

THE CAPITOL LETTER

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Criminal Law Research Center*

From the Executive Director

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NEWS:

Jay Williams and David Kelley obtained an acquittal in the Circuit Court of Mercer County for a client charged with first degree murder.

The circumstances were particularly challenging for the attorneys in that the client was armed while the victim was not. Due to their zealous advocacy, the jury found the client not guilty after three hours of deliberation.

BILLING GUIDELINES FOR PARALEGALS:

Several attorneys have admitted that the time of staff has been billed at the attorneys' rates. As noted in the last newsletter, this is improper and as the article was entitled, "This has to stop." It was noted, however, that attorneys are permitted by statute to seek reimbursement for the expenses associated with the employment of a paralegal in the representation of a client.

The agency is working on formal guidelines for the billing of paralegal's time by panel attorneys.

The following principles will be eventually reflected in the formal guidelines.

First, attorneys are encouraged to review the provisions of W. Va. Code §29-21-13a(d) in that the statute provides the foundation upon which these principles are constructed.

Second, the paralegal time is, by reason of the governing statute, a "reimbursable" expense of the attorney. Accordingly, if paralegal time is to be submitted, it must be treated as an expense. The agency will not accept direct expense vouchers from a paralegal, which means the expense must be included with an attorney's voucher. As with other expenses, the attorney must attach, essentially, an invoice detailing the time and the nature of the services of the paralegal in the same form that attorney time and services are detailed. The identity of the paralegal must be stated and a separate invoice must be prepared for each paralegal.

What is a paralegal? From the agency's perspective, a paralegal is any person who has the experience and knowledge to prepare documents that would otherwise have to be prepared by an attorney. Accordingly, a secretary or an administrative assistant or an unlicensed attorney can act as

a paralegal, but only if their experience and knowledge enables them to perform legal tasks.

The real issue is, what is a paralegal task? Again, from the agency's perspective, a paralegal task is any task that, if performed by an attorney, could have been billed to a client as a legal service. Accordingly, copying, filing, or other purely administrative tasks that are common to any business are not paralegal tasks. Essentially, if the agency would not compensate an attorney for the task, the agency will not reimburse the attorney for the expense associated with a staff person's performance of the task. The reality is that not every hour of a secretary's or administrative assistant's time can be included as a reimbursable expense.

Third, the statute provides that the rate of reimbursement is the actual out of pocket expense incurred by the attorney for the paralegal's time, but cannot exceed \$20 an hour. The significance of this statement is that an attorney cannot simply bill the paralegal services at \$20 an hour. Instead, the attorney must either bill at the hourly wage paid to the paralegal

or the equivalent amount calculated from the yearly salary. The office overhead associated with the staff person cannot be included in the hourly wage or salary calculation. The agency has created a chart for conversion of a salary into an hourly rate that will be posted to the agency's website. The chart provides for ranges of a salary so that a more standardized rate can be applied. Again, the payment of this amount is intended to be a "reimbursement" of the attorney for expenses related to the use of staff as paralegals, not as a "profit" to the attorney.

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AGENCY NEWS & INFORMATION

Notably, the agency will require the invoice of the staff person to set forth either his or her hourly wage or salary. The declaration on the attorney's information page will provide the attorney's verification of the accuracy of this information.

Fourth, the paralegal, by statute, cannot bill for "in court" time. Accordingly, if a staff person accompanies you to a trial, the time of the staff person cannot be billed at any amount.

Fifth, the agency will not pay for staff time that is described as a conference with an "attorney" or other "paralegal." The agency will pay the compensation to the attorney for this time, but the accompanying staff time will not be a reimbursable expense.

So, an attorney has an opportunity to recoup certain expenses related to the performance of legal services for an indigent client. However, the attorney cannot bill this time at the attorneys' rate of compensation and cannot transform administrative tasks into legal tasks for the sake of obtaining reimbursement.

Again, the agency is working on formal guidelines for the issues relating to paralegal time and will eventually incorporate the guidelines into its procedural rules, which are also currently being developed.

If you have any questions, you are encouraged to contact the agency and ask for Dana F. Eddy, Brenda K. Thompson or Sheila Coughlin.

WATCHLIST:

To date, four attorneys have been placed on the agency's watchlist. Two of the attorneys have now been removed from the watchlist. One attorney has retired from the practice of law and has surrendered his or her law license. The second attorney has executed a "Conciliation Agreement" with the agency, resolving the issues surrounding the billing anomalies. With respect to the remaining two attorneys, the agency filed a complaint with the Office of Disciplinary Counsel against one attorney and negotiations toward a conciliation agreement are ongoing with the fourth attorney.

The agency is generating further reports at this time to determine whether other attorneys will be placed on the watchlist.

If you have engaged in billing practices that might not be consistent with the statutory provisions and the agency's guidelines, an opportunity exists for you to discuss with the agency the resolution of the matters through a conciliation agreement.

You should contact the agency and ask for either Dana F. Eddy, Executive Director, or Brenda K. Thompson, General Counsel.

ADDVICE: A public service announcement.

Zealous representation of the criminally accused can be difficult, time-consuming work. If you would like fresh insight into a case or if you just want help with some of the heavy lifting, the Appellate Advocacy Division is at your service. One of the missions of the Appellate Advocacy Division is to provide court-appointed attorneys in West Virginia with quality legal research and writing support.

The attorneys in the Appellate Advocacy Division will do their best to answer any question that you may have regarding West Virginia and United States Supreme Court criminal law. The AAD will also assist you with all types of research and writing; from pretrial motions and memoranda to appeals and extraordinary writs.

In addition to legal research and writing support, the AAD will get on the ground floor with you before trial and review discovery documents for issues ripe for pretrial motions. Also, if you have an oral argument before the Supreme Court, the AAD can set up a moot court so that you can practice your oral argument before you go to the Capitol.

If you need or want help regarding any aspect of a criminal case, please feel free to contact one of the attorneys in the Appellate Division at (304) 558-3905. If you prefer to communicate via email, you

may contact any or all of the members of the Appellate Division as follows:

Matthew.D.Brummond@wv.gov,
Jason.D.Parmer@wv.gov,
Crystal.L.Walden@wv.gov, and
Lori.M.Waller@wv.gov.

WORDS OF WISDOM:

"conflate": (verb) 1. To bring together; meld or fuse. 2. To combine into one whole. *The American Heritage College*, 3rd Edition.

Example: "Petitioner incorrectly relies on prior case law and *conflates* the standards for mistake of fact and mistake of law" *State v. Lilly*, 2015 WL 1741690.

It is axiomatic that "language in a footnote generally should be considered *obiter dicta* which, by definition, is language 'unnecessary to the decision in the case and therefore not precedential.' *Black's Law Dictionary* 1100 (7th ed. 1999)." *State ex rel. Med. Assurance v. Recht*, 213 W.Va. 457, 471, 583 S.E.2d 80, 94 (2003).



IT IS SO ORDERED

The Supreme Court of the United States issued a notable opinion in *Rodriguez v. United States*, 135 S.Ct. 1609, on April 21, 2015. The issue was whether a dog can bark up the right tree, but for the wrong reasons.

A traffic stop was made by a K-9 officer just after midnight. The circumstances leading to the traffic stop were the officer's observation of a Mercury Mountaineer veering "slowly" onto a shoulder of the Nebraska highway and then jerking back onto the road. Driving on the shoulder of a highway violated Nebraska's traffic laws and warranted, therefore, the resulting traffic stop. The officer's canine companion was with the officer. The defendant was the driver of the motor vehicle. He had one passenger. The defendant then explained he was avoiding a pothole.

Interestingly, the officer asked the driver to accompany him to the patrol car after obtaining the license and the registration for the car. The defendant asked if he had to do so to which the officer replied that he did not. The defendant refused to accompany the officer.

After returning to the car, the officer asked several additional questions relating to the defendant's activities and destination. The officer then returned to the patrol car to complete a records check on the passenger. A second officer was called. The officer then began completing a warning ticket for the traffic violation.

The officer then approached the defendant's car for a third time to issue the written warning and to return the defendant's and his passenger's documents. For all practical purposes, therefore, the traffic stop was completed.

But the officer did not permit the defendant to leave. The officer requested permission to "walk his dog around Rodriguez's vehicle." The defendant refused to give permission. The officer then ordered the defendant to turn off the ignition to the vehicle, exit the vehicle, and stand in front of the patrol car to await the arrival of a second officer. The second officer arrived about five minutes later. The dog was then retrieved and was walked around the vehicle. The dog alerted to the presence of drugs "halfway through [the officer's] second pass." By this time, "seven or eight minutes" had elapsed from the time the officer had issued the written warning. A search then found a "large bag of methamphetamine."

The post-indictment motion to suppress the seized evidence was denied by the magistrate on the grounds that, notwithstanding the officer acted on a "rather large hunch," "extension of the stop by seven to eight minutes for the dog sniff was only a *de minimis* intrusion on Rodriguez's Fourth Amendment rights and was therefore permissible." The higher court agreed that "the 7 to 10 minutes added to the stop by the dog sniff was not of constitutional significance." These results led to a "conditional guilty plea" for

which a sentence of five years in prison was imposed. The Eight Circuit Court of Appeals affirmed the decisions on the motion to suppress.

The Supreme Court granted certiorari "to resolve a division among lower courts on the question whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff." Restated, can a short delay be permitted after completion of the stop or does the defendant have to be allowed to depart once the purpose of the stop has been completed?

Justice Ginsberg, writing for the majority of five justices, recited the relevant precedent. The Court focused on the 2005 decision in *Illinois v. Caballes*, 543 U.S. 405, that "because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate th[at] purpose." In such a stop, "an officer ... may conduct certain unrelated checks during an otherwise lawful traffic stop," but "he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." The Court identified the following as the "ordinary inquiries incident to [the traffic] stop": "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." These inquiries, although technically unrelated to the traffic infraction, "serve the same objective as enforcement of the traffic code: ensuring that

vehicles on the road are operated safely and responsibly."

The Court then notes that a "dog sniff, by contrast, is a measure aimed at detect[ing] evidence of ordinary criminal wrongdoing." Restated, "lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission."

The Court further addressed the precedent that permits a police officer to require a driver to exit a lawfully stopped vehicle, which is, in itself, an additional intrusion. The Court justified this, however, as a safety precaution related to the actual stop which cannot be equated with "on-scene investigation into other crimes." Accordingly, the delay accompanied by a safety precaution could not be used to "facilitate" a search for evidence of another crime. Essentially, the critical question "is not whether the dog sniff occurs before or after the officer issues a ticket ... but whether conducting the sniff 'prolongs' – i.e., adds time to – the stop."

Notably, the Court found only that the *de minimis* standard was improper. The Court remanded the case to permit the Eighth Circuit Court of Appeals to consider the question of whether "reasonable suspicion of criminal activity" justified the defendant's detention. The officer had apparently testified regarding the strong odor of a freshener and heightened anxiety of the passenger and the suspicious explanation for their traveling at such a late

hour.

The fair question raised by the dissenting opinions is how this decision can readily be reconciled with *Cabellas* in which the dog sniff was upheld notwithstanding it was conducted in the course of an ordinary traffic stop for speeding. The majority opinion would distinguish the cases on the basis that, in *Cabellas*, the second officer arrived on the scene with the dog during the first officer's routine and allowable inquiries. Accordingly, the search was done during the reasonable length of the traffic stop and did not, in any manner, prolong the search. In *Rodriguez*, the dog sniff required the defendant to be detained beyond the completion of the traffic stop.

For defense counsel, the analysis might be this. No dog sniff can be upheld in a traffic stop, absent reasonable suspicion of criminal activity, if the dog sniff is done by the officer who stopped the vehicle, unless it can be argued that the search was done while awaiting a response to the inquiries. The dog sniff can only be upheld in the absence of reasonable suspicion if done by a second officer while the stopping officer is diligently completing the process of the traffic stop and the search does not, in any manner, prolong the traffic stop before the dog alerts to the presence of drugs.

The irony in the decision, and the nub of the resulting problem, is that no incentive now exists for an officer to "expeditiously" complete a traffic stop because, in the majority's opinion, "that is the amount of time reasonably required to complete the stop's mission." If the length of time it takes to complete the stop is axiomatically the reasonable amount of time,

then "slow-footing" through the process would be encouraged. Moreover, the standard is hardly objective, especially considering the technology available to a police officer in Charleston versus that available to a police officer in Middlebourne. One could complete the checks rather quickly, but the other might require some time. Under the majority's analysis, however, both are reasonable even though one permits a canine officer to appear and do a search before completion of the traffic stop while the other does not. Finally, of course, reasonable suspicion can be found rather readily by a court, so the opportunity to argue a motion on simply the prolonging of the stop may be



rare.

IT IS SO REPORTED ...

Spencer S. Hsu, an investigative reporter and two-time Pulitzer finalist and a national Emmy award nominee, reported on April 18, 2015, that the "Justice Department and FBI have formally acknowledged that nearly every examiner in an elite FBI forensic unit gave flawed testimony in almost all trials in which they offered evidence against criminal defendants over more than a two-decade period before 2000." Specifically, "of 28 examiners with the FBI Laboratory's microscopic hair comparison unit, 26 overstated forensic matches in ways that favored prosecutors in more than 95 percent of the 268 trials reviewed so far."

This statistic was attributed to the National Association of Criminal Defense Lawyers and the Innocence Project, which are described as "assisting the government with the country's largest post-conviction review of questioned forensic evidence." Of these cases, 14 defendants were executed or died in prison and 18 more have been sentenced to death. Four defendants have been exonerated. Mr. Hsu reports that "Texas, New York and North Carolina authorities are reviewing their hair examiner cases, with ad hoc efforts underway in about 15 other states." A compelling editorial statement in the article is, "The admissions mark a watershed in one of the country's largest forensic scandals, highlighting the failure of the nation's courts for decades to keep bogus scientific information from juries ... [and] the question now ... is how state authorities and the courts will respond to findings that confirm long-suspected problems with subjective, pattern-based forensic techniques – like hair and bite-mark comparisons – that have contributed to wrongful convictions in more than one-quarter of 329 DNA-exoneration cases since 1989." If you would like a copy of the entire article, you are encouraged to make your request by email to Dana.F.Eddy@wv.gov.

NATIONAL ASSOCIATION FOR PUBLIC DEFENSE POLICY STATEMENT ON THE PREDATORY COLLECTION OF COSTS, FINES, AND FEES IN AMERICA'S CRIMINAL COURTS:

Published May 13, 2015

Executive Summary

The collection of costs, fines, and fees in too many criminal courts across the United States are predatory in nature and

an economic failure. These predatory practices impact poor people in catastrophic and life altering ways and are disproportionately levied against people of color.

In the criminal justice system, significant fees and court costs are levied upon poor people to fund criminal justice costs, and in some instances a significant part of municipal budgets. Privatization of the criminal justice system function is also increasing, aggravating the impact. Functionally, the status of being poor has been turned into a crime, resulting in the poor being used to enrich the courts and municipalities through a cycle of debt that continually increases. The methods used to collect costs, fines, and fees are so extreme that many, if not all, practices have been outlawed when applied to predatory lenders. These court practices include:

- Usurious interest rates
- Payment plans that are harsh, unrealistic and designed to cause failure
- Hidden cost and additional fees
- Loss of freedom and repetitive arrest over nothing more than a few dollars that is increased each time an arrest is made creating a never ending cycle of debt
- Denial of access to families while in jail

Meanwhile, too many courts are ignoring their constitutional requirement to determine ability to pay before imposing fines, fees, and costs on indigent clients, and many courts are illegally imposing jail time as a punishment for unpaid criminal justice debt.

Public policy weighs strongly against funding government on the backs of poor people. It should end now.

SUPREME COURT OF APPEALS OF WEST VIRGINIA UPDATE

Nobody’s Perfect, and, in this state, Nobody’s Imperfect; or, A Good Defense is Not an Imperfect Offense.

In the memorandum decision reported as *State v. York*, 2015 WL 1881028, the appeal was from a motion denying the defendant’s new trial following his conviction of two counts of first-degree murder, one count of second degree murder, one count of concealment of a deceased human body, one count of conspiracy to commit concealment of a deceased human body, and one count of illegally possessing a firearm.

While visiting friends, the defendant’s spouse quarreled with an acquaintance. After the defendant returned to his home, the acquaintance and others came, unarmed, to the residence to “repossess a washer and dryer.” The defendant spotted the group approaching his residence, grabbed his rifle, and eventually shot one person in the chest, another person in the chest and twice in the back, and another person in the side and twice in the back. All three victims died. The defendant and his spouse tried to conceal one body by tying it to the back of an ATV with an extension cord, but the cord broke during the effort and the body was abandoned on the hillside. The defendant then fled and was later arrested while traveling on the interstate.

The sentence on the eventual convictions was two consecutive terms of life without mercy for the two first degree murder charges and consecutive terms for the remaining charges.

The primary issue was whether the jury was properly instructed on self-defense. The defendant’s counsel had proposed a jury instruction on “imperfect self-defense,” which, in part, would explain to the jury “that when a defendant uses deadly force with an honest but unreasonable belief that it is necessary to defend himself, the element of malice, necessary for a murder conviction is lacking.”

The Supreme Court opined that the defendant’s proposed jury instruction was “properly rejected by the circuit court because it did not accurately reflect our law on self-defense.” The Supreme Court then declared that “this Court has not recognized or adopted the doctrine of ‘imperfect self-defense.’” The Court acknowledged that in a footnote in a previous decision the doctrine was recognized as having been applied in other jurisdictions, but the Court made clear that the Court had not adopted this defense by such a reference.

The defendant also argued that the lower court had erred by failing to remove a juror who was seen by the trial judge conversing with a deputy during a recess. The deputy was a witness for the state. The judge observed that the juror had initiated the conversation believing the deputy might have been related to an acquaintance and the judge intervened to stop the conversation. The motion to strike the juror was denied because “there was no communication between the two regarding the case; the communication was initiated by the juror, not the witness; and the conversation took place in a hallway, not in a private area.” The Supreme Court reiterated that “there is no automatic requirement that mandates the reversal of a

conviction whenever a witness for the State comes into contact with the jury.” The question becomes one of prejudice to the defendant, which the Supreme Court found was not demonstrated in these circumstances. The Supreme Court did state that a relevant concern was whether the witness’ testimony was crucial or was merely formal in nature. Presumably, the prejudice of any contact would be greater the more crucial the witness’ testimony was.

The editor takes note that no discussion was had regarding the juror’s interest in the deputy’s relationship to her acquaintance; i.e., whether this bolstered the witness’ credibility in her eyes.

Additionally, the defendant challenged the sufficiency of the evidence regarding his malice, especially considering the quarrel that had earlier occurred with one of the victims who then approached the defendant’s home. The Supreme Court noted certain facts, including the number of times the victims were shot, especially in the back. Moreover the Supreme Court noted that “in a homicide trial, malice and intent may be inferred by the jury from the defendant’s use of a deadly weapon, under circumstances which the jury does not believe afforded the defendant excuse, justification or provocation for his conduct.”

Finally, the defendant complained about the trial court assisting the prosecution by basically insisting that the medical examiner confirm that the entrance wounds supported the conclusion that the victim had been shot in the back. Moreover, it was the trial court which confirmed with the witness that the opinions were “within a reasonable degree of medical certainty or

pathological certainty.” The Supreme Court found that the questions were within the trial court’s “right to control the orderly process of a trial.” However, the Supreme Court hedged this ruling by emphasizing that the trial counsel had not objected to the court’s questioning.

For Better or Worse, For Richer or Poorer, In Murder and Mayhem.

In the memorandum decision reported as *State v. York*, 2015 WL 1881062, the Supreme Court of Appeals of West Virginia considered the appeal of the spouse of the defendant in the above decision. She was tried with her husband. The spouse was convicted of three counts of voluntary manslaughter and one count of conspiracy to conceal a deceased human body. The spouse received consecutive sentences of 15 years for each of the manslaughter convictions and a consecutive sentence of 5 years for the conspiracy count.

Several issues on appeal mirrored her husband’s issues and were resolved identically.

The unique issue was whether the evidence was sufficient to convict her of voluntary manslaughter for the three killings for which her spouse had been convicted of first and second degree murder.

The spouse was prosecuted as an accomplice. The Supreme Court noted, therefore, that “the State was not required to prove that petitioner killed the victims; instead, it was only required to prove that she was present and aided and abetted her husband’s acts, or that she advised and encouraged them.” The Supreme Court added that “proof that the defendant was present at the time and place the crime was committed is a factor to be considered by the jury in determining guilt, along

with other circumstances, such as defendant's association with or relation to the perpetrator and ... [her] conduct before and after the commission of the crime." In this matter, the defendant did not shoot the victims, but was armed with a shotgun and stood behind her spouse as he confronted the victims; the defendant helped the spouse in the attempt to conceal the bodies; and the defendant initially tried to cover for her spouse by claiming responsibility for the shootings. This, the Supreme Court opined, justified finding that she was an accomplice of her husband.

The defendant further emphasized the inconsistency of being liable as a principal for involuntary manslaughter when the person whom she purportedly aided and abetted was convicted of murder. Moreover, the defendant had been acquitted of conspiracy to commit murder. The Supreme Court resolved the issue by refusing to resolve it. Specifically, "this Court has repeatedly held that claims of inconsistency in jury verdicts are not reviewable on appeal."

Finally, the defendant argued that she could not be convicted of conspiracy to conceal a deceased human body because the statute provided that a "complete defense" existed when the "defendant affirmatively brought to the attention of law enforcement within forty-eight hours of concealing the body and prior to being contacted regarding the death by law enforcement the existence and location of the concealed deceased human body." W. Va. Code §61-2-5a(b). After her spouse fled, the defendant had immediately called the police to report the killings and, therefore, the bodies were found

immediately. The charge was "conspiracy," however, and the fact that the actual crime was not completed was irrelevant. The focus was on the "inherent danger in a criminal agreement" and, therefore, the "prohibited conduct is the agreement to commit an act made an offense by the laws of this State."

Haven't I seen your ugly Mug (shot) around here before?

In the memorandum decision reported as *State v. McKean*, 2015 WL 1881021, the recited facts arose out of law enforcement's high speed chase of the defendant on a motorcycle when a traffic stop was attempted due to a missing tail light. The defendant eventually crashed the motorcycle after hitting a speed bump in a residential area. After an arrest was made, a police officer found a duffel bag near the motorcycle. In the bag was material used to make methamphetamine.

In the subsequent trial proceedings, a deputy sheriff responded to a question on voir dire about any potential acquaintance with the defendant by stating that "he believed he had once arrested" the defendant. Questioning was immediately stopped and the deputy sheriff was removed from the jury pool. The resulting motion for a new jury pool was denied. The trial was held and the defendant was convicted.

Understandably, the defendant appealed the conviction on the ground that the denial of a motion for a new jury pool was error. The Supreme Court acknowledged that "the right of a criminal defendant to an impartial and objective jury is a

fundamental right guaranteed by the state and federal constitutions." However, the Supreme Court "cautioned" that "the mere presence of a biased prospective juror on a jury panel, although undesirable, does not threaten a defendant's constitutional right to an impartial jury if the biased panel member does not actually serve on the jury that convicts the defendant."

But what about a "bias statement" made during jury selection? The Supreme Court found that the curative instruction of the trial court "fulfilled its purpose of learning whether any of the prospective jurors were influenced by the deputy sheriff's remark." And, again, the Supreme Court hedged its finding with the notation that the defense counsel chose not to ask questions of the prospective jurors regarding the curative instruction. And, finally, the Supreme Court noted that the dashboard camera's capture of the high speed chase left no room for doubt that it was the sufficiency of the evidence that convicted the defendant rather than any misapprehension or passion or prejudice on the part of the jury.

The editor questions, however, did the deputy sheriff know that his remark would be prejudicial and stated it for this reason rather than asking to speak privately with the court and counsel? Surely, the deputy sheriff's recognition of the defendant came earlier than the question on voir dire. These facts do lead to a trial tip: if you know a law enforcement person is on the panel, ask for individual voir dire of the person based on the grounds that any response might lead to a conclusion that the defendant had previous encounters with the law.

In the Beginning, there was Tail Light

In the memorandum decision of *State v. Lilly*, 2015 WL 1741690, the issue centered on the validity of a traffic stop. Around midnight, the defendant was pulled over on a state route because he did not have "a clear legible registration light." Once stopped, the police officer stated that he observed a "small wooden box" inside the vehicle which he asked to inspect. The defendant purportedly consented and the police officer found "methamphetamines, scales, spoons, and baggies" in the box.

A suppression motion was grounded on the defendant's assertion that his "registration light was functional at the time of the stop because he checked it before he drove that night and again when he reclaimed his vehicle from the impound yard." Restated, the defendant asserted that the light was functioning when he retrieved the car after his arrest.

A video recording of the stop had been made and, apparently, the registration plate was illuminated. The lower court found, however, that the illumination came from the police cruiser and surrounding lights rather than from the required license plate light. The motion to suppress was denied.

A conditional plea was entered to the felony offense of possession of a controlled substance with the intent to deliver or manufacture. A sentence of one to five years was imposed.

In its review, the Supreme Court noted that "a mistake of law will automatically invalidate a stop but a mistake of fact will not invalidate a stop if the mistake is reasonable." So, if a police officer believed,

incorrectly, that a broken side mirror violated the law or believed, incorrectly, that the failure to use a turn signal violated the law, the stop would be invalidated. However, a missing tail light is a violation of the law and will support a stop, even if just a misdemeanor. Accordingly, no mistake of law was made in these circumstances.

Based on this discussion, the assumption would be that the Supreme Court would simply state that the issue was over a mistake of fact which would not invalidate the stop, unless unreasonable, and the Supreme Court would then stop its analysis. However, the brakes were not applied to the Supreme Court's review. Instead, the Supreme Court reviewed the evidence and agreed with the lower court that the evidence demonstrated that the light was not properly illuminated. So, the Supreme Court found "no mistake of fact and articulated reasonable suspicion" and affirmed the denial of the motion to suppress the evidence gathered at the traffic stop.

All's Fair in Love and War and Sentencing.

In its reported decision, *State v. Keith D.*, -- S.E.2d --, 2015 WL 1720912, the Supreme Court of Appeals split, 3-2, over the issue of whether the lower court erred when it refused to permit a defendant to withdraw a plea before sentencing once the defendant learned about the possibility of a sentence enhancement.

The defendant was indicted on fourteen counts of sex crimes relating to his five-year old stepdaughter and on an additional count of possession of a firearm by a prohibited person. The count on the possession of a firearm stated that defendant had been

previously convicted of voluntary manslaughter.

The plea agreement had the defendant pleading guilty to one count of sexual assault in the third degree and to the possession of a firearm by a prohibited person. The State was to remain silent on the issue of sentencing. The interesting facts then occur.

At the plea hearing, the defendant waived the right to a presentence report and asked to be immediately sentenced. The prosecuting attorney opposed the motion on the stated ground that the victim's mother was not present due to a medical emergency and should be at the sentencing. The lower court set a later date for the sentencing.

Six (6) days after the plea hearing, the prosecutor filed an information setting forth prior convictions of the defendant, involving grand larceny and the voluntary manslaughter charge. Notably, the grand larceny charge had not been included in the indictment on the possession of a firearm by a prohibited person. While the prosecutor had agreed to remain silent on the sentencing issue, the information was filed for the purpose of having the defendant deemed to be a habitual offender and sentenced to a term of life. As a result, the defendant moved to withdraw the plea, averring that he had not been advised by anyone that the plea subjected him to a potential life sentence. The lower court refused to permit the withdraw of the guilty plea and the defendant was found to be a habitual offender and was sentenced to life in prison.

The majority opinion recites that "it remains clear that a defendant has no absolute right to withdraw a guilty

plea before sentencing" and that a trial court's decision on such a motion is reviewed only for an abuse of discretion. However, it was further acknowledged that the right to withdraw a plea can be granted for "any fair and just reason."

Again, the defendant's "fair and just reason" was that "he did not know the State could seek a habitual offender sentence after he pled guilty with the understanding that he could receive no more than ten years in prison." The editor would add that the plea agreement also contained the State's promise to remain silent regarding the sentence.

The majority's analysis focused, first, on the trial court's obligation. The majority reiterated a point of law that the court was obligated at the plea hearing to inform the defendant of the "direct" consequences of the plea, not the "collateral" consequences. The "collateral" consequences were defined as "all possible ancillary or consequential results which are peculiar to the individual and which may flow from a conviction of a plea of guilty." The habitual offender proceeding was deemed to be a "collateral" consequence, therefore, because its life sentence was not "definite, immediate and largely automatic." Indeed, the habitual offender proceeding was deemed to be "a classic example of a conviction's consequences that is collateral in the sense that the consequence requires application of a legal provision extraneous to the definition of the criminal offense and the provisions for sentencing those convicted under it."

The majority was not persuaded by arguments that the decision of the United States Supreme Court in

Padilla v. Kentucky, 599 U.S. 346 (2010), cast a significant pall over the state court's precedent. The majority rejected the argument stating that deportation was a "direct" consequence of the plea, not a "collateral" consequence. This was based largely on the assessment, apparently, that, consistent with the definition of a direct consequence, deportation was "largely automatic."

While holding that the "trial court and the prosecuting attorney did not have a duty under our law to inform the petitioner of the possibility of enhanced sentencing ... before the petitioner entered his guilty plea," the majority did "agree that it is preferable for a defendant to be advised of habitual offender proceedings before he or she enters a guilty plea." The implication is that the matter may be one for the Legislature to address, not the Supreme Court.

The majority did not address the issue of the State's agreement to stand silent on sentencing or the issue of the State's objection to immediate sentencing which would have prevented the filing of an information in order to enhance the sentence.

Justice Ketchum dissented, stating the defendant got "hoodwinked." The Justice made reference, as the majority failed to do, to the fact that the State, as its part of the agreement, agreed "to a maximum sentence." Presumably, this statement relates to the State's express agreement to remain silent on sentencing.

Justice Davis dissented, setting forth the opinion that the habitual offender proceeding is a direct consequence of the act of entering a guilty plea, and, accordingly, the defendant should be informed about the

possibility under the Court's precedent.

Partners in Crime but Not Partners for Life – a Life Sentence, that is.

In the memorandum decision reported as *State v. Jeffrey*, 2015 WL 1740281, the Supreme Court addressed the issue of a conviction based on the testimony of an accomplice.

The defendant was convicted on counts of kidnapping, malicious wounding, second degree robbery, and assault during the commission of a felony. The resulting sentence was life with mercy and other concurrent terms of incarceration. The co-defendant pled guilty to one count of conspiracy to commit first-degree robbery. The co-defendant received a sentence of one to five years of incarceration.

The defendant challenged the trial court's admission of the testimony of the co-defendant because it lacked "credibility." The Supreme Court reiterated its precedent that a "conviction for a crime may be had upon the uncorroborated testimony of an accomplice." The Supreme Court noted, however, that, in this matter, the co-defendant's testimony was corroborated by the victim. Moreover, the Supreme Court found that the disclosure of the co-defendant's guilty plea was properly addressed in an instruction by the judge that the "accomplice's plea of guilty cannot be considered as proving the guilt of the defendant, and may only be considered for proper evidentiary purpose such as to impeach trial testimony or to reflect on a witness' credibility." Notably, this is a mandatory instruction in these circumstances IF requested by the defense counsel.

The Supreme Court also dismissed any concerns that the State had improperly bolstered the credibility of the witness before credibility was attacked, because the defense counsel attacked the credibility of the co-defendant in the opening statement.

Finally, the defendant accused the State of using false testimony from the co-defendant. The co-defendant stated she did not cut the victim with a knife, but the victim testified that she did. The Supreme Court's analysis was "this only shows the testimony was conflicting, not false." Moreover, the testimony, if false, was found to have no material effect on the jury's verdict in light of the "substantial evidence presented by the victim's testimony." The conviction was affirmed.

Call me Maybe, and Maybe I will go to Prison.

In the memorandum decision reported as *State v. Krystal M.*, 2015 WL 1740302, the defendant's appeal related to the revoking of probation for what the defendant deemed to be "technical violations."

The defendant pled guilty to a count of child abuse causing serious bodily injury. The defendant was sentenced to one to five years in prison, but the sentencing court suspended all but four months of petitioner's sentence and placed the defendant on five years of supervised probation. An agreed term of the probation was that the defendant would have no contact with her previously live-in-boyfriend.

While incarcerated, however, the defendant contacted the boyfriend sixty-three times. The probation office moved for revocation of the probation, which the lower

court granted. The original sentence was re-imposed with credit for time already served.

The defendant argued that the court had abused its discretion. Under the governing statute, W. Va. Code §62-12-10(a)(1)(C), the sentencing court is authorized to revoke the suspension of a sentence if the defendant violates a "special condition of probation designed to protect the public or victim." The Supreme Court rejected the defendant's argument that, because she was incarcerated, the telephone calls did not place her children in any danger and stated that the statute refers to a condition that is "designed" to protect the victim. Violating this condition was, therefore, grounds for revocation of the suspension of her sentence.

Moreover, the Supreme Court did not accept the defendant's argument that her violation should only result in a sixty-day term of incarceration as it was her first such violation. Instead, the Supreme Court considered her violations as numbering sixty-three, that is one violation for each separate call to her boyfriend, which was well in excess of the "statutory minimum required to revoke petitioner's probation."

The actions of the lower court were affirmed.

You can't put the Big Hurt on me for just a Little Hurt.

In the memorandum decision reported as *State v. Holpp*, 2015 WL 1740293, issues were raised with respect to the lower court's ruling on matters involving a purported confession and on the issue of the sufficiency of evidence.

The defendant was convicted of beating his girlfriend during a fight at a bar and causing bodily injury, but the

defendant was acquitted of the charge of retaliating against his girlfriend as a witness. The defendant's sentence was enhanced due to the recidivist statute and resulted in a term of four to ten years of incarceration.

The lower court admitted, without an *in camera* hearing, the defendant's statement to an arresting officer that "if this costs me my job, I'll go back to prison." The defendant argued on appeal that this was reversible error.

The Supreme Court acknowledged that its precedent requires that any evidence regarding confessions must be first heard outside the presence of the jury in order to determine the voluntariness of the confession. However, the Supreme Court further emphasized that the failure to hold such a hearing does not, alone, constitute "reversible error." Instead, the failure to hold such a hearing requires that the matter be remanded to the trial court for a "voluntariness hearing." If the statement was voluntary, the verdict stands, but if the statement was involuntary, a new trial is warranted unless the "constitutional error is harmless beyond a reasonable doubt."

In the final analysis, however, the Supreme Court held that no *in camera* hearing was necessary because (i) the defendant's statement was not inculpatory in that he did not state that he had done anything, and (ii) the defendant did not provide any evidence that the statement was, in fact, involuntarily made.

The defendant additionally argued that because his girlfriend was not obviously permanently disfigured or disabled, the evidence was otherwise insufficient to prove his "intent to maim, disfigure,

disable or kill” as required for a conviction of the crime of malicious assault. The Supreme Court disagreed, stating that the severity of the actual injuries and the description of the assault were sufficient to establish the requisite intent.

Isn't Biting Off Someone's Tongue Quite Literally an Unspeakable Act?

In the reported decision, *State v. Seen*, -- S.E.2d -- (W. Va. 2015), 2015 WL 1721012, the issue was whether the defendant's battery of a person required, upon his conviction, that he register as a sex offender.

The defendant was a physician at a hospital who began an examination of a patient upon admission. The patient was seventy-seven years of age and was suffering from dementia, Parkinson's Disease, arthritis, depression and anxiety. In the course of the examination, the patient bit off the defendant's tongue. The defendant physician did not immediately report the incident and did not immediately seek medical assistance, even though 1/2 to 3/4 of an inch of his tongue was missing. One hour after the incident the doctor contacted the emergency room physician about a consult, but did not explain the injury. The emergency room physician deferred and, at that time, the physician reported the incident to staff members. The report was made, however, by the defendant physician typing on a laptop computer as his mouth was covered with a paper towel or washcloth. The explanation was that the physician had leaned over the patient to better hear the patient's response when the patient, old and infirmed, grabbed his tongue and bit it. At that point, the emergency room physician was again

contacted and he then came to treat the defendant. The defendant was then transported to another hospital for treatment by a specialist.

The emergency room physician then examined the patient and found the patient to be alert, but confused, disoriented and unable to communicate. The patient had blood around his lips and in his mouth. More disturbingly, the patient was chewing something, which was believed to be a portion of the defendant physician's tongue. The overall assessment by the emergency room physician was that, due to the arthritis, the patient “lacked the fine motor skills, strength, and grasping ability to hold the ... [defendant's] tongue” as described by the defendant.

When asked in a later examination about the incident, the patient became upset, indicating something had happened, but the patient refused to talk about the matter, stating that he did not want to dwell upon it.

The defendant's story during an internal investigation, which was somewhat inconsistent with his initial explanation, was that the patient had “grabbed the back of his neck with one hand and had reached up with his other hand to grab the ... [defendant's] tongue, pulling the ... [defendant] toward him.” This explanation was not accepted by either the hospital officials or by the law enforcement personnel who investigated the matter upon the filing of a criminal complaint by the patient's daughter. In the state trooper's summation, the patient was “as frail ... a human being as [he had] ever attempted ... to speak to about anything.”

A bench trial on the criminal charge resulted in the conviction of the defendant physician and the suspension of the defendant's medical license.

A person convicted of an offense that does not automatically result in “sex offender” status can, nonetheless, be required to register as a sex offender if the sentencing judge makes a written finding that the offense was “sexually motivated.” W. Va. Code §15-12-2(c).

The first time that the State expressed its intent to seek this finding was during the opening statement to the court at the bench trial. The court found the defendant guilty and made the finding that the battery was sexually motivated. The actual sentence was 300 hours of community service, registration as a sex offender for ten years, and the payment of a \$500 fine.

The most compelling issue on appeal was whether the defendant had been denied due process by the failure to provide any pretrial notice that the State intended to seek a finding of sexual motivation. The Supreme Court found the issue compelling enough to analyze it as plain error since the defendant's counsel had not objected in the trial proceedings. Notably, the State agreed that it was plain error.

The Supreme Court held that, in *State v. Whalen*, 588 S.E.2d 677 (W.Va. 2003), “we unequivocally declared the requirement for pretrial notice in circumstances like those encountered in the present case.” The only issue was whether, because this was a constitutional error, the State could prove that the error was harmless beyond a reasonable doubt. The Supreme Court found that the State had

failed to do so because, “as the petitioner contends, his trial strategy would have been altered drastically if he had known he had to defend against the contention that the act was sexually motivated.” Specifically, the defendant had proffered that he “would have considered utilizing expert evidence to prove he was not attracted to men and that he would not receive sexual gratification from kissing a man.”

The lesson in the opinion is if you have an offense without sexually explicit elements and the State references sexual motivation for the first time at the trial, object and assert the defendant's constitutional right to due process in the form of a pretrial notice.

What has Four Legs and Can Bench Press a Defendant? The Prosecutor and the Trial Court Judge.

In the memorandum decision reported as *State v. Horne*, 2015 WL 1741146, the appeal arose out of the defendant's conviction for conspiracy to commit a felony, burglary, and petit larceny.

The defendant and two other individuals were arrested for the theft of firearms from a residence of an incarcerated person. The alleged facts were that the defendant was in the vehicle when a co-defendant twice entered the residence and returned with firearms. In his statement, the defendant denied knowing that the co-defendant was stealing the guns from the residence, but admitted that he assisted the co-defendant in selling the guns.

The defendant was tried, convicted and sentenced on the conspiracy charges.

On appeal, the defendant complained that the trial court judge had exceeded the

bounds of impartiality in the questioning of witnesses. The first instance was when an alleged co-conspirator, who was required by the terms of a plea agreement to testify against the defendant, was reluctant in his testimony and vague in his answers. The court interjected and instructed the witness as follows: "You've given a statement. ... Now, this lawyer shouldn't have to drag things out of you. If you know something about the case, spit it out. If you don't then that's fine too. But, now, listen to the question and try to respond to it as best you can. All right, go ahead and ask him the question." The defendant argued that the scolding of the witness resulted in testimony consistent with the former statement, implicating the defendant in the robbery of the firearms.

The court further interjected when the purported co-conspirator identified the defendant as the person who had given him orders to reenter the residence. The court questioned the witness at this point and had him describe the shirt worn by the defendant at the trial so that the identification would be certain.

The court then later permitted the co-conspirator to be recalled to testify as to threats made by the defendant, purportedly, when both had been transported to the courthouse from the jail. The court began the questioning by asking the witness, "did you arrive at court this morning with the defendant?" The questioning was then turned over to the attorneys.

The Supreme Court rejected, summarily, all three grounds stating the circuit court did not lose its impartiality. The first questions were non-substantive

and the second set of questions merely confirmed an identification that had already been made. The court's decision to allow the witness to be recalled concerned threats that, in the Supreme Court's opinion, would explain the witness' initial reluctance to testify and should be made known to the jury in their evaluation of the evidence.

The defendant also argued on appeal that the binding Supreme Court precedent was that "an indictment must allege all of the elements of the offense charged, including accomplice liability." The Supreme Court disagreed stating that its binding precedent put all defendants on "constructive notice" that "an aiding and abetting instruction may be requested, even in the absence of an indictment thereon." Moreover, the Supreme Court believed the defendant had actual notice of the accomplice liability theory because the police report and a co-defendant's statement made it clear that someone else actually broke into the house and then delivered the guns to the defendant and because the State talked about the theory during jury selection. The Supreme Court found no prejudice to the defendant in any event because his theory on defense would not have changed even if he had been given formal notice of the potential accomplice theory.

You Can Put Lipstick on a Pig, but it doesn't make the Bacon Sizzle.

In the memorandum decision reported as *State v. Loudin*, 2015 WL 1741150, the Supreme Court considered the appeal of a defendant who had been convicted of unlawful assault and who was sentenced to a term of

incarceration of one to five years.

The defendant punched another person in the eye. The person who was hit suffered an orbital blowout fracture, nasal bone and septum fractures, and abrasions, and, as a result, had a titanium plate inserted into the face.

The first assignment of error was that a motion to set aside a verdict should have been granted when the bias of several jurors became known. One juror's sister had been disappointed with the defendant's construction work and another juror's husband owned a business that was stiffed on an invoice when the defendant filed bankruptcy. The Supreme Court noted that "the question as to whether or not a juror has been subjected to improper influence affecting the verdict, is a fact primarily to be determined by the trial judge from the circumstances, which must be clear and convincing to require a new trial, *proof of mere opportunity to influence the jury being insufficient.*" [emphasis added]. The Supreme Court noted that voir dire should be used for these purposes and, moreover, the defendant had no proof that the jurors were even aware of their family's connections with the defendant.

A second assignment of error was that the jury communicated with the court bailiff outside of the defendant's presence. The bailiff also relayed the jury's question to the court outside the defendant's presence. The court then convened the counsel and the parties to discuss the matter and then brought in the jury to put the jury's question on the record and to then instruct the jury on how to communicate future questions.

The defendant argues that

this violated his right to be present during all critical stages of a criminal proceeding. The Supreme Court found this brief communication between the jury and the bailiff and between the bailiff and the court occurred at a point that was not critical since the jury had just begun deliberations. Moreover, the Supreme Court noted that the defense counsel had not objected even when prompted by the court.

A third assignment of error was the use of a photograph at trial that had been obtained from the defendant's cell phone without the process of a warrant. The defendant's problem is that his trial counsel stipulated to the admission of the photograph which showed the victim in the hospital and the counsel never questioned how the photograph came into the State's possession. Without a record on this issue, the Supreme Court refused to find that error was committed.

A fourth assignment of error concerned the court's interjection during the defendant's counsel's cross-examination of an investigating officer. The defense counsel asked the officer to read a portion of the police report when, according to the defendant, the court stopped the questioning and encouraged the State to object. The report was then found to be hearsay. The Supreme Court found the record to be inadequate to fairly determine the issue and also found that the jury was able to review the document in any event because it was admitted during the cross-examination of another witness.

In the final analysis, this decision is significant because it demonstrates two common problems that hinder prosecuting appeals. One problem is the failure to object at the trial court level and the second problem is the failure to adequately designate a record

that supports the arguments.

The decisions of the lower court were affirmed.

No, No, No, I don't Deliver it No More; I am Tired of waking up in a Cell.

In the memorandum decision reported as *State v. Nutter*, 2015 WL 867812, the Supreme Court of Appeals of West Virginia was confronted with the argument that "West Virginia's system of designating all crimes as either a felony or misdemeanor violates the state constitutional provision requiring that penalties shall be proportional to the character and degree of the offense."

The defendant was sentenced for his conviction of the delivery of a controlled substance, i.e., marijuana, to a police officer and another person. The defendant was sentenced to two concurrent terms of one to five years. The sentences were suspended, however, and the defendant was placed on probation for five years. The costs of the proceeding, which were almost three thousand dollars, were imposed on the defendant, but no monetary fines were imposed.

The defendant's contention on appeal was that "the non-violent crimes of which he was convicted should not be categorized and punished in the same manner as more egregious offenses, particularly given that... marijuana is no longer considered to be a dangerous drug." Essentially, the defendant was challenging the felony/misdemeanor designations of crimes.

The Supreme Court stated, simply, that "the Legislature made a policy decision in classifying ... [the] crime as a felony, a decision with which

this Court will not interfere."

The defendant continued, however, to argue that, because counties bear the costs for incarcerating persons convicted of misdemeanors and the State bears the costs for persons convicted of felons, the counties are pressured to charge and only accept pleas for felonies. This, the defendant concludes, violates the constitutional provision that "justice shall be administered without sale." W. Va. Constitution, Art. III, sec. 17. The defendant emphasized that the sentence ultimately imposed was the same as if he had been convicted of a misdemeanor. The only difference is that the state was now faced with bearing the costs, not the county.

The Supreme Court's resolution of the issue was to simply state that the suggestion of "undue pressure" was "completely unfounded and supported in the record."

The defendant additionally argued that marijuana did not possess the characteristics of a Schedule I drug, which are, the drug "has high potential for abuse" and "has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision." The defendant asserted that the State's burden included proving that marijuana met these statutory requirements.

The Supreme Court again deferred to the Legislature's determination that marijuana was a Schedule I substance.

The State needed only to prove that the substance was marijuana.

Finally, the defendant argued that he should not have to pay the costs of the

proceedings since he was convicted of only two of the five counts and was forced to trial only because the State refused to meaningfully negotiate with him. At the very least, he should only have to pay 40% of the costs.

The Supreme Court resolved the argument by reiterating that "costs are not punishment or part of the penalty for committing a crime." The purpose is purely "compensatory." Because "requiring a convicted criminal to pay court costs is well settled in West Virginia law," the Supreme Court rejected the argument.

The defendant's convictions were affirmed.

Wave Goodbye to your Grounds for Appeal if you Waive the Issues during Trial.

In the memorandum decision reported as *State v. Frank A.*, 2015 WL 867912, the defendant appealed from a conviction on two counts of first degree sexual assault against a minor child and two counts of sexual abuse by a parent against a minor child. The defendant was sentenced to two consecutive terms of ten to twenty years and two concurrent terms of one to five years.

The defendant's first ground for appeal was that the grand jury had been informed by the testifying police officer that the defendant had been previously arrested for a crime related to sexual assault or abuse, but the charges were dismissed. The record reveals that the victim had recanted her allegations in the course of the prior proceedings. The defendant argued this was impermissible evidence under Rule 404(b) of the Rules of Evidence, governing the use of other crimes, wrongs or other acts to prove a pending charge.

The Supreme Court held that an indictment would be reviewed only for constitutional error and prosecutorial misconduct, neither of which the defendant alleged. The Supreme Court further noted that it would only inquire into the evidence considered by the grand jury if "willful, intentional fraud" could be found.

The defendant then asserted that the case should not have been allowed to proceed to trial due to his "limited mental status" and his failure, therefore, to understand a plea offer. The Supreme Court determined that the lower court's "better vantage point" to determine competency should not be disturbed absent any abuse of discretion. The record demonstrated that no evidence had been presented to demonstrate incompetency and no motion for a mental capacity evaluation had been made.

The record did show that, upon inquiry by the trial court, the defendant had trouble remembering the details of a plea offer that had been made. The defendant asserted on appeal that this demonstrated his lack of competency. However, the Supreme Court noted that no participant in the proceeding raised any concern about the defendant's behavior and the defendant "clearly indicated to the circuit court that he understood and did not wish to accept the plea offer." The Supreme Court emphasized that a defendant "has no constitutional right to have his case disposed of by way of a plea bargain."

The defendant then raised the prohibited use of evidence of crimes, wrongs, or other acts in the trial proceedings under Rule 404(b). The prosecuting attorney mentioned, in opening statement, the previous criminal charges that had been dismissed. A witness during questioning mentioned that he

had not seen the defendant “since a previous court hearing.” The defendant believed this prejudiced the jury against him. Due to a lack of objection at the trial court to either instance, the defendant was deemed to have waived these issues. Moreover, the previous charges were part of the current indictment and the defense counsel understandably used the recanting of the previous charges in the cross-examination of the witness. Accordingly, no prejudice could be found in the prosecutor’s or witness’ reference to the prior charges.

Similarly, the expert testimony of another witness regarding situations in which victims recant testimony was deemed to be waived when, despite an initial objection, the defense counsel withdrew the objection and then stipulated to the qualification of the expert witness. The editor notes that this might have been a trial strategy on the part of defense counsel because the opinion notes that the defense counsel solicited certain expert opinions upon cross-examination of the witness.

Finally, the defendant complained that the prosecutor cross-examined him about statements made against him by individuals who were not called as witnesses at the trial because they were unavailable to testify. The Supreme Court found these questions did not violate the Confrontation Clause because defense counsel raised in the defendant’s direct testimony the issues to which these statements related. The defendant opened a door which the Confrontation Clause would not close. The Supreme Court stated “the curative admissibility rule allows a party to present otherwise inadmissible evidence on an evidentiary point where an opponent has ‘opened

the door’ by introducing similarly inadmissible evidence on the same point.” The Supreme Court further stated “an appellant or plaintiff in error will not be permitted to complain of error in the admission of evidence which he offered or elicited, and this is true even of a defendant in a criminal case.” Also, it was noted that one question merely asked if the statement of an unavailable witness had been seen by the defendant. No questions were asked about the statement’s content. Because the inquiry was not “testimonial in nature,” the Confrontation Clause was not invoked.

For these reasons, the Supreme Court found no error.

Out of the Mouths of Babes...

In the memorandum decision reported as *State v. Darrell L.*, 2014 WL 6634367, the Supreme Court dealt with the issue of the competency of a witness who was four years of age.

After a bench trial, the defendant was convicted of various sex crimes involving the then three year old child of his “live-in girlfriend.” On appeal, the defendant argues that the lower court erred in permitting the young child to testify.

The lower court ordered a psychological evaluation of the child and found that the child was competent to testify via closed circuit television.

Notably, the “rape shield law plainly states that ‘in any prosecution under this article, neither age nor mental capacity of the victim shall preclude the victim from testifying.’ W. Va. Code §61-8B-11(c) [1986].” Moreover, the Supreme Court emphasized that competency was not tied to any “precise age.” Finally,

the Supreme Court did not agree with defendant that the lower court had failed to undertake its own examination of the child, pointing to the examination done by a psychiatrist who then testified before the court and to the court’s obvious observation of the child during the testimony.

The defendant also took exception to the fact that an advocate was with the child during the testimony and prompted the child, at one point, “to use her words.” The Supreme Court found this prompting to make a response to be “common in many courtrooms” and did not establish that the child was unable to competently testify. The lower court had admonished the advocate not to make such prompts, but, again, the Supreme Court did not find the circumstances indicative of any coaching.

Finally, the defendant complained about the inability of the court to provide him a transcript of the hearing on the defendant’s motion for a new trial due to the inoperability of the computer onto which the proceeding had been loaded. The Supreme Court found that without any evidence that the proceedings were not fairly characterized by the order denying the motion for a new trial, the “presumption of regularity of court proceedings” would be sustained.

If you are not going to Plead for Mercy, Expect No Mercy.

A plea agreement came under scrutiny in the reported case of *State v. Holstein*, 770 S.E.2d 556 (W. Va. 2015). The defendant was involved in a rather violent home invasion resulting in the death of a homeowner. Two co-defendants pled guilty to first degree felony murder and were sentenced to life imprisonment with the

possibility of parole.

Subsequently, the defendant Holstein pled guilty to first degree felony murder in consideration for the State’s dismissal of the robbery and breaking and entering charges and the State standing silent on sentencing. On that same day, the plea hearing was held and the defendant testified that he had read, reviewed and discussed the plea agreement with counsel.

The petitioner did give the sentencing court details regarding his medical history, which, while it did not include hospitalization for mental illness, did include a diagnosis of bipolar disorder and the prescription of antidepressants. The defendant’s counsel attested, however, to the defendant’s continuing lucidity throughout the proceedings and his orientation toward time and events.

A 121 page pre-sentence report was prepared. The report detailed an extensive criminal history, including the fact that this crime was committed within three months of being discharged from parole. Moreover, the report detailed that the defendant had essentially been brought into the scheme due to his expertise and his knowledge of “how to commit such a robbery ‘properly.’” Further, the evidence pointed to the defendant as the one who pulled the trigger on the shotgun blast that killed the homeowner. Finally, the probation officer found no evidence that the defendant was sincerely remorseful and further described the defendant as manipulative and deceptive.

Despite the harshness of the report, the defendant’s counsel stated at the sentencing, in response to the court’s inquiry, “There is nothing that is factually inaccurate in the report....” The petitioner’s testimony included the

statement that “I don’t expect to get mercy today.” And, he did not. The Court sentenced the 29 year old defendant to life imprisonment without the possibility of parole.

On appeal, the defendant argued that the plea was not made knowingly, voluntarily and intelligently. The defendant emphasized the effect of the bipolar disorder on his decision making.

In reviewing other state’s precedent on the issue of bipolar disorder, the Supreme Court noted that the consistent ruling was that claiming the disorder is not sufficient. Instead, the proceedings must in some manner reflect that the disorder impacted the defendant’s ability to comprehend the proceedings. And in the absence of such a finding, a competency evaluation is not required to be had. An example of the other states’ position is the following summary of the holding in *Douglas v. State*, 2010 WL 2196082, made by a Texas Appellate court: “finding trial court did not abuse its discretion by failing to conduct informal inquiry into defendant’s competency after she testified that she had been recently diagnosed with ‘schizoaffective disorder and bipolar disorder, suffered from hallucinations, and was taking medications that quiet the voices she hears and control her racing thoughts’ where record showed defendant’s testimony was ‘lucid, her answers to the questions posed were responsive

and clear, and she coherently relayed her side of the story.”

Essentially, unless the Rule 11 plea colloquy by the defendant reflects the effects of a stated mental disorder or the counsel states a concern about the client’s mental status, then the court is not required to do a mental competency evaluation notwithstanding the existence of a diagnosis of a mental illness or disorder. Moreover, the defendant will be deemed to have entered the plea voluntarily, knowledgeably, and intelligently.

Also, the Supreme Court found no abuse in discretion by sentencing the defendant differently than his co-defendants in light of the matters set forth in the pre-trial sentencing report which, again, the defendant’s counsel stated was not factually inaccurate.

The crux of the case is that counsel must be attuned to the impact of the presentence report and must be able to present some mitigation. Simply affirming the report’s accuracy may be effectively assuring a harsh result. For example, the bipolar disorder might have been a matter to explore in mitigation of the sentencing, if it was not so used.

Don’t put off Today the Evaluation you will need for Sentencing Tomorrow.

In the memorandum decision reported as *State v. Brichner*,

2015 WL 1236005, the issue arose of out the sentencing of a defendant as a result of a *Kennedy* plea to one count of first degree sexual abuse. The sentence was to run concurrently with a sentence that was being served for delivery of cocaine. Additionally, the defendant was to register as a sex offender for life and was to be under supervised release for twenty years.

The defendant was not encumbered from arguing for any sentence, but, if probation were to be possible, a psychiatric evaluation would be required. See W. Va. Code §62-12-2(e). Discussion ensued at the plea hearing whether the expense of the evaluation would be paid by the public defender corporation due to the fact the defendant was presently incarcerated and due to the highly unlikely possibility of probation being granted. Without resolution of this issue, the plea was entered. Eventually, a sentence was imposed consistent with the plea, but without any evaluation having been done.

The court denied post-trial motions for new counsel, for a psychiatric evaluation, and for resentencing based upon the requested evaluation. Under the plea agreement, the defendant was entitled to ask for any lawful sentence, which could include probation but only if an evaluation was done. On appeal, the defendant argued he was denied this opportunity.

The Supreme Court denied relief indicating that it was not an abuse of discretion for the court to impose sentence without an evaluation, thereby precluding the consideration of probation. Noting that probation was a matter of grace and not a right and that the sentence was within statutory limits, the court’s sentencing was upheld. The matter of ineffective assistance of counsel was considered an improper issue on appeal.



Due to the volume of decisions issued in the months of March and April, this newsletter does not contain the summaries of all decisions. The remaining decisions will be included in the May/June edition of the newsletter.

DAFFYNITION: What is a “paradigm”? Twenty Cents.

"WHAT ARE YOU WAITING FOR??"

TIME IS RUNNING OUT TO REGISTER FOR THE 2015 PUBLIC DEFENDER ANNUAL CONFERENCE!

YOU DON'T WANT TO MISS OUT ON THE OPPORTUNITY TO BE AMONG A FORUM OF GREAT SPEAKERS, ENJOY COMRADERY WITH YOUR FELLOW COLLEAGUES AND ENJOY THE WONDERFUL AMENITIES OFFERED AT STONEWALL RESORT.

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REGISTER TODAY AND BE A PART OF THE VARIOUS PANEL DISCUSSIONS THAT WILL BE OFFERED IN SEPARATE SESSIONS, A GUEST SPEAKER FROM THE GOVERNOR'S OFFICE AND A FUN-FILLED EVENING OF ENTERTAINMENT BY THE BOB NOONE SHOW!

ITINERARY AND REGISTRATION INFORMATION IS AVAILABLE ON OUR WEBSITE AT WWW.PDS.WV.GOV

As always, if you have any questions please contact Pamela Clark at Pam.R.Clark@wv.gov

“Quotes” to Note

NOTABLE PARABLE:

“Once upon a time, there was a village by the sea. Some villagers fished the sea in their trawlers. Others were content to cast their lines in a vast freshwater inland lake where fish were abundant. Yet other villagers were farmers, who worked the land and who used the lake to water their livestock. All the villagers were happy. Food was plentiful. No one went hungry. Villagers enjoyed recreational time at the beach, at the lake, and at the parks. Life was good for the village by the sea.”

“One day, the lead sea captain of the sea trawlers noticed that sea conditions had become such that he now had more fishermen than needed to meet his quotas for fish. At the same time, he noticed that the lake anglers were often unable to meet their quotas. The lead sea captain proposed that several of his fishermen be transferred to the lake, on an as-needed basis, to assist the lake anglers.”

“Upon learning of this, the farming boss immediately objected, maintaining that sea fishing was sea fishing and lake fishing was lake fishing. He asserted that it was simply not proper for the chief lake angler to supervise sea fishermen who, though competent fishermen, had been trained their entire lives by others in the net-method of fishing, not the line-method of fishing. The farming boss warned that if the lead sea captain insisted on the transfer, the farmers would construct irrigation ditches to their fields from the lake, thereby reducing the lake’s fish population to a level compatible with the quota abilities of the lake anglers.”

“A conflict having arisen in the village, the matter was taken before the village elders. Determined to get to the bottom of the controversy that was disturbing the village’s customary calm, the Elders asked if any sea fishermen had yet been transferred to the lake. The lead sea captain and the chief lake angler assured that such was not the case. The Elders then inquired whether digging had commenced on the irrigation ditches. The farming boss responded that construction of irrigation ditches had not begun, being merely in the planning stages. The Elders exchanged glances among themselves, and then proclaimed, - partly in exasperation and partly in relief – ‘There is no current conflict here! Everything is running along smoothly, just as it always has been.’ ”

“The representatives of the various occupations heeded the Elders’ proclamation, and, indeed, all the villagers in attendance were constrained to admit that the sea might thereafter grow less jealous of its bounty, such that no fishermen need ever be transferred and no irrigation ditches need ever be dug. Indeed, everything probably had been premature. Just as the proceedings were about to adjourn, however, the Elders conferred among themselves and announced that a fence would be built all the way around the lake, with but two gates for which the farming boss and the chief lake angler would be given the only keys. At this, the lead sea captain leapt to his feet and exclaimed, ‘But this is unnecessary. Our fishermen will have no place to take their families on the weekends! Other villagers will no longer be able to enjoy the lake. With all respect, learned Elders, why would you insist upon such an unnecessary and extravagant thing when there is no current need?’ A reverential hush fell as the question lingered in the room. ‘Because,’ the Elders replied nonchalantly, ‘we know what is best for all of you, we know what you need, we are quite good at building fences, and this is what is needed for life to be good in our village by the sea.’ ”

Justice Benjamin, dissent, *State of West Virginia ex rel. Patrick Morrissey, Attorney General of West Virginia v. West Virginia Office of Disciplinary Counsel and West Virginia Lawyer Disciplinary Board*, 764 S.E.2d 769 (W. Va. 2014) (explaining that while the majority properly found no justiciable controversy, the majority inexplicably then renders an opinion on the issue of the attorney general’s executive power).



POINTS OF INTEREST

Did you know.... 92 W. Va. C.S.R. §1-10.1 is a regulation of the West Virginia Parole Board that provides, in pertinent part: “Any inmate or interested party may make a request for records of the Parole Board pertaining to consideration of an offender for release on parole, rescission or revocation of parole or discharge of a parolee from supervision provided such records are subject to disclosure under the West Virginia Freedom of Information Act, W. Va. Code § 29B-1-1 et seq. Examples of documents not to be disclosed include but are not limited to the following: official, judicial, or community sentiment of any form.”

Honorable Earl Ray Tomblin - Governor

Jason Pizatella - Acting Secretary of Administration

Dana F. Eddy - Executive Director

Public Defender Services

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VOUCHER UPDATE

For the period of July 1, 2014 through April 30, 2015, Public Defender Services has processed 30,081 vouchers for payment in a total amount of \$ 22,042,252.20.

Most Highly Compensated Counsel

For the period of July 1, 2014, through April 30, 2015

Law Office of David B. Kelley	\$171,207.00
Christopher G. Moffatt	\$165,675.74
Gerald G. Jacovetty Jr., LC	\$163,964.00
Ruth Law Offices, PLLC	\$158,584.00

Most Highly Compensated Service Providers

For the period of July 1, 2014, through April 30, 2015

Tri S Investigations, Inc.	\$ 86,701.05
Jones Dykstra & Associates, Inc.	\$ 60,807.36
Paul E. Kradel	\$ 45,859.35
Forensic Psychiatry, PLLC	\$ 41,800.00

NOTABLE QUOTES:

“The defendant got ‘slip-shucked’ by the prosecutor.” Justice Ketchum, dissent, *State v. Keith D.*, -- S.E.2d—(W. Va. 2015), 2015 WL 1720912.

“This is a tragic attempt to distinguish reality from reality.” Justice Davis, dissent, *State v. Keith D.*, -- S.E.2d—(W. Va. 2015), 2015 WL 1720912.

“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)