

THE CAPITOL LETTER

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

From the Executive Director

ON THE OTHER HAND.....

It had to be said. Abuse in the system exists. And this agency is charged with addressing this abuse.

However, it also needs to be said that almost eight hundred attorneys in this state are taking assignment of criminal matters and are submitting vouchers that fairly and honestly reflect their effort. It needs to be said that almost eight hundred attorneys in this state barely break even on the work they do for the indigent citizens of this state. It needs to be said that almost eight hundred attorneys are testaments to the profession's commitment to ensuring that equal justice is available to all.

These things also needed to be said.

The agency is aware that any delivery system for legal services will necessarily include the willingness of private counsel to accept appointments. This agency is committed, therefore, to advocacy for an increase in the compensation for panel attorneys. This agency is further committed to providing support for the efforts of all public defenders, whether they are attorneys in private practice or full time employees of a public defender corporation.

So, while some harsh things had to be said, it also has to be said, with pride, that almost eight hundred private counsel and one hundred and thirty attorneys working with public defender corporations deserve the gratitude of the citizens of the State of West Virginia because, without them, the state could not fulfill its constitutional obligation to ensure that no person has been denied equal justice because he or she could not afford legal representation.

Enough said.

BABY STEPS: The Finish Line.

By the end of March, 2014, panel attorneys are to have gained access to the agency's online voucher system. During the month of March, representatives of the agency will conduct training sessions on the voucher system in Lewisburg, Clarksburg, and Fairmont. As an inducement, a seminar will be provided, at no cost, that will qualify for 3.0 Ethics continuing legal education credits. If you desire additional details, you should contact Pamela Clark, the Criminal Law Research Center Coordinator for West Virginia Public Defender Services.

Any voucher that is submitted for payment which was signed by an attorney after the date of March 31, 2014, will be returned for entry into the online voucher system if it has not already been entered. The manual entry of the information into the state's database will no longer be undertaken by the agency's personnel.

If you have any continuing questions, you are encouraged to contact Sheila Coughlin at the agency. Also, you should visit the agency's website because "Tips of the Month" are included on the home page for the website that are intended to assist you with the use of the online voucher system.

Finally, if the system can be improved in any manner, you are encouraged to communicate these ideas to Sheila Coughlin. The agency will review each and every suggestion in its efforts to process your vouchers quickly, efficiently, and effectively.

ERRATA: *In the January/February issue of the newsletter, a quotation of Justice Margaret L. Workman, Supreme Court of Appeals of West Virginia, was attributed to a "dissenting opinion" in State v. Clark, 752 S.E.2d 907 (W. Va. 2013). In actuality, the quotation was from the Justice's "concurring opinion."*

Volume 2, Issue 2

March/April 2014

ANNOUNCEMENT:

Beginning April 1, 2014, the West Virginia Public Defender Services agency will process vouchers for payment only if the voucher is entered into the online voucher system.

THIS IS NOT AN APRIL FOOLS' JOKE.

If a voucher is signed by an attorney after the date of March 31, 2014, and is not entered into the online voucher system, the voucher will be returned to the attorney for entry into the online voucher system.

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Who are we to say that it's unfair?

The memorandum decision in *State v. Coates*, 2014 WL 620507, is included for discussion more for the issue that was not decided than the issues that were. The petitioner was convicted of sexual offenses that resulted in the imposition of a period of supervised release of ten (10) years. Upon his first violation of the terms of the supervised release, the petitioner was sentenced to thirty days' imprisonment. The petitioner was then returned to supervised release and he again violated the terms of supervision with a variety of criminal activity. The court then sentenced him to the penitentiary to serve the remainder of his ten year period of supervised release. The petitioner was given credit for the thirty days he served after the first revocation and for the additional time he served pending the resolution of the second revocation.

The governing statute, W. Va. Code §62-12-26(g) (3), authorizes a court to "[r]evoke a term of supervised release and require the defendant to serve in prison all or part of the term of the supervised release without credit for time previously served on supervised release...." [emphasis added]. The only restriction is that the "term ... may not be ... more than the period of supervised release."

The argument was that the sentence imposed for the second revocation violated the petitioner's right to due process and right to freedom from cruel and inhuman punishment. The petitioner presented the following scenario as support-

ing the constitutional arguments: "A person could serve nine years and three hundred and sixty-four days of supervised release and then violate the terms of his release and then be sentenced to the full ten years in prison." The petitioner believed this to be undeniably unjust.

The interesting fact is that, while the Court emphasized that it had previously upheld the constitutionality of the statute, the Court then stated that the scenario painted by the petitioner was "not presented by the facts of the case." Indeed, the petitioner had been given breaks by the circuit court before being sentenced. The Court then dismissed the petitioner's arguments stating that "if supervised release is to have any meaning, then violations thereof must have consequences." Nonetheless, the Court did not expressly state that the scenario presented by the petitioner raised no constitutional issues. Instead, the Court stated such issues were not presented in the case. The challenge may be viable, therefore, in the right circumstances.

You don't deserve a break today!!

The memorandum decision in *State v. Tyler*, 2014 WL 620486, is included for discussion because it demonstrates the frustration that can exist for trial counsel. The petitioner was accused of maliciously assaulting a person at a McDonald's restaurant. The petitioner claimed that he was defending himself. The case should have been readily resolved because surveillance footage of the incident was obtained by the investigating officers and stored on a DVD.

Two weeks after the incident, however, the DVD was found to not contain any data. Moreover, McDonald's recycles the footage on its cameras every thirty days and no longer had the footage of this incident.

The petitioner's counsel moved at the end of the prosecutor's case-in-chief for a judgment of acquittal "based on the State's failure to present sufficient evidence." The motion was denied, but an adverse inference instruction was given regarding the State's failure to preserve the surveillance footage. The petitioner's counsel renewed the motion for a judgment of acquittal at the end of the defendant's case-in-chief. The petitioner was found to be guilty of malicious assault by the jury. The petitioner's counsel renewed the motion, once again, at sentencing. The motions were denied at all points and the petitioner was sentenced to two to ten years.

On appeal, the petitioner's counsel changed the issue ever so slightly. On appeal, the argument was made as a *Brady* violation – the suppression of potential exculpatory or impeachment evidence. But, again, the ground for the argument remained the State's inability to produce the surveillance footage. The Court refused to consider the *Brady* implication "because the petitioner failed to properly raise this argument below" notwithstanding that three motions were made for acquittal that were based on the same ground as the *Brady* argument; that is, the inability to produce the surveillance footage. *Cf.*, *State v. Maggard*, 750 S.E.2d 271 (Overturning conviction when specific ground for objection was "sufficiently apparent" from the context of the discussion with the Court.).

Who needs to read the instructions?

The memorandum decision in *State v. Roger P.*, 2014 WL 620483, found that the circuit court had erred by instructing the jury that no intent requirement existed with respect to crimes involving an element of "sexual intrusion." In actuality, the state had to prove that the intrusion was done "for the purpose of gratifying the sexual desire of either party." The Court recognized that an "element of the crime" is an issue of "constitutional magnitude." On such issues, the United States Supreme Court has held that the state must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967). The Supreme Court of Appeals of West Virginia adopted this principle as follows: "Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." *State ex rel. Grob v. Blair*, 214 S.E.2d 330, 337 (W. Va. 1975).

The interesting aspect of the Court's harmless error analysis in this matter is that the Court focused on the prosecutor's arguments as assuaging the error. The Court noted that the "prosecutor did not utilize the inappropriate intent instructions to attempt to persuade the jury of the petitioner's guilt and did not misstate the law." The Court further noted that the prosecutor informed the jury that "sexual gratification is an element of all these crimes...."

Admittedly the Court also relied upon the testimony that tended to prove the "acts" that

occurred. Nonetheless, the Court essentially found that the prosecutor's statements regarding the element of sexual gratification assured that the jurors found the element of sexual gratification as they deliberated the matter.

This reliance upon the prosecutor's statements as curing a trial court's error on instructions might be useful in analyzing the effect of prosecutorial misstatements in closing arguments. If the prosecutor's statements can cure a constitutional error in a Court's instruction, then can a prosecutor's misstatements be so readily cured by a Court's cautionary instruction?

Also notable in the opinion was the Court's following admonitions in a footnote: "This Court cautions circuit courts concerning the inclusion of extraneous and unnecessary instructions. In the same vein, this Court cautions prosecutors that their zealotry must be restrained in an effort to avoid the inclusion of erroneous instructions. An otherwise perfectly-trying case can be very promptly dismantled on appeal because of the addition of an erroneous or misleading instruction."

Justice is blind, and so are jurors apparently.

In *State v. Cook*, 2014 WL 620478, the memorandum decision contained several noteworthy points. The first is that a suppressed statement by the defendant may not be used by the State in its case-in-chief, but if an expert is called by the defendant, the expert can be cross-examined by use of the suppressed statement. In this matter, the defendant never took the stand, but statements that had been made

only after a right to counsel had been asserted were used in the cross-examination of the defendant's expert on the issue of his diminished capacity. The Court relied on its previously issued Syllabus Point that "when a defendant offers the testimony of an expert in the course of presenting a defense such as the insanity defense or the diminished capacity defense, which calls into question the defendant's mental condition at the time the crime occurred, and the expert's opinion is based, to any appreciable extent, on the defendant's statements to the expert, the State may offer in evidence a statement the defendant voluntarily gave to police, which otherwise is found to be inadmissible in the State's case-in-chief, solely for impeachment purposes either during the cross-examination of the expert or in rebuttal, even though the defendant never takes the witness stand to testify." Syl. pt. 3, *State v. DeGraw*, 470 S.E.2d 215 (W. Va. 1996).

The second point is that the State's expert's failure to record the entirety of the interview with the witness was not fatal. The Court requires such a recording to protect the defendant's constitutional privilege against self-incrimination and right to assistance of counsel at court-ordered psychiatric examinations. See *State v. Jackson*, Syl. Pt. 2, 298 S.E.2d 866 (W. Va. 1982). The Court found that only five to six minutes of the interview were missing and the failure to record this portion was unintentional. But notably, the Court stated that "no evidence was presented to indicate that any topic of substance was discussed during the gaps in the recording." The question that arises is,

without the recording, how could you know with certainty what was discussed? Nonetheless, the Court found that the defendant's rights had not been compromised.

The third and most salient point is that the inadvertent projection of the defendant's assertion of his right to counsel onto the overhead screen would not constitute reversible error if "the jury's attention was being directed away from the complained of text by the assistant prosecutor drawing a vivid blue circle around text at another area of the page to draw attention to the circled text." Notably, the offensive text was on the same page, but because it had not been circled but other text had been, the jury is presumed not to have seen the offensive text. Specifically, the "circuit court concluded that the likelihood that the jury even saw the statement referring to a lawyer was slim and, thus, [the defendant]... had not been prejudiced by the **display**." [emphasis added]. The circuit court further decided not to issue a cautionary or curative instruction "so as to not unnecessarily draw their attention to the same." The Supreme Court determined the circuit court did not abuse its discretion by refusing to declare a mistrial.

The fourth point was that the State's expert's inadvertent reference to the defendant's incarceration also did not warrant a mistrial, even when compounded by the public display of the defendant's assertion of his right to counsel. The defendant's counsel compared this statement to forcing the defendant to appear in restraints. The Supreme Court disagreed, finding that the "fleeting reference" to the

defendant's incarceration was harmless.

The final point was that the defendant's choice to stand silent on the issue of mercy did not preclude the State from presenting testimony on the issue. The Court noted that the evidence that could be presented in the mercy phase was much broader than the evidence that could be presented in the main trial, including evidence regarding the defendant's character. The State was to be given this opportunity to do so.

Looks aren't everything, unless it's a murder trial.

In *State v. Anderson*, ___ S.E.2d ___ (W. Va. 2014), 2014 WL 642504, the Court considered the issue of a prospective juror's remarks to other jurors that the defendant in the murder case "just looks guilty." In subsequent *voir dire*, the prospective juror admitted that she had said the defendant, "just looks guilty, looks like my ex-husband." This juror was excused. The circuit court then asked the entire panel in open court whether any prospective juror had heard a "female juror ma[ke] a remark regarding the Defendant." The circuit court commented that the remark was inappropriate and that the juror had been excused. Only two of the panel members acknowledged hearing such a remark.

The Supreme Court noted that the petitioner's counsel did not object to this questioning, but the petitioner's counsel did move for a mistrial when the *voir dire* was concluded. On appeal, the petitioner asserted that the circuit court's questioning "chilled" the jurors from admitting overhearing the remark. The Supreme Court

found that the circuit court had properly followed the procedure in *State v. Finley*, 355 S.E.2d 47 (W. Va. 1987) in that it “innocuously inquired as to whether the remainder of the panel even heard the unidentified remark...” The Court found no error. The Court noted that the petitioner’s counsel had even left one juror on the panel who had admitted to hearing the remark, so how could there be any prejudice?

Another issue was summarily disregarded. A witness who testified had apparently made a statement to his personal attorney. Petitioner argued that the discovery motion required the State to produce a copy of this statement. The Supreme Court determined that the only obligation under the governing rules was to produce statements “in the possession of” the State which includes statement to which the prosecutor has access. The Court found it “difficult,” accordingly, “to surmise how a letter presumably in possession of a witness’ attorney could be deemed to be ‘in the possession of’ the State.”

Finally, the petitioner argued that the victim’s “sex offender status” should have been admitted into the record of evidence. Allegations had been made that the victim had “licked the ear” of the daughter of the petitioner’s girlfriend. The petitioner argued that the victim’s “sex offender status” could support his argument for lesser included offenses. The Supreme Court deemed the argument to actually be that the victim’s sex offender status might justify the “murder” of the victim and the Court readily disregarded this ground for the appeal.

Don’t be confrontational; it’s just not hearsay.

In *State v. Lambert*, 750 S.E.2d 657 (W. Va. 2013), the Supreme Court considered the circumstances of a defendant who had masturbated to a pornographic movie in the presence of a four year old child. The defendant was convicted of sexual abuse by a parent, custodian or guardian and of the display of obscene matter to a minor. The child had been deemed incompetent to testify, primarily due to the child’s age of five years. Nonetheless, the evidence consisted of testimony by the mother as to statements made by the child, testimony by the state trooper consisting of his interview of the petitioner in which the trooper repeated statements made by the child, and testimony by a child protective services worker about statements made by the child. The circuit court admonished the jury that the child’s statements were not being admitted for the truth of what the child said. The statements were instead found to only show “how the investigation got started,” to show merely “the technique employed by ... [the trooper] in getting responses from [the defendant],” and to “demonstrate what caused the investigation by CPS.” Intriguingly, the recorded interview by the Trooper was permitted to be played due to the fact that the trooper testified that he was allowed to “lie” during the interviews and, therefore, the jury had to understand that with respect to whatever he claimed the child had said to him in the recorded interview, he might have been lying. Obviously, therefore, the statements were not being offered for the truth of the matter.

The Supreme Court reiterated that only “hearsay” statements violate the confrontation clause of the state and federal constitutions. Because the statement of the non-testifying child had not been offered for the truth of the matter, the statements when recounted by the other persons were simply not hearsay. The mother’s statement explained why she went to CPS. The trooper’s interview statement merely gave “context” to the defendant’s admissions.

However, the Supreme Court did take issue with one statement by the CPS worker who said that, when she went to the home, she found the “lotions that the child had referenced.” The Supreme Court found this to be problematic because it “served to tell the jury both that the petitioner had used lotions as an aid to masturbation and that this information came from [the child].” Moreover, the Supreme Court acknowledged that neither the prosecutor nor the State “put forward a non-hearsay rationale to support admission of this statement.” And, indeed, the circuit court was “obviously concerned” because it then instructed the witness, “just don’t reference what was told to you by the child since she will not be testifying.”

The final conclusion was that this deprivation of the defendant’s constitutional rights was “harmless beyond a reasonable doubt” because this was a “fleeting reference in a trial otherwise free of error.” Admittedly, the defendant did not dispute the fact of masturbation. Nonetheless, as an editorial comment, the statement did defeat the defense that the child could not see the act.

Another issue that was first raised on appeal was the statement made by the prosecutor in closing argument that “I wish, oh how I wish you could have heard

her talk or met her or seen her [i.e., the child]. ... She didn’t have any reason to make up these allegations.” The Supreme Court found these statements to be “invited error,” because the statements were made in rebuttal after the petitioner’s counsel had stated that the child did not testify because it had been found that she did not know the difference between truth and a lie. In the Supreme Court’s opinion, the prosecutor was merely countering the defense counsel’s argument to the jury “in misleading fashion and based upon evidence not before the jury, that the reason S.W. had been deemed incompetent was because she was a liar.”

If you didn’t notice, make it important.

In *State v. Schlatman*, 2014 WL ____, the defendant’s alibi witness was excluded for failure of the defendant to comply with Rule 12.1 of the West Virginia Rules of Criminal Procedure, requiring disclosure of an alibi witness ten days before the date of the trial. The defendant gave notice to the State about the alibi witness on the morning of the trial.

The Court reiterated its holding in *State v. Ward*, 424 S.E.2d 725 (W. Va. 1991), that the exclusion of witnesses who are not properly disclosed under the rules of criminal procedure is consistent with the compulsory process clause of the state and federal constitutions if “the explanation offered indicates that the omission of the witness’ identity was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence.” *Id.* at 725. In other words, a witness is not to be immediately

excluded because of an untimely disclosure. An intent to improperly influence the trial is seemingly required.

The Supreme Court found that the trial court did not abuse its discretion in excluding the witness, in part, because the explanation for why the witness was suddenly able to “provide more detailed information” was deemed to be an “unfounded representation.” The significance of the decision is, however, that this explanation was combined, expressly, with the Court’s perception that the testimony of the witness was of limited value given that the petitioner could not prove a crucial fact. The lesson is, therefore, if a defendant is in a position in which a critical witness was untimely disclosed, the value of the testimony should be stressed as much as the reason for the untimeliness of the disclosure.

The Court ended its analysis by emphasizing that the defendant could have taken the stand and testified regarding the subject of the excluded witness’ testimony. Rule 12.1 of the Rules of Procedure expressly provides that, notwithstanding the failure to comply with the notice requirements, “this rule shall not limit the right of the defendant to testify.” So, the witness might be excluded from providing an alibi to the defendant, but the defendant has to choose whether to testify to uncorroborated fact. What if the prosecution then cross-examines the defendant? Would this permit the witness to be called in rebuttal? Essentially, no bright line exists and the defense counsel must not only vouch the record with the testimony, but has to establish why the testimony is crucial and why it is credible.

Good things can happen to Bad boys.

In *Holcomb v. Ballard*, 752 S.E.2d 284 (W. Va. 2013), the defendant was convicted of child neglect creating a substantial risk of injury or death. The defendant had quite the scorecard, however, as he had been previously convicted of two grand larceny offenses, two receiving stolen goods offenses, and a malicious wounding offense. The State labelled him a recidivist, therefore, and he was eventually sentenced to life imprisonment.

However, the trial court granted the defendant a new trial on the most recent conviction. A new trial was held and the result was the same. On the last day of the term of court, the defendant was served, again, with the recidivist information. At a new term of court, the hearing was held and the defendant was sentenced, again, to life imprisonment.

The issue in this petition for a writ of habeas corpus was whether the “second recidivist life sentence was invalid because he [, the defendant,] was not arraigned ... during the same term of court in which he was convicted on retrial for the underlying offense.” The State acknowledged, eventually, that the second recidivist proceeding was invalid, but asked the Court to remand the case so that the Court could sentence the defendant by reason of the first recidivist proceeding.

The Court held true to the statutory language and held that the second recidivist proceeding was faulty in that the defendant had not been arraigned before the end of the term of court in which he had been convicted on the retrial. The circuit court was incorrect

to hold that this error was harmless. Notably, the Court reiterated its holding that the compliance with the provisions of the recidivist statute is “jurisdictional and mandatory.” Accordingly, the failure to follow the provisions is “not subject to harmless error analysis.”

But, again, the State argued that the first procedurally correct recidivist sentence should be merged with the second conviction on the same offense. The Court noted, however, that the habitual criminal provisions are to be strictly construed against the prosecution because the provisions are “highly penal, [and] in derogation of the common law.” The Court held, therefore, that “a recidivist sentence under W. Va. Code §61-11-19 ... is automatically vacated whenever the underlying conviction is vacated.”

They may be talking out of school, but you have to take them to the principle.

The opinion in *State v. Robert Scott R.*, __ S.E.2d __ (W. Va. 2014), 2014 WL 350915, is notable for two points. First, the Court, in a footnote, instructs prosecutors as follows: “[P]rosecutors should avoid commenting upon expected evidence by a defendant during their opening statements. ... Such comments do nothing more than raise potential grounds for error. A criminal defendant is not obligated to put on any evidence.” Second, defense counsel waives this ground for appeal if a “contemporaneous” objection is not made and a “curative instruction” is not requested. Notably, the defense counsel did make an objection, but not until the opening statement was made. Nonetheless, the Court held this matter was waived for appeal. So, defense

counsel cannot wait, for either purposes of courtesy or strategy, until the end of the opening statement to object to improper comments.



FREE CLE ANNOUNCEMENT

The Ethics of Billing & Online Vouchers

(3.0 hours of MCLE Ethics credits)

The West Virginia Public Defender Services is offering a series of presentations around the state on its Online Voucher System. These seminars will consist of a morning session of voucher training and an afternoon session of Ethics CLE. The details are as follows:

Lewisburg on March 11, 2014, at The State Fair of West Virginia's WV Room;

Clarksburg on March 13, 2014, at the Hilton Garden Inn Clarksburg; and

Wheeling on March 18, 2014, at the West Virginia Northern Community College.

Each seminar will begin at 10:00 a.m., and end at 3:00 p.m. The seminars themselves are free to panel counsel. For details, please visit the Public Defender Services website at <http://www.pds.wv.gov>

Please RSVP via email to: Pam.R.Clark@wv.gov

For questions please contact: Don Stennett at Donald.L.Stennett@wv.gov

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VOUCHER UPDATE

For the period of July 1, 2013 through February 28, 2014, West Virginia Public Defender Services has processed 19,701 vouchers for payment in a total amount of \$14,705,458.92.



Most Highly Compensated Counsel

For the period of July 1, 2013, through February 28, 2014:

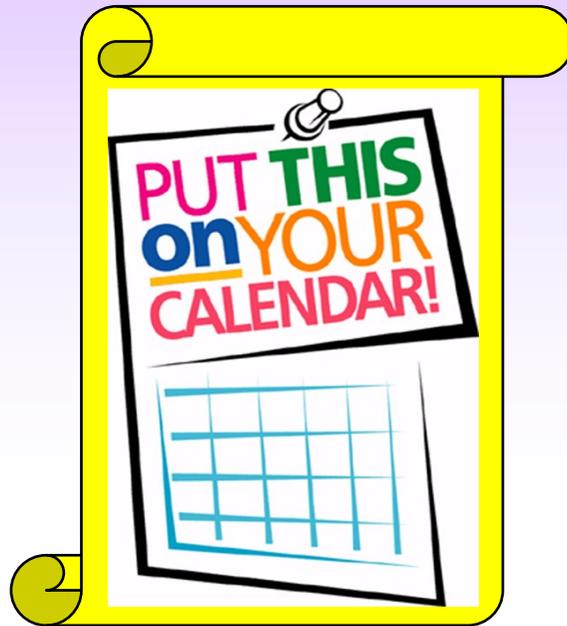
Law Office of Daniel R. Grindo, PLLC	\$ 153,995.00
William M. Lester	\$ 144,040.50
Ruth Law Offices PLLC	\$ 139,559.00

Most Highly Compensated Service Providers

For the period of July 1, 2013, through February 28, 2014:

Tri S Investigations, Inc.	\$ 99,971.95
Forensic Psychology Center, Inc.	\$ 75,020.22
Forensic Psychiatry, PLLC	\$ 30,600.00

ANNOUNCEMENT



The 2014 Annual Public Defender Conference will be held at Oglebay Resort & Conference Center in

Wheeling, WV

Thursday, June 12 & Friday, June 13, 2014.

Detailed itinerary & registration information will be included in a brochure that will be sent via email

in the following weeks.

March & April
Days to remember.....

Don't forget..... Turn
your clocks one hour
ahead on Sunday
March 9



April 23
Administrative Professionals Day



Honorable Earl Ray Tomblin - Governor

Ross Taylor - Secretary of Administration

Dana F. Eddy - Executive Director,

Public Defender Services

Pamela Clark - Criminal Law Research Center
Coordinator/ Newsletter Design

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“QUOTES”

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“However, I cannot accept the State’s argument that the circuit court’s cautionary or curative instructions, given at several points during the trial, were sufficient to cure the multiple errors which infected these proceedings. A cautionary instruction to the jury may un-ring the proverbial bell, but it cannot un-ring a carillon.”

The Honorable Margaret L. Workman, Justice, Supreme Court of Appeals of West Virginia, dissenting opinion, *State v. Bowling*, 753 S.E.2d 27 (W. Va. 2013).

POINTS OF INTEREST.....



Did you know.... The Supreme Court of Appeals of West Virginia has posted on its website “examples” of non-compliance with the Rules of Appellate Procedure.

The examples include:

1. Briefs that appear to be pieced together in a hurried manner by cutting and pasting memoranda previously submitted to a circuit court, the Workers’ Compensation Board of Review, or some other tribunal that does not have the same briefing requirements as this Court;
2. Briefs that lack citation of authority, fail to structure an argument applying applicable law, fail to raise any meaningful argument that there is error, or present only a skeletal argument; ...
6. Briefs that set forth rambling assignments of error that are essentially statement of facts with a conclusion that the lower tribunal was “clearly wrong” ...; and
16. Repeated filing of motions for extension of time without setting forth adequate good cause as required by Rule 39(b).”

“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)