JURY INSTRUCTIONS

Public Defender Services is beginning a project to revise, reorganize, and update its "West Virginia Criminal Jury Instructions, Sixth Edition." PDS' Appellate Advocacy Division is assisting the Criminal Law Research Center in this effort, headed by Donald L. Stennett, Deputy Director. If you have any suggestions, contributions or requests, you should send an email to Pamela Clark at [Pam.R.Clark@wv.gov](mailto:Pam.R.Clark@wv.gov)

## WELCOME TO THE AGENCY!

Public Defender Services would like to welcome Rhonda Ashworth, Rachel Flynn and Sarah Saul to the agency.

Rhonda Ashworth will be the secretary for the Appellate Division. Sarah Saul will be a paralegal in the Division. Rachel Flynn is the new receptionist and will be the first face you see when you come to our office or the first voice you hear when you call.



### THE REASONS FOR THIS SEARCH ARE PHONY; OR MY IPHONE IS SMARTER THAN YOUR FLIP PHONE.

In *Riley v. California*, 573 U.S. \_\_\_\_\_, 134 S.Ct. 2473 (2014), the issue was the warrantless search of digital data on a cellular phone incident to an arrest.

The Supreme Court ruled that, for various reasons, the search and seizure of evidence from a cellular phone required a warrant if the only reason for the search was that it is incident to an arrest. However, the exigent circumstances exception to the warrant requirement might apply in particular cases.

The judgment of the Court was unanimous, although Justice Alito wrote a concurring opinion.

Two cases gave rise to the issue. In the first case, the defendant was stopped by a police officer for driving with expired registration "tags." Once stopped, the police officer discovered that the defendant's license had been suspended. The car was impounded and the inventory search found loaded handguns under the car's hood. The arrest of the defendant resulted in a "pat down" that revealed a "smart phone." The savvy officer explored the phone and found contacts and texts that contained the letters "CK," which was believed to be a reference to the gang "Crip Killers." At the station, further exploration of the phone unearthed photographic evidence of the defendant's involvement in an earlier shooting. The eventual

conviction of the defendant on several charges resulted in an enhanced sentence due to the gang connections. The conviction and enhancement were supported by evidence garnered from the smart phone. The California trial and appellate courts upheld the search as "incident to an arrest," because the cellular phone was associated with the defendant's "person."

In the second case, the defendant was observed selling drugs from a car. The defendant was arrested and transported to the police station. A "flip phone" was found on the defendant's person. While at the station, the "flip phone" was receiving calls, "repeatedly," from a source identified as "my house" on the external screen. The information in the phone eventually led to discovering the address of the defendant's house and, after a warrant was obtained, discovering 215 grams of crack cocaine, marijuana, drug paraphernalia, a firearm and ammunition. The defendant was convicted. The First Circuit Court of Appeals reversed the conviction on the basis that the search of the cellular phone was improper. The Circuit Court of Appeals opined that a cellular phone, unlike other physical possessions carried by a person, has a substantial amount of personal data and is a negligible threat to law enforcement. Thus a warrant was required to do such a search.

The Supreme Court emphasized that the "ultimate touchstone of the Fourth Amendment is reasonableness." The Supreme

Court reiterated that "in the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement."

The exception for a warrantless search incident to an arrest, when first articulated, was restricted to weapons or destructible evidence within a suspect's "immediate control." This was extended to "personal property ... immediately associated with the person of the arrestee." And, for automobiles, this was extended to account for the "circumstances unique to a vehicle," permitting, therefore, warrantless searches of the passenger compartment.

How do these exceptions apply to devices that "are based on technology nearly inconceivable just a few decades ago" when the exceptions were first developed?

Because the founding fathers had yet to conceive of such devices and thus could not offer "precise guidance," the Court derived the answer "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."

The Court found no potential for risk of harm to a police officer once the cellular phone was removed from the defendant's possession. With respect to the concern for preserving evidence, the government argued that an immediate search was necessary because the

information contained on the phone could be destroyed or encrypted by remote accessing. The Court noted that no evidence was presented to support the argument that remote accessing was prevalent. The Court found that a reasonable response to this concern was to remove the battery from the phone or to place the phone in an aluminum bag, thus isolating it from potentially intruding radio waves.

In the final analysis, the Court readily recognized that cellular phones contained immense data regarding an individual either on the phone or on remote servers to which the phone has access. Due to this, the privacy interests of an individual with respect to the phone could not be compared to a wallet and, in fact, could not be compared to records maintained even in a residence. The Court also noted the pervasive presence of the phones on citizens' persons, such that 12% of smart phone users admitted to using the phones in the shower. Weighing these factors, the balance tipped heavily in favor of requiring the intrusion into cellular phones to be regulated by the warrant requirement and the intervention of a purportedly neutral, detached magistrate rather than being "judged by the officer engaged in the often competitive enterprise of ferreting out crime."

While the Court did not justify a warrantless search incident to arrest, the Court emphasized several times that the search might, in particular instances, be justified by the exigent circumstances exception.

**Let Me Count the Ways, I can Put you Away...**

In *State v. Powell*, 2014 WL 2404304, the defendant was sentenced to life in prison as a recidivist. The facts are somewhat murky in the memorandum decision, but, apparently, the defendant was facing sentencing on two convictions in one proceeding; one conviction was for battery of one victim and one conviction was for domestic battery, third or subsequent offense, of another victim. The compelling issue was whether "enhanced felonies" could constitute the predicate felonies for the recidivism finding. Specifically, one predicate felony was a prior conviction for third offense domestic battery, which was enhanced from a misdemeanor using the same convictions that resulted in an enhancement of his current charge to felonies. The court of appeals held, without lengthy discussion, that the legislature intended that a felony conviction resulting from an enhanced misdemeanor could be used to apply the recidivist statute. The court relied upon an eighteen year old decision that had upheld using a third offense DUI conviction to apply the recidivist statute. The court did not directly address the argument that this offended the double jeopardy preclusion because the same convictions supported the enhancement of a prior conviction to a felony and the

enhancement of the current charges to felonies. The court did note that "it is the repeat nature of the criminal's history that justifies the enhancement of the punishment."

**What's Saucy for the Accuser, Is not Saucy for the Accused.**

In *State v. Ruben C.*, 2014 WL 2404301, the petitioner was convicted of first degree sexual assault, domestic battery, and violation of a domestic violence protective order. The underlying facts arose out of the defendant and his wife of seventeen years ride in a car during which the spouse informed the defendant that she wanted a divorce. The defendant reacted violently resulting in the eventual entry of an emergency protective order. The defendant subsequently returned to the home and allegedly assaulted the spouse, threatening her with a knife. While arguments were made regarding the insufficiency of the evidence, the issue warranting discussion was the defendant's insistence that extrinsic evidence should have been permitted regarding the wife's welfare fraud. In the defendant's opinion, the evidence furthered his argument that the allegations against him were fabricated because "by sending petitioner to prison, the victim would be able to further hide her acts of fraud."

The trial court permitted cross-examination on the issue pursuant to rule 608(b) of the West Virginia Rules of Evidence (now amended). The rule permits an inquiry on cross-examination of "specific instances of conduct" of a witness if the conduct goes to credibility. The rule does not permit the introduction of documentary evidence to prove the conduct. Notably, however, the witness is permitted to assert a right against self-incrimination with respect to such questions.

And, in this case, the wife, as a witness, did just that. So, the trial counsel could ask questions about the purported welfare fraud. The witness could refuse to answer the questions. But the defendant could not then prove the fraud by using extrinsic evidence such as welfare checks issued to her in her name and payroll checks issued to her using an alias.

The Court applied the literal provisions of the Rule and did not permit the admission of extrinsic evidence. The question that must be asked is whether attacking credibility and insinuating a lie is the same as establishing a motive for the defendant to lie that goes to the gravamen of the charges? The first would be governed by Rule 608(b), but the second would seemingly be an intrinsic part of the defense. The Court did not address this issue, stating that petitioner did not "offer support from

any other legal authority" regarding this distinction.

Further handcuffing the defendant in this matter, the Court refused to sanction the use of an "adverse inference" instruction regarding the assertion of the fifth amendment by the wife on the questions of the welfare fraud, stating that, while available in a civil matter, there is "no precedent for such an instruction in the criminal context."

Finally, the introduction into evidence of the acts that gave rise to the domestic violence protective order was permitted despite the challenge that Rule 404(b) had not been followed. Specifically, no *in camera* pretrial hearing had been held on the evidence. The Court sanctioned the use of the testimony as "intrinsic" to a crime that was charged, *i.e.*, the violation of the domestic violence protective order. The acts were the story behind the issuance of the order. The Court then reiterated that, "as this Court has held in past cases, evidence that is intrinsic to the indicted charge is not governed by Rule 404(b)."

**A Reversal of Misfortunes.**

In *Ballard v. Hurt*, 2014 WL 2404302, the Court affirmed the lower court's grant of a habeas corpus petition to the defendant. Notably, the petitioner in this appeal was the warden who sought the reversal of the trial court's actions. The matter had

actually been previously remanded by the Court due to the failure of the trial court to make specific findings of fact and conclusions of law relating to its ultimate finding that trial counsel had been ineffective. A thirty-two page order was then entered by the trial court.

The underlying case was a first-degree murder case arising out of the robbery of a gas station/convenience store. The trial counsel was found ineffective due to failing to investigate an alibi, failing to secure the attendance of witnesses, failing to object to "non-disclosed" State witnesses, seeking a change of venue when the first trial resulted in a hung jury, but failing to challenge the new venue, conducting a "haphazard" *voir dire*, and failing to object to the prosecutor's remarks in closing, in which the defendant was characterized as a drug dealer.

The case is notable for several reasons. First, it emphasizes that it is most important to convince the trial court that habeas is warranted. Affirmance of a trial court's decision is more likely than reversal because, in the end, the standard is whether the lower court abused its discretion. Secondly, it emphasizes the need for habeas counsel to assist the habeas court by submitting proposed findings of fact and conclusions of law, because the appeal court will not summarily affirm a decision

to grant habeas relief. Thirdly, the first habeas petition was denied, but another habeas was permitted to be filed due to the ineffective assistance of the habeas counsel. So, habeas counsel can be subject to the same scrutiny as trial counsel in the representation. And, finally, it pays to be lucky in that the co-defendant in the case had recanted his trial testimony implicating the defendant and, in the first trial in the county in which the crime occurred, the defendant hung the jury, indicating that the evidence was not necessarily overwhelming.

#### **All Atwitter about Facebook.**

In *State v. Nolte*, 2014 WL 2404323, the defendant, Jeffrey Allen Nolte, had opened a Facebook account under the name of "Jeffrey Allen," a MySpace account under the name "Jeffrey Nolte," and an Amy Grant fan club account. The problem for the sociable defendant was that he was a convicted sex offender and was required to register for life as a sex offender. One of the requirements of the West Virginia Sex Offender Registration Act is that certain information is required to be provided to police, including "any Internet accounts the registrant has and the screen names, user names or aliases the registrant uses on the Internet."

The defendant had not informed the state police

about the Facebook account, the MySpace Account and the Amy Grant fan club account. Notably, "there were no allegations made that petitioner was using these sites or aliases in an inappropriate manner." At a bench trial, the defendant was found guilty of counts relating to the Facebook account and MySpace account. The sentences were one to five years to run concurrently.

An argument was made that the provision governing the registration of Internet accounts was unconstitutionally vague. The term "Internet accounts" was not defined and, therefore, the petitioner had no knowledge that this conduct violated the statute. The Court rejected the argument, deferring to the intent of the Legislature to encompass, essentially, all "online activity."

The second argument was that the evidence did not establish that the defendant had knowingly failed to register. However, the Court noted that the defendant had registered his email accounts and should have known, therefore, that the other accounts had to be registered.

#### **Where are the Newlyweds registered?**

In *In re: Jimmy M.W.*, 2014 WL 2404298, the petitioner was seeking to have his name removed from the Sex Offender Registry. When he

was forty-four, the petitioner touched the breast of a girl who was fifteen years of age. The petitioner pled no contest to a charge of sexual abuse in the third degree. Because the victim was a minor, the petitioner had to register as a sex offender for life. Notably, the petitioner was now married to the victim and had fathered her children. The Court notes that the Sex Offender Registration Act contains no provision for the removal of a registrant from the registry except and unless the conviction is overturned. The Court rejected, again, any constitutional challenges to the Act noting that its provisions are regulatory and not punitive in nature.

The decision is most notable by reason of the dissent by Justice Ketchum, in which Justice Davis joined. The primary criticism was that oral argument should have been afforded and the due process issues should have been studied. The most poignant statement was "this man received worse than a scarlet letter. .. It is worse than punitive if you have rehabilitated and are required to tell your prospective employers that you are a sex offender."

#### **Your Peers will do any Peering.**

In *State ex rel. Harris v. Hatcher*, \_\_ S.E.2d \_\_, 2014 WL 2439902, the Court granted a writ of prohibition

requested by the prosecution. The prosecution sought the writ because the circuit court had granted, as a matter of law, a motion to dismiss six counts of an indictment returned against the defendant that charged the defendant with abuse by a parent, guardian, custodian or person in a position of trust. The prosecutor argued in the petition for the writ of prohibition that the status of defendant as a parent, guardian, custodian or person in a position of trust was a question of fact, requiring the jury's determination.

The charges arose out of the defendant's conduct with a minor. The defendant was a school bus driver, but the alleged conduct occurred at the victim's home while the parents were sleeping and at the defendant's farmhouse, not on the bus or at the school. The trial court ruled that the conduct at his house was related to his position as a custodian or a person in a position of trust. However, the six counts relating to the conduct at the victim's house when the parents were sleeping did not allege the requisite custodial or trust relationship.

The Court cited to a long list of cases in which it held that the perpetrator's status with respect to the victim was a question for the jury. The Court ruled, therefore, that the Court had exceeded its authority in dismissing the six counts of the indictment and

the Court vacated the order.

### **A Corrections Officer driving a Ford Escape, is that Irony?**

In *Humphreys v. West Virginia Div. of Corrections*, 2014 WL 2219108, the petitioner had certain misdemeanor charges expunged from the court's records. Specifically, the petitioner was a correctional officer who had been arrested by police on four counts of misdemeanor battery. Allegedly, the petitioner and a cohort had been approaching individuals in a blue Ford Escape and then pepper spraying the individuals. One victim identified the petitioner. Petitioner was terminated and, at the time of this appeal, his grievance with the West Virginia Public Employees Grievance Board was pending.

The petitioner had been placed in a pretrial diversion program for three months. However, he had secured another job and the magistrate dismissed the charges entirely. Approximately two months later, the petitioner filed a petition to expunge the criminal records, citing that he had "no current charges or proceedings pending." The order was entered.

The petitioner then presented the expungement order to his previous employer, the Division of Corrections. The obvious intent was to preclude the

Division from using the charges as evidence supporting the petitioner's termination. The Division then filed a motion with the circuit court to intervene in the expungement proceeding and to have the order set aside. After a hearing, the circuit court determined that the grievance proceeding was, in fact, a "current ... proceeding" that precluded the expungement of the order.

The petitioner's appeal of this order was denied because the Court was not inclined to "rewrite the statute to read 'criminal proceedings.'" The Court reasoned that: "Just as courts are not to eliminate through judicial interpretation words that were purposefully included, we are obliged not to add to statutes something the Legislature purposely omitted." The Court further ruled that the Division was entitled to intervene because the expungement order could "impair or impede" the Division's defense in the grievance proceeding.

### **You Don't Scare Me.**

In *State v. Yocum*, \_\_ S.E.2d \_\_, 2014 WL 2017843, an appeal was taken from the petitioner's conviction for committing a terrorist act. The governing statute was adopted in the aftermath of 9/11. However, this was recognized to be the "first case that has reached us under our anti-terrorism statute."

The petitioner had been arrested, had been

handcuffed, and had been placed in the patrol car for transport when he threatened to sexually assault the transporting police officer's child. In the final analysis, the court settled on the issue as being whether, in these circumstances, the threats were intended to "affect the conduct of a branch or level of government." The prosecution's argument was that the threat was intended to intimidate the officer so that the officer would disregard his duty "of ensuring that the Petitioner was incarcerated at the Northern Regional Jail."

The court looked to the State of New York's application of its anti-terrorist statute and noted that the New York court had refused to apply its statute to gang-on-gang street violence. The State of New York held that "acts of terrorism typically involve politically-motivated and mass-targeted harm caused by incendiary or other means capable of causing significant mortal injuries." The Supreme Court of Appeals of West Virginia then concluded that terrorism has an unique meaning and that "violence and a political purpose or motivation are universal components." And, accordingly, the court found that the anti-terrorist act was not concerned with threats leveled at an individual, but, due to the reference to a "level" or "branch," the act was concerned with threats directed to an institution. To

hold otherwise, opines the Court, would be to "run the risk of trivializing the offense at issue."

Consistent with messages that have been communicated in other decisions, the Court stated, "rather than sanctioning overzealous prosecution, we take this opportunity to encourage both law enforcement and the prosecutors of this state to charge individuals with offenses that properly encompass the alleged wrongdoing at issue." In this matter, the Court noted that the petitioner could have been charged with the intimidation or retaliation against a public officer by threats of physical force or harassment in an attempt to impede or obstruct that individual from performing his or her official duties. The Court commented that, instead, "the State sought to overreach and punish Mr. Yocum for the type of impulsive empty threat that any seasoned police officer such as Sergeant A. regularly encounters in the course of his duties – a threat that falls well outside the definitional parameters of terrorist activity."

Notably, Justice Benjamin dissented. The dissent reasoned that the police officer was the very personification of the exercise of executive power. Accordingly, the threat to the police officer was deeply personal and obviously

calculated to "maximize the terror felt by Sergeant A. and thereby maximize his intimidation of him in the execution of his official duties." The dissent concludes as follows: "The petitioner is left to laugh. He pulled off a good one and got away with it. Sergeant A. is left to worry and perhaps hug his family a bit tighter."

**Circumcision is a "cutting edge" topic for some.**

In *State v. Knotts*, \_\_ S.E.2d \_\_ (June, 2014), the anti-terrorist act was again reviewed. The question was whether sufficient evidence existed that the defendant made a threat that would, indeed, be covered by the act. In this case, the defendant was deemed to be incompetent to stand trial and was committed to the psychiatric facility in Weston, West Virginia. The defendant's counsel employed the statutory procedure, however, that permitted defenses to the charges to be proffered so that the defendant could be released. A bench trial was held and the defendant was deemed to be able to be convicted of the offenses if he stood trial.

Notably, the defendant's odd behavior over a period of time was known and was attributed to a brain injury. The behavior included his confrontation of customers and employees at a federal credit union. The conversations typically centered around discussions of

circumcision with pregnant customers and employees. The record is not clear about what his views were on the subject. The defendant's account with the federal credit union was closed after several such encounters.

In a phone conversation with a bank employee about his closed account, the defendant stated he was going to place bombs on the employees' cars and was going to stream, live, the resulting devastation so the whole world could see how he had been wronged by the credit union.

In the bench trial, the defendant denied that he had threatened to place explosive devices on the cars and claimed that all he intended to do was place copies of emails and DVD's on the vehicles in the credit union parking lot to "expose the credit union's violation of his First Amendment right to freely speak about circumcision."

The appeal was made on the grounds that the evidence was not sufficient to find that the defendant had made a threat intending to "intimidate or coerce" a "civilian population." The defendant's counsel characterized the defendant's statements as "the rantings of a mentally disabled person who was angry and who is incapable of articulating his displeasure in a socially acceptable manner."

In resolving the issue, the

Court did not define the term, "civil population." However, because the defendant had stated that he wanted "to let the world know how he felt about the credit union," his actions were viewed as extending beyond "just the employees of the credit union." Moreover, the Court noted that "detonation of bombs in a metropolitan area" was an express act viewed as terrorism in the federal statutes. Notably, it is merely the knowing and willful making of the threat that is the violation. The intent or lack of intent to commit the threatened act is irrelevant. Accordingly, the Court affirmed the lower court's application of the act to the defendant's actions.

**Isn't this crime spree grand?**

In *State v. Jerome*, \_\_ S.E.2d \_\_, 2014 WL 1876158, the Court dealt with the issue of whether property taken from four victims could be combined for the purpose of determining whether it was "grand larceny." After a law firm's Christmas party, several coworkers went to a nightclub. Throughout the night, various patrons of the nightclub determined that their purses had been stolen. The items in the purses included, among other things, cell phones and a medical inhaler.

The trial focused on whether the defendant was guilty of grand larceny or petit larceny. The victims testified that the

total value of the items was in excess of one thousand dollars. The sole defense witness was a purported expert on the value of used cell phones, which reduced the defendant's total haul to less than one thousand dollars.

The principal issue on appeal was whether all the property could be aggregated to determine the total value of the stolen property. The court reviewed, therefore, the "common law single larceny doctrine." The doctrine provides that the "taking of several articles at the same time from the same place is pursuant to a single intent and design." Apart from its application in this case, the doctrine has application to determine whether counts in an indictment are duplicitous when it involves theft from several persons at the same time and whether double jeopardy bars prosecution for more than one offense when it involves theft from several persons at one time. In this context, the doctrine is applicable to determine whether the value threshold is met by aggregating the value of the various items of stolen property from the different victims.

The doctrine does not require that the items be stolen simultaneously. Instead, the doctrine covers several thefts within a brief period of time. Moreover, the doctrine does not literally require the "same place," but can cover different

rooms on the same floor of a building. The overriding factor, in the Court's opinion, is "whether the separate takings were part of a single scheme or continuing course of conduct." Obviously, therefore, no bright line exists and the application of the doctrine must occur on a case-by-case basis.

The final issue raised concerned the manner in which the property was to be evaluated. The Court, again, does not draw a bright line, but, holds that, the owner of the property is competent to testify to the "fair market value" of the property, but other valuation methods may be used such as "purchase price [or] replacement cost." As the Court noted, the jury will decide the weight to be given to the owners' testimony as to the value of the property. Notwithstanding the defendant's expert testimony, the Court found that the jury had sufficient evidence, notably the owners' testimony, to find that the value of the stolen property exceeded one thousand dollars.

Justice Loughry and Justice Workmen concurred, but consistent with his and Justice Workmen's opinions in other cases, emphasized that the true analysis in the case must come down to whether, in the circumstances, the actor had separately formed an intent to steal the various items of property. This is the analysis that should be used in

determining whether one assault or multiple assaults occurred or whether one brandishing or multiple instances of brandishing occurred or whether one larceny or several larcenies occurred. The admonishment to the State was that the charging document needed to comport the evidence with the allegation of the single intent. In this case, the defendant was circling the bar such that the jury could have found the single intent to steal the multiple items.

### **If you are a drug dealer, don't overstay your welcome!**

In *State v. Dorsey*, \_\_ S.E.2d \_\_ (June, 2014), a search and seizure was the focus of the appeal. The defendant was staying at the trailer of a female, from which he operated a drug trade. The owner of the trailer was paid \$20.00 in crack cocaine for every \$100.00 of crack cocaine that was sold by the defendant. The defendant also supplied the owner with marijuana and partially paid at least one utility bill.

Tips were received that the trailer was a staging site for drugs. Notably, a state trooper determined that the tips were not sufficient to obtain a warrant. The state trooper determined, however, that he would talk to the owner of the trailer to see if she would cooperate. The trooper claimed, however, that

the defendant was known to have a previous firearm charge. Accordingly, four officers were brought along in order to have this "talk" with the owner. Upon arrival, three of the officers surrounded the trailer in the purported effort to just "knock and talk."

When the knocking commenced, the owner testified that the defendant threatened her by making a throat-cutting motion and threatening to kill her if she opened the door. Eventually, she opened the door. In the meantime, one trooper had heard someone in the house running and then had heard a toilet flushing. The troopers came into the residence and, before the "talking" started, secured everyone in the residence, including the petitioner who was in the bathroom. In the toilet, the trooper observed water running and marijuana floating in the water. The troopers then asked permission of the owner to search the premises, which she gave. The search turned up cash, a digital scale, a razor blade with cocaine residue, and a 9mm handgun.

The defendant was indicted on, and convicted of, drug-related charges. While several issues were raised on appeal, the most compelling issue was on the search and seizure of the evidence from the trailer in which the defendant was staying.

The Court reviewed the

question of whether the defendant had any standing to contest the search of the owner's trailer. The issue is framed as whether, subjectively, the defendant had an expectation of privacy, and whether, objectively, the expectation was reasonable.

The Court had to acknowledge that the case law supported an expectation of privacy by invited guests. However, in this matter, the Court went to great lengths to find that the defendant had exceeded the boundaries of his original invitation. Essentially, the petitioner had an expectation of privacy, subjectively, but the expectation was not reasonable, objectively. The defendant's continued residence in the trailer was obtained by threats of violence against the owner and the exploitation of the owner's addiction. Simply, the Court found that the defendant was no longer a welcomed guest. While this characterization was not used, the Court essentially treated the owner as the defendant's hostage.

Only after this analysis did the Court then review the other circumstances of the search and seizure. The Court rested on the fact that the owner had opened the door, invited the troopers into the residence, and then consented to the search of the premises. Moreover, the evidence that other persons were present in

the home, that the defendant was known to have a firearm, and that destruction of evidence was heard supported the entry into the home without permission or a warrant. The Court went to great lengths to determine that it was not the troopers who had created the exigent circumstances in that the troopers did not threaten actions that would violate the owner's fourth amendment rights.

Justice Davis dissented, noting that the facts did not support the idea that the owner was less than willing to have the defendant share her home. While it was not so characterized, the payments to the owner seemingly made the defendant, effectively, a tenant. The Justice also believed that the troopers had created the exigent circumstances by their behavior. The Justice highlighted the trooper's testimony that his intent, from the beginning, was to go to the trailer to "secure" the involved persons. In the Justice's opinion, the majority opinion "ensured that no police officer in West Virginia will ever need a warrant to enter and search any person's home."

#### **I Looked Into his Eyes ....**

In *State v. Blackburn*, \_\_\_ S.E.2d \_\_\_, 2014 WL 1876152, the defendant confessed to robbing a Wendy's wearing a bandana and brandishing a machete. The confession came after the

defendant subsequently called 911 threatening to shoot someone if he did not get a cigarette. In the course of the arrest for his 911 threat, the defendant demanded a lawyer. The defendant was nonetheless questioned nine times without a lawyer present.

Two issues arose on appeal after the defendant's conviction on the robbery charge. The first was the admissibility of the confession and the second was the admissibility of an eyewitness identification.

With respect to the confession, the Court held that it was proper for the police to interrogate the defendant with respect to the robbery charge even though he had requested counsel for the 911 threats. The only caveat was that the interrogating officers had to *Mirandize* the defendant regarding his right against self-incrimination and his right to the appointment of counsel. The Court stresses that the interrogation "must involve a wholly unrelated offense."

As for the voluntariness of the confession, the Court was not convinced that coercion, in the form of dropping the 911 charges if he confessed to the robbery and the statement that the defendant had not done well on his polygraph, was present. Moreover, the defendant was not believed to be incapacitated by either his emotional or physical distress. Under the totality of the

circumstances, the confession was deemed to be voluntary.

As for the eyewitness' identification, the eyewitness stated that his certainty level, considering the face of the robber was covered by a bandana, was "9 out of 10." Does this constitute a reasonable doubt? This question was not asked and, therefore, not answered. The most interesting aspect of the identification was that the prosecutor, in the *in camera* hearing on the motion to suppress, questioned the witness by asking him if he was identifying the defendant, who he referred to as a person seated in the courtroom. The Court found, however, that in the circumstances of the questioning, which included a general question regarding a "bunch of gentlemen seated over there," the prosecutor had not "communicated the identity of the assailant" to the witness. Moreover, the trial counsel was noted to have never raised an objection.

So, the witness' certainty of only 9 on a scale of 10, his admission that he was identifying the defendant based on his eyes and skin color and his acknowledgment that he had viewed a website that revealed the defendant had confessed were merely factors for the jury to consider and not a reason to suppress the identification. The question to be asked is, what if the confession had been suppressed, would the

eyewitness identification have been determined differently?

**To 404(b) or Not to 404(b), that is the Question.**

In *State v. Angle*, \_\_ S.E.2d \_\_ (June, 2014), the Court remanded and reversed the defendant's conviction and sentence of life imprisonment as a recidivist. The reversal was based on issues relating to Rule 404(b) of the West Virginia Rules of Evidence.

The defendant had been charged with the assault of a female victim. The trial on this charge included the admission of evidence that, after the date of the alleged assault, the defendant had been a person of interest with respect to the assault of two female victims living in the same neighborhood as the victim in the instant matter.

Notably, the only witnesses at the trial were the purported victim and the police officer who relayed the Rule 404(b) evidence.

Based on the record, or lack of record, and the testimony of the police officer, the Court determined that the lower court had failed in its responsibility to determine in the Rule 404(b) hearing that it was the defendant who had committed the other acts, especially when another individual was also a "person of interest." This is significant in that the standard in such a hearing is merely a

"preponderance of the evidence," and not "guilt beyond a reasonable doubt."

The fact that it was a "subsequent" uncharged offense that was proffered was of no consequence. The Court acknowledged a 2013 decision in which it had permitted a subsequent bank robbery to be admitted as evidence of guilt on a charge of an earlier bank robbery because it showed a "common plan, scheme and identity" and because "there was substantial forensic evidence linking the defendant to both crimes." In this matter, however, the Court found insufficient evidence to support a conclusion that the defendant was involved, especially considering the different circumstances of each alleged crime.

The Court also found that a stated purpose for the use of the evidence was improper. The State intended to show a lustful disposition toward the victim. The Court emphasized that its decision in *Edward Charles L.* was only for lustful disposition toward children. The general rule that such evidence is impermissible still extends to cases involving adult victims.

Finally, the trial court was found to have improperly conducted the Rule 404(b) process. First, the evidence must be admissible. But once deemed to be admissible, the evidence must be found to be relevant. But once found to be

relevant and admissible, the evidence must be evaluated under the balancing test of Rule 403. The Court emphasized that "the balancing necessary under Rule 403 must affirmatively appear on the record." As the Court noted, "it is clear that no balancing test was ever conducted."

Significantly, the Court refused to engage in a "harmless error" analysis. The Court noted "that Rule 404(b) determinations are among the most frequently appealed of all evidentiary rulings and the erroneous admission of evidence of other acts is one of the largest causes of reversal of criminal convictions." Accordingly, "where a trial court erroneously admits Rule 404 (b) evidence, prejudicial error is likely to result." The conviction and the recidivist conviction were reversed.

**A Novel Defense, or A Prosecution by the Book.**

In *State v. Prophet*, \_\_ S.E.2d \_\_ (June, 2014), the defendant had authored a book entitled, *Enter the Fire: Seven Days in the Life*. The novel contained themes of violence within the drug culture, referred to a house fire, featured drug dealers as the main characters, killed the wife of one of the main characters, injured the child of one of the characters in a home invasion, and detailed the slitting of a character's

throat. What were the charges against the defendant in this criminal proceeding? The charges were the murder of a mother with whom he was spending the night and one of her two sons. The details were that a fire had been set in the apartment. The bodies were found in the apartment, but, while no cause of death could be determined for the son due to the damage done by the fire, the mother had her throat slit before the fire.

The defendant claimed that the real perpetrator was a drug dealer whom he had crossed and who was seeking retribution. The defendant's story was that, on the evening of the fire, the apartment had been invaded by two thugs. He managed to escape. When he saw the fire, he came back to the apartment and managed to save one child. He then panicked and fled, leaving the surviving son on the patio of the grandparent's adjacent residence.

Notably, the defendant had never told anyone this version of events. However, in support of the defendant's story was a 911 call made by the defendant to report threats by the drug dealer.

The Court ruled that the State could not use the novel and its similarity to the crime scene in its case-in-chief, but could use it in rebuttal. The defendant testified and the prosecutor began cross-examining the defendant about the novel,

**THE CAPITOL LETTER**

which, over objection, the Court permitted. The prosecutor then argued in closing the theme that the defendant was a writer of crime fiction and was quite capable, therefore, of fabricating a story to fit the evidence in the two years between the charge and the trial. The defendant was convicted.

With respect to the cross-examination on the novel, the Court held that the defendant, by testifying, "placed his credibility at issue." The use of the novel in cross-examination was "relevant to the petitioner's credibility." The novel was not used, in the Court's opinion, to suggest that the defendant was more likely

to have killed the victims because he wrote about such things.

The other noteworthy issue was the prosecutor's questions regarding the defendant's failure to have told this story to any person in law enforcement. Objections to the line of questioning had been interposed. The ruling was that the prosecutor could refer to "pre-arrest silence," but "not post-arrest silence." The prosecutor then asked a question that arguably could have elicited "post-arrest information," but subsequent questions specifically referred to a "pre-arrest conversation." The Court found, in the circumstances, that the prosecutor did not improperly

inquire into post-arrest matters.

**Close doesn't count except when it relates to drugs.**

In the case of *State v. Shamblin*, 2014 WL 2922804, the defendant was found guilty of the crime of possession of a firearm by a prohibited person. The charge was deemed to be a felony because the prior felony convictions were determined to be controlled substance offenses. See W. Va. Code §61-7-7(b)(2).

On appeal, the defendant argued that his charges should have been treated as a misdemeanor under section (a) of the governing statutory provision.

The prior convictions were for the "attempt" to commit a felony. The defendant acknowledged that the

attempt related to the manufacturing of methamphetamine, but, since he did not actually manufacture methamphetamine, the offense should not be considered to "involve" a controlled substance. Accordingly, his current conviction was a misdemeanor offense, not a felony.

Without much discussion, the Supreme Court of Appeals of West Virginia rejected the argument, stating that the attempt was related to a controlled substance and, therefore, would invoke the felony elements of the felon-in-possession statutes. The Court noted that the attempt charge was considered to be a lesser included offense of the controlled substance felony charge.

**VOUCHER UPDATE**

For the period of July 1, 2013, through June 30, 2014, West Virginia Public Defender Services processed 34,054 vouchers for payment in a total amount of \$25, 541, 762 .07



**Most Highly Compensated Counsel**

**For the period of July 1, 2013, through June 30, 2014:**

Kurelac Law Office, PLLC	\$ 256, 908.64
Law Office of Daniel R. Grindo, PLLC	\$ 242, 329.00
William M. Lester	\$ 238, 289.00

**Most Highly Compensated Service Providers**

**For the period of July 1, 2013, through June 30, 2014:**

Tri S Investigations, Inc.	\$ 176, 680.92
Forensic Psychology Center, Inc.	\$ 140, 691.75
Forensic Psychiatry, PLLC	\$ 48, 100.00



Independence Day is a patriotic holiday for celebrating the positive aspects of the United States. Above all, people in the United States express and give thanks for the freedom and liberties fought by the first generation of many of today's Americans. The Statue of Liberty is a national monument that is associated with Independence Day.

In 1775, people in New England began fighting the British for their independence. On July 2, 1776, the Congress secretly voted for independence from Great Britain. The Declaration of Independence was first published two days later on July 4, 1776. The first public reading of the Declaration of Independence was on July 8, 1776. Delegates began to sign the Declaration of Independence on August 2, 1776.

The first description of how Independence Day would be celebrated was in a letter from John Adams to his wife Abigail on July 3, 1776. He described "pomp and parade, with shows, games, sports, guns, bells, bonfires, and illuminations" throughout the United States. However, the term "Independence Day" was not used until 1791.

Interestingly, Thomas Jefferson and John Adams, both signers of the Declaration of Independence and presidents of the United States, died on July 4, 1826 - exactly 50 years after the adoption of the declaration.



**National Senior Citizens Day**

**Aug  
21st**

National Senior Citizens Day is an observance and not a public holiday in the US. Some people celebrate Senior Citizens Day on August 14 as it was the day past US president Franklin Roosevelt signed the Social Security Act in 1935. However, in 1988 Ronald Reagan, who was the US president at the time, declared August 21 to be National Senior Citizens Day. This observance was established in honor of senior citizens in the US who made positive contributions in

their communities. The day was also created to bring awareness of social, health, and economic issues that affect senior citizens.

**Honorable Earl Ray Tomblin - Governor**

**Ross Taylor - 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**

**Criminal Law Research Center**

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## “Quotes” to Note

“These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.” Chief Justice Roberts, Supreme Court of the United States, *Riley v. California*, 573 U.S. \_\_\_, 134 S.Ct. 2473 (2014).

“That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.” *Id.*

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**Did you know....** On the date of September 2, 2014, the extensive revisions to the West Virginia Rules of Evidence will become effective. The proposed rules to make prior allegations of sexual offenses admissible as a matter of course have not been adopted. However, the proposed new Rule 412 was adopted. Rule 412 supersedes the provisions of the Rape Shield statute which is codified at W. Va. Code §61-8B-11 to the extent the statute conflicts with the rule. The commentary states that the new rule adopts the federal rule of evidence on the subject except that the state rule retains the reference to an express bar on the admission of “opinion and reputation evidence” regarding a victim’s sexual conduct when prosecution is based on the victim’s incapacity to consent.

### DID YOU ALSO KNOW?

The Supreme Court of Appeals of West Virginia is considering extensive revisions to the Rules of Professional Conduct. The revisions are generally described as conforming the state’s rules to the American Bar Association’s Model Rules of Professional Conduct.

Structural changes include removing the rules regarding pro hac vice admission and addressing such admission in the Rules for the Admission to the Practice of Law and also include removing the rules regarding IOLTA accounts and addressing such accounts in administrative rules for the State Bar.

The revisions emphasize several new concepts including “informed consent,” “confirmed in writing,” and “signed by a client.” The rules describe when each is, or all are, required.

The revisions to Rule 1.6 significantly expand the instances in which the attorney can reveal confidential client information in order to prevent harm or injury to the interests of other persons.

Notably, the former legal opinions restricting “ghost writing” have been reversed by Comment 9 to the revised Rule 1.2 in that such assistance may be provided to pro se litigants without disclosing such assistance.

A lawyer will be expected to adopt reasonable security procedures to safeguard against disclosure of information related to a client. A lawyer is also expected to have a transition plan for clients upon his or her death.

A lawyer is given express guidance in matters when the client is believed to have diminished capacity, including the guidance to speak with others or to have a guardian ad litem appointed.

You are encouraged to read the proposed revisions, which are 163 pages in length.



“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)