

The Defender

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Funds for private counsel were exhausted on 1 April 2010. At that time we had processed 43,370 vouchers, totaling \$29,687,901, an all-time record expenditure for private counsel. (see photo at right, showing a portion of the voucher paid in 20009-2010). We were paying vouchers received within the prior 60 days.

Absent supplemental funds, we project a deficit of \$10-11 million by 30 June 2010. As of this writing, no plans for an extraordinary legislative session have been announced.

It seems clear that an extraordinary session will not occur until after the 11 May 2010 primary election. Under any scenario, we will not have additional funding until June, if then. The only good news is that if FY 2010 supplemental funding carries over to FY 2011, it will augment the otherwise low funding in the first quarter of FY 2011 (tax collections during that time make accelerated funding impossible).

Going forward into FY



2011, however, it is also clear that we are also substantially underfunded for next year. Unless voucher flow reduces, we estimate an additional \$11 million deficit in FY 2011 (total of \$22 million from now through 30 June 2011). PLEASE CONTINUE TO SEND YOUR VOUCHERS. We will be unable to show that increased funding is necessary unless vouchers are on site (and of course, W.Va. Code 29-21-13a already requires bills to be submitted within 90 days of the last date of service).

This current situation demonstrates yet again the clear need for more Public Defender offices so that the current loosely regulated fee for service system cannot continue to grow unchecked. Now that past billings are virtually cur-

rent, the immediate dilemma is brought about by a 54% increase in private counsel billings compared to the pre-“surge” (grace period for submission of old billings) level. While lawyers are certainly not, in the aggregate, overpaid, the growth in demand for funds continues to outstrip funding availability.

In this economic environment there are no easy answers. The hourly rates for private attorneys are now over twenty years old. Clearly they should be increased. On the other hand, funding for work at even the current rates is not available. In the interest of justice, both the West Virginia State Bar and the West Virginia Supreme Court of Appeals need to address this issue. I invite your participation in encouraging both bodies to take an interest. The Indigent Defense Commission recommended raising the hourly rates to \$75/105 (out and in court) on 15 January 2009 (see other recommendations for the Bar and the Court, on our website, www.wvpds.org).

West Virginia Legislature Update



The Regular session of the 2010 Legislature wrapped up on March 20, 2010. Some of the bills which passed the Legislature and were signed by the Governor include:

- S.B. 218 - permitting accelerated parole eligibility for inmates who have completed a rehabilitation plan (§62-12-13) [effect. 6/11/10]
- S.B. 362 - redefining the offense of providing false information in order to obtain a prescription and increased the jail sentence (§60A-4-410) [effect. 6/11/10]
- S.B. 435 - mandating certification for State, county and municipal police officers using speed-detecting devices (§17C-6-7) [effect. 6/11/10]
- S.B. 490 - redefining provisions on issuance of domestic violence orders (§48-27-202, et. seq.) and added new provision and sentence for third-offense violation of protective order (§48-27-903) [effect. 6/11/10]
- S.B. 649 - establishing criteria for searches of automobiles, including requirements for recordation of consent (§62-1A-10) [effect. 6/11/10]
- H.B. 4188 - the “Anti-Organized Criminal Enterprise Act”, designed to address street gang activities (§61-13-1, et. seq) [effect. 6/11/10]
- H.B. 4531 - prohibiting the shackling of pregnant women except in extraordinary circumstances (§31-20-30a) [effect. 6/11/10]
- H.B. 4534 - increasing penalty for felony offense of failure to render aid after accident involving death (§17C-4-1) [effect. 6/09/10]
- H.B. 4604 - increasing the penalties for persons convicted of fleeing from or making false statements to police officers (§61-5-17) [effect. 6/18/10]

Under S.B. 457 (effect. June 11, 2010), which repealed a number of outdated provisions of the West Virginia Code, it is no longer illegal to wear a hat in a movie theater (§61-6-16), display a red or black flag; (§61-1-6), or commit numerous criminal acts in connection with dueling, including taunting for nonparticipation in a duel (§ 61-2-24).

United States Supreme Court Update



Thaler v. Haynes, 130 S. Ct. 1171 (02/22/10) - The Court reversed a decision of the Fifth Circuit granting habeas corpus petitioner a new trial, on grounds that no decision of the Court “clearly established” that a judge, in ruling on a *Batson v. Kentucky* peremptory challenge, must reject a demeanor-based challenge unless the judge personally observed the juror in question. (*Per Curiam*).

Wilkins v. Gaddy, 130 S. Ct. 1175 (02/22/10) - The Court reversed the decision of the Fourth Circuit affirming dismissal of petitioner’s claim under 42 USC § 1983, holding that petitioner’s/prisoners assertion of injuries at hands of corrections officers must be judged on nature of the force used rather than the “de minimis” extent of the injuries received. (*Per Curiam*).

Florida v. Powell, 130 S. Ct. 1195 (02/23/10) - Advice to a suspect that the suspect has “the right to talk to a lawyer before answering any questions” and that the right could be invoked “at any time” satis-

fies *Miranda v. Arizona*, reversing the judgment of Supreme Court of Florida that these warnings did not adequately advise petitioner that he could have an attorney present throughout the questioning process. (*Ginsburg, J.*)

Maryland v. Shatzer, 130 S. Ct. 1213 (02/24/10) - The police questioned and Mirandized the respondent in a Maryland prison in 2003 regarding sexual abuse allegations. Two-and-one-half years later the respondent was questioned again at the prison regarding the same issue and made inculpatory statements. The Court held that there was a sufficient break in *Miranda* custody to override the *Edwards v. Arizona* presumption that such statements are considered coerced and involuntary. (*Scalia, J.*)

Johnson v. United States, 130 S. Ct. 1265 (03/02/10) - A state felony battery offense, which is defined as “actually and intentionally touching” another person, does not have as an element the use of “physical force” and thus does not constitute a “violent felony” for sentencing enhancement purposes under the federal firearms statute, 18 USC §924(e) (1). (*Scalia, J.*)

Berghuis v. Smith, No. 08-1402 (03/30/10) - Reversed the

Sixth Circuit’s determination that the lower court erred in holding respondent was denied his Sixth Amendment right to an impartial jury; holding that *Duren v. Missouri* did not support finding that respondent was denied jury selected from a fair cross section of the community. (*Ginsburg, J.*)

Padilla v. Kentucky, No. 08-651 (03/31/10) - The Court determined that the petitioner may have a valid claim of ineffective assistance of counsel based on counsel’s failure to adequately inform the petitioner, a long-time resident of the United States, of the possibility of deportation for his drug conviction. The Court cited the expansion of deportable offenses under federal immigration law, and noted that “deportation is an integral part - indeed, sometimes the most important part - of the penalty that may be imposed on non-citizen defendant.” (*Stevens, J.*)



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

West Virginia Supreme Court Update

Lawyer Disciplinary Board v. Chittum, No. 34733 – 1/29/10 - PC

Based upon two complaints from a former client and the Office of Disciplinary Counsel, a Hearing Panel Subcommittee of the Lawyer Disciplinary Board determined that the respondent attorney had violated seven different provisions of the Rules of Professional Conduct. The Court reviewed the Panel's rulings and determined that the respondent had violated Rules 8.4(a) and 8.4(d) by attempting to establish an intimate personal relationship with the client through letters and telephone conversations.

In regard to the second complaint (which was filed by the ODC), the Court affirmed the Panel's determinations that the respondent had violated Rule 1.15 (a) by commingling personal money in his client trust account, and Rule 1.15 (d) by failing to maintain an IOLTA account.

The Court adopted the Panel's recommended sanctions, which included a reprimand; a period of supervised practice; additional CLE requirements; audits of his office accounting re-

ords; delivery of the divorce client's personal belongings and payment of costs.

Attorney Reprimand.

Lawyer Disciplinary Board v. Barton, No. 34623 – 1/29/10 - PC

The executrix of a former client filed an ethics complaint against the respondent attorney, alleging that the attorney had mishandled the proceeds of a personal injury action settlement.

The Court affirmed the findings of a hearing panel, finding that the attorney had converted a portion of the settlement funds, had failed to provide an accurate accounting and had charged excessive fees for the provision of the accounting.

The Court adopted the recommendation of the hearing panel and annulled the respondent's law license.

Law License Annulled.

State v. Hughes, No. 34470 - 2/11/10 - Davis, C.J.

At the appellant's trial for first degree murder, the State presented dual theories of premeditated murder

and felony murder. The appellant assigned as error this dual presentation along with several other issues.

The Court held (1) that the State can pursue dual theories provided that the jury is properly instructed as to both theories; (2) that the trial court did not err in refusing to strike two jurors for cause; and (3) that it was not error to permit the jury to return to the courtroom during deliberations to listen to two tape recordings that had been admitted into evidence.

Affirmed.

In the Interest of Katelyn P., No. 35450 - 2/16/10 - PC

The DHHR appealed the decision of the circuit court granting a post-adjudicatory improvement period to the parents of four children. The DHHR argued that since neither of the parents had identified who had broken the leg of one of the children, they could not fully participate in the improvement period.

The Court concurred and reversed the circuit court,

holding that the parent’s refusal to acknowledge the existence of abuse/neglect foreclosed their participation in a post-adjudication improvement period.

Reversed and Remanded.

SER Bowers v. Scott, No. 34972 - 3/04/10 - PC

The State of West Virginia appealed the decision of the circuit court granting habeas relief to the appellee. The circuit court determined that the appellee had received ineffective assistance of counsel and that there had been instances of prosecutorial misconduct during his 2003 trial on several counts of sexual abuse. In granting the appellee’s petition, the circuit court cited numerous instances of ineffective assistance, including failing to object to inappropriate evidence and failing to object to several instances of prosecutorial misconduct.

The Court reviewed the findings of the circuit court under the standards of *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995), and after an extensive review of the evidence presented at trial determined that the circuit court’s decision was erroneous. The Court held that while there may have been instances of ineffective assistance of counsel, there was no reasonable probability that the result of the trial proceedings would have been different.

Reversed.

SER Dunlap v. McBride, No. 34808 - 3/04/10 - PC

The appellant appealed the decision of the circuit court denying

his petition for habeas corpus. He asserted (1) ineffective assistance of trial counsel, (2) improper bifurcation, (3) improper admission of 404(b) evidence during the penalty phase, and (4) a conflict of interest of a prior attorney.

The Court reviewed his assertions and affirmed the circuit court’s decision. The Court held (1) that the assertions of ineffective assistance of counsel were meritless; (2) that it was not an abuse of discretion to bifurcate the case after the trial had begun; (3) that a *McGinnis* hearing was not required for evidence introduced during the penalty phase of the trial; and (4) that any potential conflict of interest raised by the appellant’s prior counsel’s representation of a state witness was harmless in light of testimony given by other witnesses.

Affirmed.

Lawyer Disciplinary Board v. Martin, No. 34734 - 3/04/10 - PC

The Hearing Panel Subcommittee of the Lawyer Disciplinary Board determined that the respondent attorney committed numerous violations of the Rules of Professional Conduct in his handling of an estate matter. The violations included failing to diligently represent the estate, failing to properly disburse funds and failing to promptly comply with an order for his removal.

The Court adopted the Panel’s findings and affirmed the Panel’s recommended sanction of a six-month suspension of the respondent’s law license.

Law License Suspended.

State v. Black, No. 34722 - 3/04/10 - Davis, C.J.

The appellant was convicted along with three co-defendants of second degree murder in connection with the 2002 death of a Cabell County woman. The appellant assigned numerous errors.

The Court reviewed each of the appellant’s assignments and affirmed his conviction. The Court determined (1) that inculpatory statements made by the appellant to the police were voluntary despite the appellant’s assertion that the police had coerced the statements by the threat of parole revocation; (2) the trial court had not abused its discretion in prohibiting the testimony of an expert witness on false confessions because the statements made by the appellant could not be considered “confessions”; (3) the trial court properly excluded a proposed witness for the defense because the defense had not disclosed the identity of the witness prior to trial; (4) the trial court properly struck the testimony of a defense witness on the basis of relevance; (5) that the appellant had not demonstrated a pervasive sentiment in the community against the appellant sufficient to justify a change of venue; (6) that the use of allegedly exculpatory evidence offered by a state witness, undisclosed to the appellant prior to trial, was not erroneous because the testimony was vague and it was not possible to determine whether the evidence was exculpatory; (7) the



trial court did not abuse its discretion in permitting a witness to rebut the appellant's alibi defense; and (8) that references by the prosecuting attorney during closing argument to taped statements made by a co-defendant were not improper.

Affirmed.

State v. William M., No. 35130 - 3/11/10 - Ketchum, J.

The appellant was accused of sexual assault by his twelve-year old daughter. Prior to trial the alleged victim was examined with a colposcope, which recorded 98 digital images during the exam. However, the existence of the images was not revealed to the appellant until the trial during the State's case in chief.

The appellant objected to the late disclosure of the images, but the trial court determined that the images were not photographs, had not been in the State's possession prior to trial and therefore were not subject to disclosure.

The Court disagreed, holding (1) that the digital images recorded by the colposcope were "photographs" within the meaning of Rule 1002 and therefore fit within the appellant's pre-trial discovery request, and (2) that discovery of the images constituted newly discovered evidence, entitling the appellant to a new

trial.

Reversed and remanded.

State v. Elswick, No. 35014 - 4/01/10 - PC

The appellant sought review of his convictions of voluntary manslaughter and conspiracy and the resulting imposition of a life sentence as a habitual offender. The appellant alleged multiple assignments of error, all of which were considered and rejected by the Court.

The Court's primary focus was upon the appellant's assertions of a violation of his right to a speedy trial. The appellant was indicted in September of 2005 but was not tried until July of 2008. The Court held that there was no violation of the three-term rule, citing the lack of any deliberate action of the part of the State to delay the trial. The Court also noted that some of the delays (procuring forensic testing and expert witnesses) were to the benefit of the appellant.

The Court also held, *inter alia*, that (1) remarks by the prosecutor as to his inability to call the appellant as a witness, which brought about a mistrial, did not foreclose a retrial and thus did not implicate double jeopardy; (2) the prosecutor's failure to disclose the terms of a plea agreement with a state witness was rectified by the granting of a continuance; and (4) that destruction of telephone

numbers and photographs allegedly belonging to the appellant by the police did not constitute a violation under *Brady v. Maryland* and *State v. Osakalumi*.

Affirmed.

SER Taylor v. Janes, No. 35287 - 4/05/10 - Ketchum, J.

The petitioner sought a writ of prohibition to prevent the State, in a retrial on a murder charge, from presenting evidence that the petitioner had shot and killed the victim. The petitioner based this argument on his acquittal on a related conspiracy charge, and the petitioner argued that because the conspiracy charge alleged a single overt act (shooting the victim), collateral estoppel barred the State from presenting evidence of the shooting.

The Court rejected this argument and set forth several new syllabus points regarding whether collateral estoppel bars a retrial of a defendant when a prior jury has acquitted the defendant.

Writ of Prohibition Denied.

In Re: Katelyn T and Joel T., No. 35138 - 4/14/10 - PC

The DHHR and the guardian *ad litem* for two children appealed the circuit court's order dismissing an abuse/neglect petition and ordering the return of the children to their mother.

The Court reviewed the testimony offered during the proceedings and reversed the circuit court's decision. The Court based its determination upon testimony indicating that the children had been sexually abused by the mother's boyfriend. The Court explained with substantial detail the allegations by the children of sexual activities by the boyfriend, including masturbation and invitations to the children to touch his privates. The Court noted that the mother had been advised of these occurrences but had taken no action to protect the children.

Reversed and remanded.

In Re: Isaiah A., No. 35031 - 4/15/10 - PC

Abuse and neglect proceedings were initiated against Alicia T. over allegations that, due to her drug use and assorted emotional problems, she was unable to care for her son. She stipulated to the abuse petition and was placed on a post-adjudicatory improvement period.

The DHHR subsequently filed for termination of the improvement period and Alicia's parental rights, citing her continuing failure to abide by the terms of the improvement period. The court declined to terminate her parental rights, however, citing

a "glimmer of hope" that she might be able to remedy the situation.

The Court disagreed, noting that the mother had been granted three extensions to her post-adjudicatory improvement periods but had not demonstrated a reasonable likelihood that she could correct the conditions of abuse. The Court reversed and ordered that the mother's parental rights be terminated.

Reversed and remanded.

State v. Fields, No. 34746 - 4/21/10 - Ketchum, J.

The appellant was charged as a juvenile with first degree murder. While the case was pending the appellant's family retained a Huntington attorney for a nominal fee. Following the appellant's transfer to adult status the attorney was appointed *nunc pro tunc* by the trial court to represent the appellant.

At a pretrial hearing the trial court expressed dissatisfaction with the pace and scope of discovery between the parties, and *sua sponte* ordered the removal of the prosecutor and the appellant's attorney. The attorney was retained by the appellant's family on a private basis the very next day but the court refused to permit the attorney to act, citing the attorney's conduct.

On appeal, the Court considered whether the trial court's action constituted a violation of the appellant's right to counsel. The Court answered in the negative, holding that a trial court has the discretionary power to remove

appointed attorneys based upon proper cause. The Court held that such cause had been shown in the appellant's case and affirmed the trial court's decision.

Affirmed.

State v. Martin, No. 35225 - 4/21/10 - PC

The appellant pleaded guilty to a felony charge and, as a part of his plea agreement, the State agreed to recommend probation. However, at a subsequent sentencing hearing the prosecutor resisted probation "or any alternative sentence", citing the appellant's conduct during a pre-sentence evaluation. Defense counsel did not object to this statement. The appellant was sentenced to a term of imprisonment.

The Court held that the State had clearly breached the plea agreement and that the State's failure to recommend probation was plain error. The Court remanded the matter to permit the appellant to withdraw his guilty plea.

Reversed and remanded.



WVPDS Continuing Legal Education - Upcoming Events

WVPDS ANNUAL CONFERENCE

June 17-18, 2010

Charleston Civic Center

200 Civic Center Drive

Charleston, W. Va.



The 2010 WVPDS Annual Conference will be held on June 17-18, 2010 at the Charleston Civic Center in Charleston, West Virginia.

The Conference will feature a number of nationally known speakers on a variety of topics. The Conference will be eligible for approximately 10.5 hours of general CLE credits and 1.2 hours of ethics CLE credits.

To review the Tentative Agenda and obtain a Registration Brochure, please go to www.wvpds.org and click the Criminal Law Research Center tab, or call Erin Fink at (304) 558-3905 for further information.

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