

THE CAPITOL LETTER

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

From the Executive Director

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“WE ARE IN THIS TOGETHER!!!”

The Public Defender Services Annual Conference is scheduled for the dates of Thursday, June 12, 2014, through midday, Friday, June 13, 2014. The location is the Oglebay Resort & Conference Center in Wheeling, West Virginia.

The theme of the conference is, “We are in this together!!!!.” The message is that Public Defender Services is committed to the support of **ALL** attorneys who are engaged in criminal defense.

The agency administers grants from the state’s general revenue to the public defender corporations for their operation, but the agency also administers an appropriation of an even greater amount for the payment of panel attorneys. The agency’s criminal law research center is committed to the education or edification of attorneys, whether employed by self or by a nonprofit corporation.

The agency’s appellate division is dedicated to the appeal of legal issues on behalf of clients without regard to who provided the initial legal counsel. The agency’s services are dedicated, therefore, to the criminal defense lawyer, wherever or however he or she may hang the shingle.

And, consistent with this commitment, the annual conference has been designed to provide information for attorneys, whether the attorneys are appointed from panels or are employed in public defender corporations. Because, after all, the goal of each lawyer is the same: To provide the highest quality legal representation to citizens who are faced with the loss of their liberty, but who are unable to retain private counsel.

You are encouraged to register for the conference, therefore. In addition to the continuing legal education that is proffered, a dinner is planned for the first evening. The evening will include a reception, a “grand” buffet, an awards ceremony, and entertainment by a well-known artist and satirist, who is also “in this together.”

The agenda for the conference is being finalized and will soon be published. The intent is to provide for discussion as well as education and to focus on the practical as much as the theoretical. Simply stated, the desire is to engage you as a professional.

Moreover, a representative of the agency will be available to assist you with questions about vouchers or budgets.

Again, “we are in this together” and I hope that is literally true on June 12, 2014. You should make your reservations at Oglebay’s facilities now.

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COMING ATTRACTIONS....

In future issues, Donald L. Stennett, the Deputy Director of Public Defender Services, will discuss cases of historical significance in an installment entitled, *Laying the Foundation*.

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

AGENCY NEWS & INFORMATION

FEELING REJECTED?

Vouchers that are signed by an attorney on or after the date of April 1, 2014, must be prepared using the online voucher system ("OVS"). If the agency receives a voucher that is signed by an attorney on or after that date which has not been entered into OVS, the voucher will not be processed. Instead, you will receive a "rejection" letter, by facsimile transmission, that informs you the voucher has been received, but cannot be found in the OVS system. The letter will state that the voucher will not be processed until it is entered into the system. Once entered, you are instructed to provide the agency with the OVS number so that the voucher can be found.

The reality is that the processing of an OVS voucher and a non-OVS voucher are profoundly different tasks. A non-OVS voucher has information that requires agency personnel to manually enter into its accounting system. An experienced processor may be able to input between 5 and 10 vouchers an hour, depending on the size of the voucher. After the voucher is entered, another representative of the agency must double check the entered information in order to eliminate any human error. An OVS voucher eliminates the

need, generally, for manual input. The principal task is to simply make sure that the attorney entered the information correctly or that the judge's order did not change the information. Moreover, mathematical errors in the attorney's preparation of the voucher are eliminated, which was one of the primary corrections that the personnel in the agency had to make when manually entering the information. After the initial review, the online voucher can be immediately approved to be transferred, electronically, to the agency's accounting system, while manually entered vouchers would have to be reviewed again for inputting errors.

Simply, the agency's mission has shifted from entry and review to simply review. The agency's goal is to substantially reduce the processing time once all the non-OVS vouchers submitted before the date of April 1, 2014, have been inputted and reviewed. The latter effort may take an additional three (3) months.

So, if you feel rejected, it is because you have not prepared your voucher by using OVS notwithstanding the announcement almost one year ago that such use would be mandated.

THE STATEWIDE APPELLATE DIVISION

Section 6(e) of Article 21 of Chapter 29 of the West Virginia Code, W. Va. Code §29-21-6(e), provides that the Public Defender Services "shall establish and ... shall operate an appellate advocacy division for the purpose of prosecuting litigation on behalf of eligible clients in the Supreme Court of Appeals."

On July 1, 2014, the Public Defender Services will significantly expand the *PDS Appellate Division*. The division will have five attorneys with Duane C. Rosenlieb, Jr., as the director. Crystal L. Walden shall serve as a lead appellate attorney. Lori M. Waller, Jason D. Parmer, and Matthew D. Brummond shall comprise the division's remaining appellate attorneys.

PDS does not intend to take any and all appeals from cases handled by appointed counsel. PDS will concentrate on appeals in which trial counsel has a compelling reason for not handling the appeal and in which significant legal or procedural issues are raised. Moreover, PDS will not handle *habeas corpus* proceedings in the circuit courts, but will consider the prosecution of any resulting appeal.

The activation of the *PDS Appellate Division* is intended to ensure that issues with compelling procedural or constitutional underpinnings will be prosecuted vigorously, zealously, scholarly, and thoroughly in the state's highest court or, if necessary, in the Supreme Court of the United States.

PDS is finalizing its procedures for the appointment of cases to the appellate Division. When finalized, the procedures will be published to the judges of the various circuit courts and will be made available to attorneys through the agency's website and an e-mail blast.

WELCOME TO THE AGENCY!

Public Defender Services would like to welcome Donald L. Stennett as the agency's first Deputy Director!

Don has practiced litigation and trial law for thirty years, including five years as a Federal Prosecutor in the Southern District. He has tried cases throughout the state and has taught on a number of subjects at CLE events. In addition to his administrative responsibilities, Don will work with the Executive Director in accomplishing the mission of the Criminal Law Research Center.

US SUPREME COURT: IT IS SO ORDERED.....



AN INTOXICATING ANALYSIS, OR, LET THE CHiPs FALL WHERE THEY MAY.

In *Navarette v. California*, 572 U.S. ___, 134 S.Ct. 1683 (April 22, 2014), the Supreme Court of the United States by Justice Thomas held that the traffic stop of a vehicle based on a 911 call “complied with the Fourth Amendment because under the totality of the circumstances, the officer had reasonable suspicion that the driver was intoxicated.”

A driver called the 911 dispatcher describing with some detail a truck that had purportedly run the driver off the road, the location at which this had occurred, and the direction in which the truck was traveling. While the identity of the caller was apparently known, the record treats the call as an “anonymous tip” because the prosecutor did not call as a witness to the suppression hearing either the 911 caller or the 911 dispatcher.

The truck was spotted by a California Highway Patrolman (a “CHiP”) and was stopped after a five minute period of observation. Notably, the truck was stopped even though the CHiP did not observe any reckless driving or any other traffic violation. As the truck was approached, marijuana was smelled and the resulting search of the truck bed “revealed 30 pounds of marijuana.” A motion to suppress the evidence of the search and seizure was denied and the “petitioners pleaded guilty to transporting marijuana and were sentenced to 90 days in jail plus three years of probation.”

Did the traffic stop, based on the anonymous tip, violate the Fourth Amendment “because the officer lacked reasonable suspicion of criminal activity?”

The starting point of the analysis was that the “Fourth Amendment permits brief investigative stops – such as the traffic stop in this case – when a law enforcement officer has a ‘particularized and objective basis for suspecting the particular person stopped of criminal activity.’” (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)). The analysis continued with the acknowledgement that “reasonable suspicion” is “dependent upon both the content of information possessed by police and its degree of reliability.” (quoting *Alabama v. White*, 496 U.S. 325, 330 (1990)). This standard, reminds Justice Thomas, takes into account “the totality of the circumstances – the whole picture.” (quoting *Cortez*, *supra* at 417).

The opinion then recounts when an “anonymous tip” can demonstrate “sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop.” Indeed, a description of the 911 system led to the conclusion that the tip was inherently, although not *per se*, reliable, simply because the system was used with knowledge that the call could be traced and that abuse could result in a criminal violation.

The question then to be answered was whether “criminal activity” was reasonably suspected based

on the fact that the caller was “driven off the road.” Again, the call did not report a sighting of, or other indication of, marijuana possession or use.

With respect to this, the Court’s majority opinion was that, “the behavior alleged by the 911 caller, viewed from the standpoint of an objectively reasonable police officer, amount[s] to a reasonable suspicion of drunk driving.” (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)). This was viewed as an “ongoing crime” since the truck was still on the highway. This is somewhat difficult to reconcile, however, with the fact that for a period of five minutes, the CHiP officers viewed no reckless driving.

So, does this open the door to assuming criminal activity when any report is made to a 911 dispatcher about a traffic violation outside the presence of a law enforcement officer? The opinion states that “unconfirmed reports of driving without a seat belt or slightly over the speed limit, for example, are so tenuously connected to drunk driving that a stop on those grounds alone would be constitutionally suspect.” But, in this instance, a report of “running another car off the highway ... bears too great a resemblance to paradigmatic manifestations of drunk driving to be dismissed as an isolated example of recklessness.” And the Court reminds the reader that, although other reasons might cause such behavior, “reasonable suspicion need not rule out the possibility of innocent conduct.”

Nonetheless, the opinion does relieve the officers of

having to “surveil a vehicle at length in order to observe suspicious driving” noting that “it is hardly surprising that the appearance of a marked police car would inspire more careful driving for a time.” Essentially, once reasonable suspicion is established, the failure to personally observe questionable conduct does not preclude the officers’ traffic stop.

The Court’s opinion does make note, however, that “this is a close case” which is made clear by the 5-4 vote. In the opinion of the minority as expressed by Justice Scalia, the Court was not following precedent as carefully presented by the majority opinion, but, instead was creating a new rule: “So long as the caller identifies where the car is, anonymous claims of a single instance of possibly careless or reckless driving called in to 911, will support a traffic stop.” Moreover, the minority was concerned that the inherent reliability given to use of the 911 system might spill over to other investigative efforts of other crimes.

However, the minority opinion rails against the anonymity of the tipster, when, in reality, the identity was known, but the call was treated as an anonymous tip because the caller was not called as a witness. Ignoring this fact is similar to ignoring that, while parents may attribute presents to a mythical being, most children know the true source. If the tip had been truly anonymous, the case might have been decided differently. This is the distinction upon which criminal law practitioners will have to pounce.

YOU'VE BEEN SCHOOLED.

In the case of *State v. Bennett*, ___ S.E.2d ___ (2014), 2014 WL 1758026, the Court affirmed the petitioner's conviction for the offense of truancy due to her child's five unexcused absences from school.

However, the lower court had sentenced the petitioner as follows: (i) probation for ninety days; (ii) community service for five days; and (iii) a fine of \$50.00.

The Court noted that, "before a court may impose a period of probation, the court must first suspend the imposition or execution of at least some portion of the sentence prescribed for the conviction." Under the truancy statutes, the first conviction of the offense results in an alternative sentence of (i) a fine of \$50.00 to \$100.00, or (ii) the parent's attendance at school with the child for a period of time. Because the court imposed a fine of \$50.00 and did not suspend the sentence, "the court had no basis to place the petitioner on probation as there was no other sentence to be imposed in the event of a probation violation on the part of the petitioner." Reversible error was committed.

Moreover, the community service requirement was deemed to be a "sentencing alternative that a court has the discretion to impose." Because the statutory sentence was imposed, however, the community service requirement did not exist as an "alternative" or a "substitute" for the sentence. Essentially, "the court had no authority to order the petitioner to perform five days of community service."

The case was remanded for a "new sentencing hearing only."

IF YOU DON'T CONSCIOUSLY ACKNOWLEDGE GUILT, THEN YOU MIGHT HAVE A GUILTY CONSCIENCE.

In the memorandum decision of *State v. Keith R.*, 2014 WL 1686932, the Court dealt with the petitioner's argument that because he entered a *Kennedy* plea, the circuit court should not have considered "whether he had accepted responsibility for the crimes during sentencing." Notably, "this Court has identified remorse or the lack thereof as a factor to be taken into account by a trial judge when sentencing a defendant." *State v. Jones*, 610 S.E.2d 1, 4 (W. Va. 2004). Without discussion, the Court held that "nothing in *Kennedy* precludes a court from considering at sentencing whether a defendant has accepted responsibility for his crimes." Accordingly, practitioners should advise clients who are entering into *Kennedy* pleas that the Court may, *per se*, find that the client lacks remorse, thus constituting a potentially aggravating factor in the sentencing.

WE JUST DON'T SEE EYE TO EYE.

In the memorandum decision of *State v. Utter*, 2014 WL 1673025, the Court was asked to find error in the lower court's exclusion of an expert witness' testimony on the reliability of eyewitness testimony. Notwithstanding that the recent literature discredits, and recent lectures around the circuits all decry, the reliability of such testimony, the circuit court found that, in accordance with the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Wilt v.*

Buracker, 443 S.E.2d 196 (W. Va. 1993), *cert. denied*, 511 U.S. 1129 (1994), the "evidence propounded was not of such scientific, technical, or specialized area to assist the trier of fact."

The effort should not be considered futile in other cases, however. The opinion notes that the attorney submitted the issue to the lower court on a written submission and, in the record on appeal, the attorney "failed to provide the name of the expert, the expert's qualifications, the expert's curriculum vitae, the courts in which the expert had previously testified as an expert, the expert's field of expertise, the scientific methodology upon which the expert based conclusions, or any conclusions about the eyewitness identifications at issue." Moreover, the issue extended to a photo lineup, yet no mention was made in the opinion and presumably by the counsel regarding the provisions of the state's *Eyewitness Identification Act*, W. Va. Code §§62-1E-1, *et seq.*, which establishes the mandatory protocol for photo lineups.

Accordingly, the lesson to be learned is that work must be done to bring in expert testimony on eyewitness identification. An attorney must be diligent in identifying the expert, holding an actual hearing, and eliciting the expert's history, qualifications and scholarship. Moreover, attorneys must be cognizant of the provisions of the *Eyewitness Identification Act*.

BUSINESSES ARE INCORPORATED, NOT ARGUMENTS.

In the memorandum decision of *State v. Jordan*, 2014 WL

1672951, the court reiterated the standard that "it is the three-term rule, W. Va. Code, 62-3-21 [1959], which constitutes the legislative pronouncement of our speedy trial standard under Article III, Section 14 of the West Virginia Constitution." The three-term rule is that "an individual indicted for a crime must be tried within three terms of the indictment." However, the provisions of the Sixth Amendment to the United States Constitution impose a balancing test as it's speedy trial analysis, measuring four factors: (1) the length of the delay; (2) the reasons for delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant. The case is analyzed on the basis that if one or the other test is failed, then the motion to dismiss the indictment must be granted.

The petitioner apparently believed that he had clearly established a violation of the three term rule, but that the circuit court denied the motion to dismiss the indictment on the grounds that the balance did not tip in favor of the petitioner. The Court disagreed, however, stating that the lower court did apply a balancing test, but also correctly counted the terms to be charged against the State and, therefore, correctly determined that the three-term rule did not apply although five terms had passed. Accordingly, this ground for appeal was rejected.

The decision is primarily reported because of the following footnote which serves as guidance to counsel in appellate work: "For his argument on this point, petitioner indicates in his brief that 'he has completely set forth that argument in his previous pleadings [filed in the

circuit court], wherefore **he incorporates by reference specifically**, his motion to modify the circuit court's order. [emphasis added]. We pause to caution counsel that a brief filed with this Court must set forth an argument that 'contains[s] appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal.' W. Va. R. App. P.10(c)(7). Petitioner's incorporation by reference does not comport with the spirit of this rule inasmuch as he has cast a broad net and failed to tailor his argument for this Court's consideration."

THERE'S A NEW SHERIFF IN TOWN.....BUT YOU HAVE TO LIVE WITH THE OLD DEALS.

In the reported decision of *State ex rel. Thompson v. Pomponio*, __ S.E.2d __, 2014 WL 1659327 (W. Va. 2014), the newly elected prosecutor bemoaned his predecessor's drafting of a plea agreement as "defective, [and] replete with typing and grammatical errors." The issue was whether the plea agreement effectively dismissed charges that had been bound-over in addition to the charges in the indictment under which the defendant was charged. The agreement referred to a pending charge "instead of clearly identifying the charges being dismissed in exchange for the petitioner's guilty plea." The agreement made no reference to a pending grand larceny charge and did not dismiss any charges "with prejudice."

The prosecutor railed about the "ineptitude and incompetence" of his predecessor "seen in just about every file in the [prosecutor's] office." Moreover, the prosecutor was agog over his predecessor's "systematic practice of .. plea bargaining multiple felonies to single felony pleas." For this reason, the prosecutor felt, and the circuit court agreed, that the defendant could not get away with courtroom robbery, i.e., the dismissal of the bound-over robbery charges. A new indictment issued and the defendant's motion to dismiss was denied.

The Court, by Justice Loughry, disagreed and issued a writ prohibiting the lower court from proceeding on the new indictment. Equating plea agreements to commercial contracts with constitutional twists, the court held that, "due to the significant constitutional rights that a criminal defendant waives in connection with the entry of a guilty plea, the burden of insuring both precision and clarity is imposed on the State." The opinion then concludes, "consequently, the existence of ambiguity in a court-approved plea agreement will be construed against the State and in favor of the defendant."

It should be noted, however, that defense counsel must strive to make plea agreements clear and unambiguous. In this matter, the defendant's construction of the plea agreement was fortunately supported by both statements of the former prosecutor and the Court during sentencing. Without these supporting statements, it is not so certain that, "upon review of the appendix record," the court would have found the "subject plea

agreement to be ambiguous and deficient in its construction."

DON'T BRING KNIVES TO A GUN FIGHT.

In *State v. Corey*, __ S.E.2d __, 2014 WL 1659282 (W. Va. 2014), a *per curiam* opinion, the defendant was convicted of first degree murder and was sentenced to life in prison without the possibility of parole. The victim was the defendant's brother, who had been shot from long range through the window of their mother's house.

The defendant's former girlfriend gave information that supported a search warrant for the defendant's home. During the search, the police found, under a bush, a box of rifle cartridges "in a bag" and five "collector knives" in a "tin box." The ammunition was removed, but the knives were replaced. The ammunition was the caliber of the bullet that killed the defendant's brother.

The Court deemed the search warrant to be unassailable due to its "ten paragraphs" constituting more than "bare bones." The issue then became the admission of the collector knives into the case. Remember, the knives had been replaced when the ammunition was found under a bush. However, when the defendant was arrested and his car was searched, what was found in the back seat? The purportedly same tin box containing the collector knives. The knives were again left in the car, but eventually the police obtained the knives from the defendant's mother who identified them as the defendant's collection.

The Court then deemed the

admission of the knives to be relevant to the issue of the ownership of the ammunition, which the defendant denied. If the knives under the bush belonged to the defendant, then so must the ammunition. The primary point made by the court was that, under Rule 403 of the Rules of Evidence, the "mere prejudicial effect of evidence is not a sufficient reason to refuse admission," because the rule is concerned "only with **unfair** prejudice." [emphasis added].

Another issue was whether the lower court had properly delayed the defendant's trial due to the surgery of the prosecutor. The defendant pointed out that, after the surgery, the prosecutor attended several hearings, so how debilitating could the surgery have been? Moreover, the prosecutor had an assistant.

The Court opined that attending hearings involved less "mental and physical stress" than preparing for a murder trial in which over twenty witnesses were to be called. Moreover, the assistant prosecutor's experience extended to only misdemeanor cases and, accordingly, the Court agreed that "the assistant prosecutor's lack of experience could have adversely impacted the quality of the prosecution."

Finally, the defendant argued that the lower court should have declared a mistrial when a witness testified that the defendant was a felon. Despite the cautionary instructions to the parties, the prosecutor's witness blurted that the defendant had a criminal record.

The Court first admonished defense counsel because the counsel "failed to cite to any

legal authority or make any legal argument as to why he was entitled to a mistrial.” Instead, one paragraph recited the facts surrounding the offending testimony. The Court reminded the readers that “although we liberally construe briefs in determining issues presented for review, issues which are ... mentioned only in passing but are not supported with pertinent authority, are not considered on appeal.”

Nonetheless, the Court mentioned a second problem; that is, no motion for mistrial was ever made at the trial court level. Any post-verdict motion that was made had to be a motion for a “new trial,” because “a motion for mistrial must be made before a verdict is returned.” A mistrial is intended to “end the trial proceedings before a verdict is rendered in order to ensure that the defendant may receive a fair trial.” Primarily, the Court explained that it could not, after the fact, determine whether the decision to not move for a mistrial was “tactical” or an “oversight.” In a footnote, the Court further stated, of course, that the error would have been found to be harmless due to a curative instruction. The Court stated, “Nothing in the record demonstrates that the jury disregarded the court’s curative instruction.”

THIS OPINION IS “ALL KINDS OF CRAZY.”

In *State v. Skeens*, ___ S.E.2d ___, 2014 WL 1408468 (W. Va. 2014), a *per curiam* opinion, the defendant was convicted of first degree murder without a recommendation for mercy and was sentenced to life in prison without the possibility of parole. The victim was the defendant’s former high school

football coach, now 73 years of age, against whom the defendant had no known animus. It had been almost 30 years since the defendant had been coached by the victim. The defendant stabbed his former coach 43 times. Apparently, after the stabbings, the defendant “sat down in the ... [victim’s] living room and ate ice cream.”

The confusing facts in the case are that the psychiatrist found the defendant to be psychotic, but also found the defendant to be “malingering and exaggerating his symptoms.” Nonetheless, the psychiatrist found the defendant to be “incompetent to stand trial.” A separate evaluation found the defendant to be competent to stand trial. Eventually, the lower court determined that the defendant was competent to stand trial, after treatment for his affirmed bipolar disorder.

The defendant’s counsel filed a notice “reserving the right to assert a diminished capacity defense at trial due to mental illness at the time of the homicide.”

At the trial, testimony was provided that the defendant was irrational at the time of the crime, believing that the former coach, who had always treated him respectfully, was nonetheless going to kill the defendant’s family. Again, the expert testimony was that the defendant could actually “form intent, premeditation, deliberation and malice,” but the “intent ... had at the time of the homicide was irrational, based upon ... [the defendant’s] bipolar or psychotic condition.” But, again, the expert acknowledged that the defendant was “both psychotic and malingering.”

The jury was instructed on the elements of first degree murder, requiring malice or intent to kill, deliberation, and premeditation, and second degree murder, requiring only malice or intent to kill. The issue raised was whether the jury should have been instructed on the elements of involuntary manslaughter, based on the argument that the expert testimony raised into question the malice of the defendant due to the irrationality of the defendant’s intent. The lower court had ruled that the evidence did not support the inclusion of the instruction on the lesser included offense. Nonetheless, a diminished capacity instruction was given, permitting the jury the opportunity to determine if the defendant could form the required specific intent.

The Court acknowledged that the “diminished capacity defense is available in West Virginia to permit a defendant to introduce expert testimony regarding a mental disease or defect that rendered the defendant incapable, at the time the crime was committed, of forming a mental state that is an element of the crime charged.” The Court further acknowledged that, “this defense is asserted ordinarily when the offense charged is a crime for which there is a lesser included offense.”

Accordingly, the Court concluded that the trial court was well within its discretion not to instruct on the lesser included offense of manslaughter when, at the end of the trial, the court concluded no evidence supported the instruction. But, why was the diminished capacity defense instruction given when its intended purpose is to support a conviction upon a lesser included offense due to the

diminished capacity of the defendant to form the required intent?

Seemingly, the giving of the one instruction makes the failure to give the other instruction unreasonable and an abuse of discretion. This conundrum is simply not addressed in the opinion.

“NO, NO, NO, NO” WE DON’T DECIDE IT NO MORE.

In the memorandum decision of *State v. Robey*, 2014 WL 901746, the Court considered the *pro se* arguments of the defendant and agreed with the defendant that the lower court had no jurisdiction to enter an amended order which denied his motion for a sentence reduction on the merits.

However, the Court decided that no need existed to remand the case to the circuit court because the amended order, even though entered without jurisdiction of the case, “informs this Court how the circuit court would rule on the merits of the petitioner’s motion for a sentence reduction, and the reasons for the ruling, if this Court were to remand the case.” The opinion then states that, “this Court will not require an unnecessary thing.”

The Court further commented on the fact that the petitioner “filed three motions for sentence reduction all of which were ruled upon by the circuit court.” The Court noted that the reason for the 120 day period in Rule 35(b) of the Rules of Criminal Procedure is to “protect the sentencing court from repetitious motions for sentence reduction.” The Court stated, “we see no reason why in most cases a defendant would find it necessary to file

more than one Rule 35(b) motion for sentence reduction.”

The Court then noted that, with respect to this *pro se* petitioner who had managed to file three motions for reduction of sentence, “this Court is confident that the petitioner has received more than he is entitled to under Rule 35(b).”

THE DEVIL IS IN THE DETAILS.

In the memorandum decision of *State v. Waddell*, 2014 WL 1243168, the petitioner was convicted of malicious assault and child abuse by a parent resulting in bodily injury. In the closing statement, the prosecutor addressed the defendant’s contention that he had not acted maliciously by stating “What would Jesus say? What comes out of a man’s mouth that damns ...”. At that point an objection was made. The prosecutor then went on to say to the jurors that “you are the conscience of the community,” to which an objection was also made.

The defendant argued that his constitutional rights were violated by the injection of religion into the closing argument and by telling the jury that they were the conscience of the community. The Court, in a 4-1 decision, held that the reference to “Jesus Christ” or to “being the conscience of the community” was merely in support of the point that “the jury should pay attention to what petitioner said during the attack to determine if malice existed.” The Court acknowledged that it had previously recognized that it gives “strict scrutiny to cases involving the alleged wrongful injection of race, gender, or religion in criminal cases,” and “where these issues are wrongfully injected,

reversal is usually the result.” Syl. Pt 9, *State v. Guthrie*, 461 S.E.2d 163 (W. Va. 1995). The distinction was then made that, in this case, the prosecutor was referring to “Jesus Christ as a historical figure and not an appeal to sympathy or emotion.” The Court is seemingly suggesting that the religious segue was not intended to replace the elements required by law, but was merely a means of focusing the jury on the effort of applying these elements.

In the end, the court justified the apparent departure from *Guthrie* by stating, “given the ample evidence of guilt in this case, and noting that petitioner does not argue sufficiency of the evidence in this appeal, the remarks do not warrant reversal of the convictions.” Seemingly, the Court is saying that it would have taken a miracle for the petitioner not to be convicted, notwithstanding that it was the prosecutor who defaulted to the teachings of Christ in his closing argument. See *dissent of Justice Ketchum, set forth below*. Defense counsel should take notice, therefore, that if *Guthrie* issues are presented, it should be combined with an argument that the case might have been decided differently but for the injection of the religious element.

I FORBID YOU TO SAY THIS, UNLESS YOU DON'T MEAN ANYTHING BY IT.

In the reported decision of *State v. Hillberry*, 754 S.E.2d 603 (W. Va. 2014), the defendant was convicted of robbery in the first degree and was sentenced to life in prison as a recidivist. The charges arose out of a robbery of a lounge in Farimont which was captured on video. The defendant’s former female roommate

identified the defendant in the video by his shirt, shoes and the scar on his lip. The roommate produced a t-shirt identical to that worn in the video and testified that the t-shirt belonged to the defendant. A co-worker testified to a conversation in which the defendant admitted to the robbery and that “he was caught on camera.”

The defendant was convicted and because of three previous convictions, including a bank robbery, the defendant was found to be a recidivist.

The defendant did not testify and did not present a case-in-chief, and, in closing, the prosecutor remarked that the case was “all one-sided” and further commented on the weight of the evidence by stating “[t]hat’s all that was presented by the defense at any point in time” and “[d]id anybody under oath testify to that? Not a one.” Notably, the Court had entered an order granting an *in limine* motion that “the state cannot comment on the defendant’s failure to testify or present evidence.”

The prosecutor justified his remarks as “simply intended to highlight the inconsistencies between defense counsel’s opening statement and the evidence that was actually extracted from the witnesses at trial.” Restated, the “prosecutor intended to demonstrate how the trial failed to produce the evidence that the defense counsel promised during opening remarks.”

The prosecutor apparently attributed the motive of “financial problems” to the defendant. In his opening the defense counsel asked the jury to take note of the good money made by the defendant in the coal mines and a new

car driven by the defendant, all of which indicated that the defendant had no financial issues. Counsel further indicated that the defendant was somewhere else when the crime was committed. The prosecutor claimed that his closing statements addressed these remarks in the defense counsel’s opening statement. No evidence was apparently elicited from any witness regarding any of these assertions.

The Court acknowledged that “[r]emarks made by the State’s attorney in closing argument which make specific reference to the defendant’s failure to testify, constitute reversible error and defendant is entitled to a new trial.” Syl. Pt. 5, *State v. Green*, 260 S.E.2d 257 (W. Va. 1979). However, the Court also referenced its standing opinion that the “Prosecutor’s statement that the evidence is uncontradicted does not naturally and necessarily mean the jury will take it as a comment on the defendant’s failure to testify” because “in many instances someone other than the defendant could have contradicted the government’s evidence.” *State v. Clark*, 292 S.E.2d 643, 646-7 (W. Va. 1982).

Moreover, the Court stated that “the State was entitled to remind the jury of the defense counsel’s statements made during opening remarks.” Accordingly, no error was made because the “State, in its closing argument, simply rebutted that assertion by reminding the jury there was no evidence establishing any of those points, and that the defense was trying to distract from the real evidence.”

The practice point is that defense counsel should consider what statements will

be made in the opening statement regarding the evidence, keeping in mind that the prosecutor can make comments regarding the failure to prove the facts made in the statement.

Another error that was alleged was that the police officer's comment that when he questioned the defendant about the shoes displayed in the video, the defendant wanted to stop answering questions and wanted to have a lawyer present. This violated the general rule "prohibiting the use of the defendant's silence against him" for which the basis is that "it runs counter to the presumption of innocence that follows the defendant throughout the trial." *State v. Boyd*, 233 S.E.2d 710, 716 (W. Va. 1977). The error was disregarded because it was "an isolated comment and the prejudicial effect was minimal."

Finally, the Court further found that the prosecutor's request for identification of the defendant by a witness by specifically referring to the location of the defendant was an improperly leading question. The Court also found, however, that the leading question was harmless in light of the overwhelming evidence regarding the defendant's identity.

IF THE BLACK HAT DOES NOT CONSTRICT, YOU MUST CONVICT.

In the reported case of *State v. Kimble*, __ S.E.2d __, 2014 WL 902490 (W. Va. 2014), a search and seizure was held to be reasonable under the 4th Amendment to the US Constitution, although the vote was 4-1 with a strongly worded dissent by Chief Justice Davis. A motorist called

to say that he had been fired upon at a specific location by "a shirtless male wearing jeans and a black hat." The responding officers went to the defendant's home because it was located near the site of the shooting and one of the officers had "previously responded to reports of the petitioner shooting guns near the residence."

Upon arrival at Kimble's residence, the officers announced their presence, pulled their guns, and ordered the defendant to come outside. Once outside, the defendant was ordered to lie on the ground and he was then cuffed. The defendant was wearing jeans, but no shirt and no hat. The officers asked where the shotgun was and the defendant replied that it was inside the front door. The shotgun was secured. The officer went back into the house, however, and found a "black hat."

The defendant was placed in the cruiser and was driven to the complaining motorist's residence. The motorist then identified the defendant who was sitting in the back of the cruiser as the shooter.

Upon motions to suppress, the lower court "ruled that any evidence obtained after the recovery of the shotgun was not admissible." This excluded the "black hat." The defendant was convicted of one count of wanton endangerment and was sentenced to five years in prison.

Upon appeal, the defendant argued that "he was under arrest the moment the deputies put him in handcuffs and that the deputies had no probable cause to believe that he had committed the alleged offense at that time because he was not identified by name as the

perpetrator during the 911 call and there were at least three other houses in the vicinity of where the shooting occurred." The arrest was unlawful and, therefore, the shotgun is inadmissible as it was obtained incident to an unlawful arrest. The State replied that the defendant was not under arrest until the shotgun was retrieved from the residence. The handcuffs were merely a means of detaining the defendant as a "safety precaution" and the resulting search by the officers was "based on their belief that a dangerous weapon was present and posed a threat to themselves as well as anyone else who might have been in the area at that time." The Court agreed, over the Chief Justice's dissent, that the "emergency exception to the warrant requirement ... applies in this instance."

The Court also found that the seizure of the weapon was justified as a "protective sweep." The Court avoided the question of whether the defendant was under arrest or not.

The Court seemed compelled to justify the search by the fact that the officers were responding to "reports of gunfire in the area" and that the officers had "no basis to know whether there was anyone else present, either inside or outside of the petitioner's presence." To the Court, the fact that the petitioner was, at this point, detained on the ground and in handcuffs was not relevant, because of the possibility other persons might be present in the trailer.

The Court was also encouraged to find error in the failure to suppress the eyewitness identification. The defendant argued that the witness had admitted to not

knowing him very well and not seeing him very well, but made his identification when the defendant was seated in the back of a police car dressed as the witness had described the perpetrator in the 911 call. The circuit court had found the identification to be "overly suggestive," but found that the witness had sufficient independent knowledge of the defendant to have made the identification. The appellate court refused to find an abuse of the lower court's discretion in determining that, in the "totality of the circumstances," the out-of-court identification should be admitted.



YOU DONT WANT TO MISS THIS!

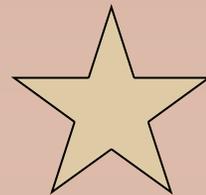


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VOUCHER UPDATE

For the period of July 1, 2013 through April 30, 2014, West Virginia Public Defender Services has processed 25,803 vouchers for payment in a total amount of \$19,400,985.23



Most Highly Compensated Counsel

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

Law Office of Daniel R. Grindo, PLLC	\$ 198,825.50
Casteel & Allender, PLLC	\$ 189,840.50
Harvey & Janutolo	\$ 173,783.50

Most Highly Compensated Service Providers

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

Tri S Investigations, Inc.	\$ 156,893.72
Forensic Psychology Center, Inc.	\$ 128,751.37
Jones Dykstra & Associates, Inc.	\$ 42,440.15

May

Days to remember.....



MAY
1st

Law Day is a special day aimed to help people appreciate their liberties and to affirm their loyalty to the United States, especially with regard to equality and justice. Law Day originated in 1957 when American Bar Association President Charles Rhyne envisioned a special day for celebrating the US legal system. On February 3, 1958, President Dwight Eisenhower established Law Day by issuing a proclamation. Every president since then has issued an annual Law Day proclamation. In 1961, May 1 was designated by joint resolution of Congress as the official date for celebrating Law Day.



MAY
11th

In 1907, Anna Jarvis held a private Mother's Day celebration in memory of her mother, Ann Jarvis, in Grafton, West Virginia. Ann Jarvis had organized "Mother's Day Work Clubs" to improve health and cleanliness in the area where she lived. Anna Jarvis launched a quest for Mother's Day to be more widely recognized. In 1908, she was instrumental in arranging a service in the Andrew's Methodist Episcopal Church in Grafton, West Virginia, which was attended by 407 children and their mothers. The church has now become the International Mother's Day Shrine. It is a tribute to all mothers and has been designated as a National Historic Landmark.



MAY
13th

A primary election is a preliminary election in which voters nominate party candidates for office. Voters in a jurisdiction select candidates for subsequent elections. It is one way that a political party nominates candidates for a following general election. They are common in the United States and are conducted by the government on behalf of the parties.



MAY
17th

Those who are honored on this day include people who serve the Army, Navy, Marines, Air Force, Coast Guard, National Guard and Reserve units. On August 31, 1949, Louis Johnson, who was the United States' Secretary of Defense, announced the creation of an Armed Forces Day to replace separate Army, Navy and Air Force Days. The first Armed Forces Day was celebrated on Saturday, May 20, 1950. The theme for that day was "Teamed for Defense", which expressed the unification of all military forces

under one government department. According to the U.S. Department of Defense, the day was designed to expand public understanding of what type of job was performed and the role of the military in civilian life.



MAY
26th

Memorial Day is observed on the last Monday of May. It was formerly known as Decoration Day and commemorates all men and women, who have died in military service for the United States. It is traditional to fly the flag of the United States at half mast from dawn until noon. Memorial Day started as an event to honor Union soldiers, who had died during the American Civil War. It was inspired by the way people in the Southern states

honored their dead. After World War I, it was extended to include all men and women, who died in any war or military action.

June

Days to remember.....



The flag of the United States represents freedom and has been an enduring symbol of the country's ideals since its early days. Americans also remember their loyalty to the nation, reaffirm their belief in liberty and justice, and observe the nation's unity. On June 14, 1777, the Continental Congress replaced the British symbols of the Grand Union flag with a new design featuring 13 white stars in a circle on a field of blue and 13 red and white stripes – one for each state. Flag Day finally came when President Woodrow Wilson issued a proclamation calling for a nationwide observance of the event on June 14, 1916. However, Flag Day did not become official until August 1949, when President Harry Truman signed the legislation and proclaimed June 14 as Flag Day. In 1966, Congress also

requested that the President issue annually a proclamation designating the week in which June 14 occurs as National Flag Week. The President is requested to issue each year a proclamation to: call on government officials in the USA to display the flag of the United States on all government buildings on Flag Day; and to urge US residents to observe Flag Day as the anniversary of the adoption on June 14, 1777, by the Continental Congress of the Stars and Stripes as the official flag of the United States.



**JUNE
15th**

Its origins may lie in a memorial service held for a large group of men, many of them fathers, who were killed in a mining accident in Monongah, West Virginia in 1907. A woman named Sonora Smart Dodd was an influential figure in the establishment of Father's Day. Her father raised six children by himself after the death of their mother. This was uncommon at that time, as many widowers placed their children in the care of others or quickly married again. Sonora was inspired by the work of Anna Jarvis, who had pushed for Mother's Day celebrations. Sonora felt that her father deserved recognition for what he had done. The first time Father's Day was held in June was in 1910. Father's Day was officially recognized as a holiday in 1972 by President Nixon.



**JUNE
20th**

West Virginia Day commemorates the date that West Virginia was admitted to the Union and became a member of the United States. It is usually held on June 20 each year held unless it falls on a Sunday, when it is observed on the following Monday.

During the American Civil War, Virginia became sharply divided over if it should leave the United States and join the Confederate States. As a result of this and the early political and social divisions, 50 counties separated from Virginia and the state of West Virginia was created. On April 20, 1863, President Lincoln proclaimed that West Virginia would

be admitted to the United States as a separate state 60 days later. On June 20, 1863, West Virginia became a member of the Union. From 1864, West Virginia Day was celebrated informally and became a state holiday in 1927.

- www.timeanddate.com

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Ross Taylor - Secretary of Administration

**Dana F. Eddy - Executive Director,
Public Defender Services**

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IN MEMORIAM

A member of the PDS family and a good friend of the staff at PDS passed away on Monday, April 21, 2014, at age 60. Richard H. Lorensen, a native West Virginian, was a previous director of the agency's appellate division and also served as a Chief Public Defender in the 11th Judicial Circuit of West Virginia. He will be fondly and reverently remembered not only as a servant of the public, but as a faithful steward of the principles upon which PDS was founded.

“Quotes” to Note

Quote #1A: “Obviously, any reasonable person handcuffed and lying on the ground, with police officers pointing guns at him, would believe he was under formal arrest.” Honorable Robin Jean Davis, Chief Justice, Supreme Court of Appeals of West Virginia, dissenting opinion, *State v. Kimble*, __ S.E.2d __, 2014 WL 902490 (W. Va. 2014).

Quote #1B: “This case presents another example of a West Virginia prosecutor expounding upon the teachings of Jesus and the Old Testament in closing argument. Our law is clear that prosecutors cannot inject religion into closing argument. Evidently, the majority held it was proper argument because Jesus is a historical figure. If this type of argument by prosecutors is proper then we should adopt a new syllabus holding that that the defendant’s lawyer can argue in closing that: 1. Jesus would give him/her another chance, or, at least, probation. See Matthew 7:12; 2. Jesus loved and forgave sinners. See John 5:1-15; and 3. Only those jurors without sin may cast a stone in judgment of the defendant. See John 8:7.” Honorable Menis E. Ketchum, II, Justice, Supreme Court of Appeals of West Virginia, dissenting opinion, *State v. Waddell*, 2014 WL 1243168.

POINTS OF INTEREST



Did you know.... Effective July 12, 2013, the provisions of W. Va. Code §62-12-10, governing the “violation of probation,” were amended so that certain violations of the conditions of probation would not result in the imposition of a sentence related to the original offense. If the Court finds that the probationer “absconded supervision; engaged in new criminal conduct other than a minor traffic violation or simple possession of a controlled substance; or violated a special condition of probation designed either to protect the public or a victim,” then the judge may “revoke the suspension of imposition or execution of sentence, impose a sentence if none has been imposed and order that sentence be executed.” For all other violations, the judge shall impose a period of confinement of 60 days, if it is the first violation, and 120 days, if it is the second violation. For a third violation, the court may impose the punishment imposed originally.

“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)