

The Defender

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From The Executive Director's Chair

At this writing, we are approaching the end of the 2013 Regular Session of the Legislature. While there are a number of bills still pending of interest to criminal defense practitioners, the very first bill to pass both houses and be signed by Governor Earl Ray Tomblin is of considerable importance.

S.B 197 provides \$11.5 million dollars in supplemental funding for payments for court appointed attorneys. I am very pleased with the quick response of the Legislature to this issue, which will permit PDS to continue making all payments within the statutory 90-day payment period and thus avoid costly interest payments. Special thanks should be extended to all Legislators, the State Budget Office, Secretary of Administration Ross Taylor and Governor Earl Ray Tomblin for their prompt and decisive action on this matter.

At this juncture it is too early to determine the state of the final budget number for the upcoming fiscal

year. It is no secret that we find ourselves in tight budgetary times, but I remain optimistic that we can continue to provide full and competent representation at the highest level.

OVS SYSTEM

The On-Line Voucher System ("OVS"), which went live on April 2, 2012, currently has over 289 users. The response to the system has been overwhelmingly positive. As many of you know, many courts have moved to on-line filings of pleadings and other documents, and it is possible that on-line voucher filing could be mandated within the next few years.

The system is free of charge and very user-friendly, and can be accessed from mobile devices, which therefore allows entry of data at any time. I would encourage all attorneys to log-on and give the system a try.

FINALLY...

At this writing, the Governor's Office is considering

applications for the position of Executive Director of PDS. I am pleased to have served as Acting Director for the past 2+ years and welcome the opportunity to work with the new Executive Director. I will continue to serve PDS in my long-time capacity as Director of the Criminal Law Research Center. In the meantime, please feel free to contact me at the phone number or e-mail address below should you have any questions.

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All West Virginia
Supreme Court
opinions may be
reviewed online at
www.courtswv.gov

West Virginia Supreme Court Update

State v. Welch, 229 W. Va. 647, 734 S.E. 2d 194 (10/19/12)

The Court affirmed the petitioner's convictions for first degree murder and sexual assault, holding in a new syllabus point that the provisions of Rule 11 of the Rules of Criminal Procedure do not apply when a trial court is approached on an informal basis to determine the court's amenability to a proposed plea agreement.

Affirmed. (Davis, J.)

State v. Finley, 229 W. Va. 690, 735 S.E. 2d 565 (10/19/12)

Holding that a statement of the petitioner admitting to the murder of his wife was admissible because the petitioner was not subject to custodial interrogation at the time of the statement.

Affirmed. (PC)

LDB v. Alderman, 229 W. Va. 656, 734 S.E. 2d 737 (10/19/12)

Approved two-year suspension of respondent's law license based upon convictions for misdemeanor drug offenses. The Court noted respondent's actions had no negative impact on his clients.

Recommended Sanctions Approved. (PC)

State v. Davis, 229 W. Va. 695, 735 S.E. 2d 570 (10/24/12)

The Court rejected the petitioner's argument that she was charged under the incorrect "obstructing" statute, resulting in a conviction of

the more serious offense. The Court also rejected the petitioner's lenity argument on the grounds that the statute was not ambiguous.

Affirmed. (PC)

LDB v. Robinson, ___ W. Va. ___, 736 S.E. 2d 18 (10/25/12)

The Court approved the recommended annulment of the respondent's law license, based upon the respondent's felony conviction of unlawful wounding of a civil client.

Law License Annulled. (PC)

Holland v. Miller, ___ W. Va. ___, 736 S.E. 2d 35 (11/08/12)

The Court remanded the case for determination of whether "good cause" existed for multiple continuances of an administrative license revocation hearing, when the continuances were allegedly based upon the absence of a witness whose presence the petitioner had not requested.

Reversed and Remanded. (McHugh, J)

SER Davis v. Fox, 229 W. Va. 662, 735 S.E. 2d 259 (11/08/12)

The Court rejected the extension of the felony murder rule to instances where a co-perpetrator of an underlying offenses is killed by the intended victim of a crime. The Court affirmed the trial court's dismissal of a first degree murder charge on the grounds that malice could not be attributed to the victim of a crime.

Affirmed. (McHugh, J.)

LDB v. Aleshire, ___ W. Va. ___, 736 S.E. 2d 70 (11/09/12)

Approving the recommended sanction of a one-year suspension of the respondent's law license, the Court held that respondent had committed numerous ethical violations while conducting a private real estate affair.

Law License Suspended. (PC)

LDB v. Burke, ___ W. Va. ___, 737 S.E. 2d 55 (11/09/12)

The Court determined that respondent attorney's conduct in failing to notify bankruptcy court or trustee of withdrawal from representation of client's medical malpractice case, and co-counsel's subsequent distribution of lawsuit funds, warranted admonishment.

Admonishment and Other Sanctions Imposed. (PC)

Ballard v. Hurt, ___ W. Va. ___, ___ S.E. 2d ___ (No. 11-0816) (11/09/12)

The Court reversed the circuit court's decision granting *habeas corpus* relief to the respondent, finding that trial counsel's lack of objection to the trial court's failure to properly advise the respondent of his right to testify (or to decline to testify) at trial did not violate constitutional rights cognizable in a *habeas corpus* proceeding. The Court also held that while trial counsel was deficient in failing to advise the respondent of such rights, there was no showing of prejudice. The Court remanded the case for findings and conclusions regarding other alleged errors.

Reversed and Remanded. (PC)

In Re: T.W., et. al., ___ W. Va. ___, 737 S.E. 2d 69 (11/14/12)

The Court held that the circuit court erred in accepting a voluntary relinquishment of a father's parental rights without first conducting an evidentiary hearing. The Court also held that the lower court should have appointed a separate guardian *ad litem* for two children who resided out-of-state, and further should have conducted an in camera hearing to determine the dispositional wishes of two older children.

Vacated and Remanded. (McHugh, J.)

State v. McGill, ___ W. Va. ___, 736 S.E. 2d 85 (11/15/12)

The Court held (1) the petitioner had failed to properly preserve the issue of whether the escape statute (61-5-10) applies when home incarceration is imposed as a condition of bond; and (2) that the restitution statutes (61-11A-1, et seq) do not authorize an award of restitution to the State as a "victim" of a criminal offense.

Affirmed in part and Reversed in part. (McHugh, J.)

State v. Surbaugh, ___ W. Va. ___, 737 S.E. 2d 240 (11/20/12)

The Court reversed the petitioner's conviction for the murder of her husband. During trial, the petitioner had presented evidence of her good character, but the trial court failed to instruct the jury as to the purpose of this evidence. The Court stated that such evidence may be considered in connection with all other evidence to generate reasonable doubt.

Reversed and Remanded for New Trial. (Benjamin, J.)

State v. Jonathan B., ___ W. Va. ___, 737 S.E. 2d 257 (11/20/12)

During the petitioner's trial for sexually assaulting a younger half-sister, a police officer testified that a computer found in the petitioner's bedroom contained video files with pornographic file names. The Court determined that this testimony constituted prejudicial character evidence under Rule 404(b). The Court also held that testimony regarding a notebook kept by the victim, indicating that her only sexual encounters had been with persons other than the peti-

tioner and his co-defendant, were not prohibited under the Rape Shield statute.

Reversed and Remanded. (Benjamin, J.)

State v. Frazier, 229 W. Va. 724, 735 S.E. 2d 727 (11/20/12)

At the appellant's trial for the murder of a former girlfriend, the State called the Chief Medical Examiner to testify to an autopsy report prepared by another forensic pathologist. The Court agreed with the petitioner that the original autopsy report was "testimonial" in nature, and that its admission into evidence without the testimony of the original pathologist violated *Crawford v. Washington* and *State v. Mechling*.

Reversed and Remanded for New Trial. (Ketchum, C.J.)

In Re: Aaron H., 229 W. Va. 677, 735 S.E. 2d 274 (11/09/12)

The grandfather of Aaron H. sought custody of the child following termination of the parents' parental rights. The Court affirmed the circuit court's determination that the statutory "grandparent preference" in 49-3-1 is not absolute, and that the best interests of the child remain the paramount concern in custody decisions.

Affirmed. (PC)

State v. Kennedy, 229 W. Va. 756, 735 S.E. 2d 905 (11/21/12)

The petitioner was convicted of murder in 1996. He filed a motion in 2010 for a new trial, arguing that the trial testimony of a pathologist as to the autopsy results obtained by a non-testifying pathologist violated *Crawford v. Washington* and *State v. Mechling*. The Court recognized the testimonial nature of the autopsy reports and noted the Confrontation Clause issues inherent in such testimony; however, the Court held that the *Crawford/Mechling* standards did not apply in a retroactive manner to the petitioner's trial.

Affirmed. (Workman, J.)

State v. Hartman, 229 W. Va. 749, 735 S.E. 2d 898 (11/21/12)

The Court held that the filing of a misdemeanor information and consolidation of the charge with a pending felony

indictment did not constitute an improper amendment to the indictment. The Court held that Rule 8(a) of the Rules of Criminal Procedure require a unitary trial, not a unitary charging document.

Affirmed. (Workman, J.)

In Re: D.P., ___ W. Va. ___, 737 S.E. 2d 282 (11/21/12)

The DHHR appealed the circuit court's dismissal of an abuse/neglect petition. The Court affirmed the circuit court's decision, finding that continuation of the abuse/neglect proceedings might jeopardize guardianship proceedings initiated by the child's grandmother.

Affirmed. (PC)

McBride v. Lavigne, ___ W. Va. ___, 737 S.E. 2d 560 (11/21/12)

The circuit court granted *habeas corpus* relief to the respondent, finding numerous constitutional errors in the respondent's original trial. The Court reversed this decision, determining that the errors asserted by the circuit court (improper jury instruction, limitation of character witnesses and insufficiency of the evidence) did not warrant reversal of the respondent's conviction.

Reversed. (PC)

State v. Farley, ___ W. Va. ___, 737 S.E. 2d 90 (11/21/12)

After entering a conditional plea to first degree robbery, the petitioner appealed, arguing that the entry of police officer's into his home and the seizure of various items was an improper warrantless search. The Court rejected this argument and, citing the testimony offered by the officers at a suppression hearing, held that there was sufficient evidence to justify the entry and search of the home under the "exigent circumstances" exception to the warrant requirement.

Affirmed. (PC)

LDB v. Sullivan, ___ W. Va. ___,
___ S.E. 2d ___ (No. 12-0005)
(01/17/13)

The Court imposed a 30-day suspension of the respondent's law license based upon the respondent's failure to correct errors in a sentencing order, which errors delayed a client's parole eligibility. The Court also noted that the respondent had failed to respond to inquiries from the client or his family regarding the matter.

Law License Suspended. (PC)

State v. Hypes, ___ W. Va. ___,
___ S.E. 2d ___ (No. 11-1273)
(02/07/13)

The Court affirmed the petitioner's conviction for operating a clandestine methamphetamine lab. The Court rejected the petitioner's arguments that a statement made two years after the incident that the petitioner was "addicted to cooking meth" was unduly prejudicial. The Court also held that sufficient evidence was presented at trial to support the petitioner's conviction.

Affirmed. (PC)

SER DHHR v. Sims, ___ W. Va. ___,
___ S.E. 2d ___ (No. 12-1124)
(02/07/13)

The circuit court granted the parents in an abuse/neglect case a six-month post adjudicatory improvement period. The DHHR and the guardian *ad litem* objected, arguing that the original evidence presented in the petition (and agreed to by the parents in the adjudication) required termination of parental rights. The Court affirmed the decision of the circuit court, noting that the court had found significant progress in substance abuse treatment and improving their parenting skills, and had not abused its discretion in granting the improvement period.

Writ of Prohibition Denied. (PC)

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

The petitioner was convicted of two counts of robbery in the first degree. On appeal, he argued that the trial court erred in refusing to instruct the jury as to the lesser included offenses of battery and misdemeanor assault. The Court rejected this argument, holding in new syllabus points that neither battery or misdemeanor assault are lesser included offenses of first degree robbery.

Affirmed. (Loughry, J.)

State v. Baker, ___ W. Va. ___,
___ S.E. 2d ___ (No. 11-0915)
(02/21/13)

The petitioner was convicted of second degree robbery and attempted second degree robbery. The trial court permitted the State to introduce evidence that the petitioner had previous felony convictions and was on parole at the time of the alleged offense. The Court held that the admission of this evidence was reversible error, rejecting the State's argument that the petitioner had "opened the door" for the introduction of the evidence during cross examination.

Reversed and Remanded. (Davis, J)

State v. Robertson, ___ W. Va. ___,
___ S.E. 2d ___ (No. 11-1618)
(02/21/13)

The Court held that the transfer of the petitioner (who had been found not guilty by reason of mental illness) to a South Carolina mental health treatment facility did not violate the Transfer Clause of the West Virginia Constitution. The Court noted that the sole purpose of the petitioner's transfer was to provide adequate mental health treatment and was not intended to be punitive in nature.

Affirmed. (Ketchum, J.)

Elder v. Scolapia, ___ W. Va. ___, ___ S.E.
2d ___ (No. 11-1156)(02/22/13)

The petitioner was sentenced to a period home incarceration for sexual offenses. He filed a petition for a writ of *habeas corpus* with the circuit court, arguing that his counsel was ineffective and requesting modifications of his home incarceration conditions. The Court held that a person on home incarceration has standing to file a writ of *habeas corpus*, but that affirmed the circuit court's denial of the writ, finding that there was no evidence to support the petitioner's IAC claim. (The Court also rejected the petitioner's argument that he had been denied the opportunity to attend additional church services.)

Affirmed. (Loughry, J.)

Ballard v. Dilworth, ___ W. Va. ___,
___ S.E. 2d ___ (No. 11-1456)(02/22/13)

The Court reversed the circuit court's grant of *habeas corpus* relief, holding that the lack of specific dates in the indictment did not render the indictment defective, because time was not of the essence in the specific sexual offenses listed therein. The Court also noted that the respondent had failed to raise the alleged defect in the indictment prior to trial and had thus waived the issue.

Reversed. (PC)

State v. McGill, ___ W. Va. ___, ___ S.E. 2d
___ (No. 11-1386)(03/12/13)

The petitioner was convicted of misdemeanor or battery. On appeal he alleged that the State had improperly subpoenaed his medical records prior to the initiation of criminal charges. The Court agreed and in two new syllabus points held that neither WV Code §57-5-4 or Rule 17 of the Rules of Criminal Procedure authorize the issuance of a subpoena duces tecum prior to the initiation of criminal proceedings. The Court determined, however, that the admission of the medical records was harmless error, given the remaining evidence offered against the petitioner.

Affirmed. (Davis, J.)

WEST VIRGINIA PUBLIC DEFENDER SERVICES
2013 PUBLIC DEFENDER CONFERENCE

JUNE 6-7, 2013
THE RESORT AT GLADE SPRINGS

West Virginia Public Defender Services will be sponsoring its annual Public Defender Conference on **Thursday and Friday, June 6 & 7, 2013** at the Conference Center at Glade Springs Resort, Daniels, West Virginia. The Conference is open only to public defenders and private criminal defense attorneys.

This Conference will feature a number of speakers and address a variety of topics pertinent to the criminal defense practitioner. A TENTATIVE AGENDA will be placed on www.wvpds.org when it becomes available (Criminal Law Research Center).

Continuing Legal Education Certification: The Conference has been submitted to the West Virginia State Bar for CLE certification. The Conference will average approximately **11.0** total hours of CLE credit, including approximately **1.2** hours in ethics/law office management (totals subject to minimal change).

Registration Fee for Appointed Counsel: Fees **postmarked by Friday, May 24, 2013 are \$125.00**. Please register as soon as possible, as the number of participants is limited. Registrations postmarked May 25, 2013 or later will be \$175. All registration fees are non-refundable.

Make checks payable to **West Virginia Public Defender Services**; mail along with your registration form.

\$125 if postmarked by Friday, May 24, 2013; \$175 postmarked May 25 or later.

2013 Annual Public Defender Conference
Glade Spring Resort, Daniels, West Virginia
Thursday and Friday, June 6 & 7, 2013

of Persons Attending _____ at \$ _____ each Amount Enclosed \$ _____

Name

Mailing Address

City/State/Zip

Phone and Fax numbers

E-mail address

MAIL NO LATER THAN MAY 30, 2013 TO:

West Virginia Public Defender Services
Criminal Law Research Center
Attention: Erin Fink
One Players Club Drive Suite 301
Charleston, West Virginia 25311

(304) 558-3905 phone

West Virginia Public Defender Services

News and Information

- Retirements. Since our last newsletter, many public defender corporations have seen the retirement of several experienced attorneys. The Martinsburg office saw both Chief Defender Deborah Lawson and attorney John Adams retire last fall after distinguished careers. In March 2013, Chief Defender Nancy Ulrich and attorney Keith Skeen retired from the Clarksburg Office. We wish all the best to these fine lawyers who have given so much to PDS over the years.
- New Chief Defenders. With departures come new challenges and new colleagues. Tom Delaney was appointed as the new Chief Defender for the Martinsburg/Charles Town offices, and Joel Mumford was recently appointed as the new Chief Defender for the Clarksburg office.
- Hourly Rates. Once again, it appears that there will be no imminent increase in the hourly rates paid to court appointed attorneys. A bill has been introduced this session to increase the hourly rates paid in abuse/neglect cases to \$75/hour for out-of-court work and \$95/hour for in-court proceedings, but as of this writing the bill (S.B. 124) has not cleared committee. The standard hourly rates of \$45/\$65 for all cases have not been increased since 1990.

WVPDS Website Re-Launch

West Virginia Public Defender Services will be re-launching our new website within the next several weeks.

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

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

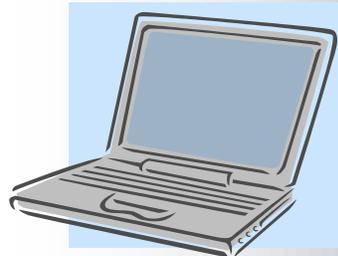


On-line Voucher System (“OVS”) Information

If you are interested in obtaining further information about WVPDS new On-Line Voucher System, please contact either Sheila Coughlin or Teresa Asbury at (304) 558-3905 or by fax at (304) 558-6612.

The OVS system is provided at NO COST to users and is designed to speed up the voucher submission, processing and payment processes.

The system may be accessed from a computer or mobile device, offering users the opportunity to enter data and review vouchers at any location.



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