

THE CAPITOL LETTER



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From the Executive Director

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ACTUAL AND NECESSARY

The agency audits vouchers which have been processed and paid. The audit for the past year reveals that some attorneys may not be aware of the statutory, and thus ethical, constraints that exist on billing.

W. Va. Code §29-21-13a (d) mandates that the payment to court-appointed counsel is for “actual and necessary time expended for services performed.” The Supreme Court of Appeals of West Virginia has opined that “actual” means “actual.” In *Frasher v. Ferguson*, 355 S.E.2d 39 (W. Va. 1987), the Court, by Justice Neely, stated that “[the statute] clearly envisages that court appointed lawyers will be compensated only for hours actually worked and expenses actually incurred in rendering services, and that duplicative compensation is unauthorized.” [italics in original]. The Court explained that, as a result of this language, “when an attorney spends one hour traveling to represent six clients at a hearing, he does not *actually* travel for six hours – he travels for one hour. When an attorney spends two hours representing six clients at a hearing, he does not *actually*

work for twelve hours—he works for two hours.” The Court then concluded, “billing for more hours than are actually worked is duplicative billing, which is clearly contrary to the system envisaged by the legislature in enacting ... [the statute]. That statute envisages a system in which each client is proportionately billed according to the time spent *actually* representing him.”

Accordingly, if an attorney travels to a far-away land for a hearing, only the actual travel time will be compensated, whether the time is put on one voucher or proportionately allocated to several vouchers. If an attorney is in a hearing for one client, this cannot be compensated waiting time for another client’s hearing.

Nothing subjective exists in this measure of compensation. Actual time expended is the standard. If a minute of time is billed to one client, that same minute cannot be billed to any other client. If both clients’ interests were actually served, the actual time must be “proportionately billed.” The statute permits billing in one-tenth of an hour increments, however, and rounding-up to a one-tenth increment is permitted.

In the course of its audits, the agency has been soliciting the assistance of the staff of, and reporters for, the circuit courts to determine whether vouchers are reflecting “actual time.” With the advent of electronic filing, the agency may be able to eventually verify this information independently of the court’s staff. Moreover, the agency has imposed on certain attorneys the requirement that the actual time period be recorded in their vouchers due to the finding that the attorney has been engaged in “duplicative billing.”

The conclusion from an audit that an attorney has not been billing for “actual” services is first addressed by correspondence from, or a telephone call from, the executive director. If an explanation exists, then the matter is concluded. If no explanation exists, but a promise of compliance with the statute is given, then the agency will monitor activity for a period of time. If the conclusion is that the compliance has not been forthcoming, the agency may report the matter to the Office of Disciplinary Counsel. And, in the most egregious circumstances, prosecution may be sought.

The agency recognizes that the majority of court-appointed counsel submits vouchers that reflect “actual and necessary time.” Unfortunately, however, the public perception, including the perception of the state’s policymakers, is otherwise. The agency’s audits are intended to help change this perception and to “clean the slate” so that the compelling needs of the court-appointed system can be addressed. Restated, the agency’s auditing effort is not intended to punish attorneys, but, instead, is intended to remove the impediment to the recognition of the noble efforts of most public defenders.

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THE WATCHLIST

Three attorneys are now on the agency’s Watchlist. Each attorney has been given a set of conditions for the future submission of vouchers. The conditions generally consist of stating the actual period of time during which services were provided and to provide greater detail regarding the services that have been provided.

The following represents the findings, respectively, that resulted in the addition of the two attorneys since the date of the publication of the last newsletter:

1. “Since the date of January 15, 2014, you are reported to have exceeded fifteen (15) hours of billing on thirty-two (32) dates. You exceeded twenty-four (24) hours of billing on six (6) of those dates. You had an additional two (2) dates on which your total billing was in excess of twenty-three (23) hours.”; and

2. “Since the date of January 21, 2014, you are reported to have exceeded fifteen (15) hours of billing on thirty-one (31) dates. You exceeded twenty-four (24) hours of billing on two (2) of those dates. You had an additional four (4) dates on which your total billing was equal to, or in excess of, twenty-three (23) hours.”

Additional issues were raised in each of these attorney’s instances, resulting in their addition to the Watchlist.

The agency’s continues to explore billing anomalies made evident by reports from the online voucher database.

ALERT: A statute of limitations of one year applies to federal habeas corpus proceedings.

The following was contributed by Thomas J. Gillooly, an attorney in private practice with offices situated in Charleston, West Virginia.

There is a one-year statute of limitations (28 U.S.C. § 2244(d)) on filing a federal habeas corpus petition under 28 U.S.C. § 2254. Lawyers handling state criminal cases in West Virginia need to watch (and calendar) the one-year federal statute. A lawyer who fails to do so risks depriving the client of the federal remedy. In most cases, the federal statute begins to run from the date the defendant’s conviction becomes final – either at the conclusion of direct review (direct appeal to state supreme court) or, if no appeal is filed, when the time for direct review expires. When an appeal to the W. Va. Supreme Court is denied, a defendant has 90 days to petition the U. S. Supreme

Court for *certiorari*, so the time for direct review does not expire (and the statute of limitations does not begin to run) until 90 days after the adverse State Supreme Court decision.

Filing for state post-conviction relief (most often by a petition for *habeas corpus* in circuit court) stops the clock until the state post-conviction proceedings end (assuming the state case is filed before the federal limitations period has expired, of course). When the state post-conviction case concludes (including the time for direct review), the federal clock starts ticking again. A lawyer handling any aspect of a W. Va. state criminal case post-conviction should therefore do nothing without assessing its impact on the federal statute of limitations. (*Editor’s Note: It must be emphasized that the one-year period of limitations does not start again when a state habeas petition is denied. The period was merely tolled during the pendency of the state proceeding and the period starts to run again from the point in the one year period at which it was tolled.*)

Ignorance of the federal statute among the W. Va. criminal defense bar may be partly due to the fact that there is no W. Va. statute of limitations for state habeas petitions. The federal law is different, however. The

federal statute dates to 1996, when the "AEDPA" (The Anti-Terrorism and Effective Death Penalty Act) became law. A client has a right to expect that his lawyer won't do anything that would deprive him of the federal writ, at least without consulting about it beforehand.

AADvice - Warrantless searches: Federal case law on consent and exigent circumstances

By Jason Parmer, Appellate Advocacy Division, Public Defender Services

As criminal law practitioners are aware, warrantless searches are very common. When drafting pretrial motions to suppress the fruits of a warrantless search, there are at least three reasons why it is preferable to cite both federal and state law in pretrial motions. First, there are often federal cases addressing issues that our Supreme Court has not. Second, our state courts cannot grant fewer rights than the Federal Constitution guarantees. Third, if a state court rules incorrectly on an issue of federal law, this may ultimately set up an appeal to the United States Supreme Court. The following is a discussion of warrantless consent searches and exigent circumstances searches to aid in your research of federal law.

I. Consent search exception to warrant requirement:

Even if a person gives consent to search, a court must determine whether the consent was freely and voluntarily made under the totality of circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). There is a significant difference between voluntary consent and a begrudging submission to a command. *United States v. Robertson*, 736 F.3d 677 (4th Cir. 2013). Both threats of force and more subtle coercive techniques may invalidate consent. *United States v. Kampbell*, 574 F.2d 962 (8th Cir. 1978) (consent coerced when defendant initially refused consent but then relented when told by police that a search warrant would give them the authority to tear the paneling off the walls). Although a person under arrest may usually give valid consent to search, an illegal arrest may invalidate consent. *Florida v. Royer*, 460 U.S. 491 (1983). If consent is obtained by a fraudulent or mistaken claim of lawful authority, e.g., police make a false claim that they have a search warrant, consent is arguably coerced. *Bumper v. North Carolina*, 391 U.S. 543 (1968). When determining the voluntariness of consent, courts should consider whether the consenting party was particularly susceptible to coercive tactics. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

The scope of a consented-to search is limited to the terms of the consent. *Florida v. Jimeno*, 500 U.S. 248 (1991). A consenting party may withdraw consent at any time, and upon withdrawal, police must refrain from searching in contravention of the consenting party's wishes. *United States v. McWeeney*, 454 F.3d 1030 (9th Cir. 2006); *United States v. Seely*, 570 F.2d 322 (10th Cir. 1978). In order to be effective, a withdrawal of consent must not be

ambiguous. *United States v. \$304,980.00 in U.S. Currency*, 732 F.3d 812 (7th Cir. 2013).

Third parties may give consent to search if they have a sufficient relationship to the premises or personal property to be searched. *United States v. Matlock*, 415 U.S. 164 (1974). The burden of establishing this relationship is upon the State. *Id.* A person cannot give consent to search to areas of a house or other property that are in the exclusive control of one person. *Id.*; see, e.g., *State v. Evans*, 372 P.2d 365 (Hawaii 1962) (wife did not have actual authority to consent to search of husband's chest of drawers); *United States v. Green*, 523 F.2d 968 (9th Cir. 1975) (tenant did not have actual authority to allow police to search a co-tenant's bedroom); *United States v. Pressler*, 610 F.2d 1206 (4th Cir. 1979) (when defendant did not give acquaintance the key or combination to locked briefcases but entrusted them with acquaintance solely for safekeeping, acquaintance did not have actual authority to consent). Also, if employers reserve space for storage of employees' personal items, the employer may not have actual authority to give consent. *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062 (7th Cir. 1976); *United States v. Millen*, 338 F.Supp. 747 (E.D. Wis. 1972) (head of law firm could not consent to search of employee's lockbox when only employee had keys to box and boxes were provided for the personal use of employees).

However, police may also rely on the "apparent authority" doctrine, which validates a consent to a warrantless search given by a third party whom police reasonably believe to possess common authority over the premises, but who in fact does

not possess that authority. *Illinois v. Rodriguez*, 497 U.S. 177 (1990). If physically present co-occupants disagree over whether to give consent to search, the police cannot conduct a valid warrantless search. *Georgia v. Randolph*, 547 U.S. 103 (2006). However, if the objecting co-occupant is removed from the scene by arrest, the other co-occupant may give a valid consent to a warrantless search. *Fernandez v. California*, 134 S.Ct. 1126, 188 L.Ed.2d 25 (2014). In response to *Fernandez*, a New Jersey court has held that valid third-party consent to search a defendant's residence is subject to the exception that the third party's consent cannot be manufactured through the unlawful detention of the defendant. *State v. Coles*, 95 A.3d 136 (N.J. 2014).

II. Exigent circumstances exception to warrant requirement:

Generally, warrants are required for an evidentiary search of premises. *McDonald v. United States*, 335 U.S. 451 (1948); *Johnson v. United States*, 333 U.S. 10 (1948); *United States v. Jeffers*, 342 U.S. 48 (1951); *Vale v. Louisiana*, 399 U.S. 30 (1970); *Mincey v. Arizona*, 437 U.S. 385 (1978); *Thompson v. Louisiana*, 469 U.S. 17 (1984). Warrantless entry cannot be justified when probable cause has existed for a period of time sufficient for the police to have obtained a warrant. *McDonald v. United States*, 335 U.S. 451 (1948); *G.M. Leasing Corporation v. United States*, 429 U.S. 338 (1977). However, there are exceptions.

Police in immediate or continuous pursuit of a suspect may enter premises without a warrant to search for the suspect and weapons hidden

by the suspect. *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967); *United States v. Schmidt*, 403 F.3d 1009 (8th Cir. 2005). A warrantless entry of premises to prevent the imminent destruction or removal of evidence is justified only when the impending destruction is certain, i.e., the officers can see or hear the destruction taking place. *Vale v. Louisiana*, 399 U.S. 30 (1970). Police may conduct a warrantless protective sweep of a home in conjunction with an in-home arrest if there are articulable facts that allow a reasonably prudent officer to believe that the area to be swept harbors an individual posing a danger to those on the scene. *Maryland v. Buie*, 494 U.S. 325 (1990). However, the mere possibility that a dangerous person is present in the home is insufficient to justify a protective sweep. *United States v. Gandia*, 424 F.3d 255 (2nd Cir. 2005); *United States v. Carter*, 360 F.3d 1235 (10th Cir. 2004). Further, police may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. *Michigan v. Fisher*, 558 U.S. 45 (2009). An ulterior motive does not render a search illegal in a situation in which officers have objectively reasonable safety concerns. *United States v. Kuenstler*, 325 F.3d 1015 (8th Cir. 2003). The possibility of property damage has been held not to constitute exigent circumstances. *United States v. Williams*, 342 F.3d 430 (6th Cir. 2003). The Eleventh Circuit has ruled that officers executing a civil commitment order had no adequate exigency to justify their unconsented entry to the home where the subject of the order was alleged to be staying. *Bates v. Harvey*, 518 F.3d 1233 (11th Cir. 2008). Moreover, a 911 call in which a dispatcher hears only static, standing alone, is insufficient to

create an objectively reasonable belief that someone inside the home is in need of aid where, in contrast to hang-up calls in which the dispatcher knows someone physically dialed 911, electrical or weather anomalies could cause static calls and it is common knowledge among officers and dispatchers that anomalies can cause such calls. *United States v. Martinez*, 643 F.3d 1292 (10th Cir. 2011).

There is an exception to the exigent circumstances exception. Under the “police-created exigency” doctrine, exigent circumstances do not justify a warrantless search of a home when the exigency was created or manufactured by police threatening conduct that would violate the Fourth Amendment. *Kentucky v. King*, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011).

Also, there is no *per se* exigency posed by a murder scene that obviates the need for a warrant to enter a home or an exigent circumstance to justify a warrantless entry. *Mincey v. Arizona*, 437 U.S. 385 (1978); *Thompson v. Louisiana*, 469 U.S. 17 (1984); *Flippo v. West Virginia*, 528 U.S. 11 (1999). Finally, the special needs exception is an exception to the general rule that a search or seizure must be based on individualized suspicion of wrongdoing. *Friedman v. Boucher*, 580 F.3d 847 (9th Cir. 2009), citing *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). Under this exception, suspicionless searches and seizures may be upheld if they are conducted for important non-law enforcement purposes in contexts when adherence to the warrant-and-probable cause requirement would be impractical. *Id.* The officers’ actions falling under this exception are motivated by a desire to aid victims rather

than investigate criminals.

Warrantless “protective” searches of vehicles are appropriate if an officer has reasonable suspicion that any of the occupants of a vehicle are armed or can gain immediate control of a weapon. *United States v. McCraney*, 674 F.3d 614 (6th Cir. 2012). The scope of a warrantless search of a vehicle is defined by the object of the search and the places in which there is probable cause to believe that it may be found. *United States v. Ross*, 456 U.S. 798 (1982). No exigency is required to search closed containers inside a vehicle if police have probable cause that contraband or evidence is inside. *California v. Acevedo*, 500 U.S. 565 (1991). A warrantless search of a person is valid when the nature of the evidence sought is so evanescent that it could be destroyed or otherwise disappear before a warrant can be obtained. *Schmerber v. California*, 384 U.S. 757; *Cupp v. Murphy*, 412 U.S. 291 (1973). However, absent circumstances that suggest an emergency or unusual delay in securing a warrant, the natural dissipation of alcohol from the blood stream does not authorize police to take a warrantless, nonconsensual blood sample from a suspected drunk driver. *Missouri v. McNeely*, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013).

WV SUPREME COURT UPDATE

Just because your Plea fell on Deaf Ears Doesn’t Mean that I didn’t Listen.

In the case of *State v. Allman*, __ S.E.2d __, 2014 WL 5800685, the defendant entered into a “Type B” plea agreement, so named because it was submitted to the Court in accordance with the

provisions of subparagraph “B” of Rule 11(e)(1) of the West Virginia Rules of Criminal Procedure. In such an agreement, the defendant receives from the State a recommendation for a particular sentence or the State’s agreement to not oppose the defendant’s request for a particular sentence. The agreement is not binding upon the Court. In contrast, a “Type C” plea agreement requires the Court to impose the sentence set forth in the plea agreement if the Court accepts the plea agreement. See *W. Va. R. Crim. P. 11(e)(1)(C)*.

In this matter, the State was to recommend that the defendant, upon her guilty plea to a single count of felony murder, be made eligible for parole from the mandated life sentence.

After a day of drug use, the defendant and her companion had invaded a home and in the course of their robbery had stabbed the homeowner several times with knives found on site. The victim had been sleeping with his eight year old grandson in a bedroom and when the victim stumbled into the hallway after being stabbed by the defendant’s companion, the defendant stabbed him several times. The Court found the circumstance of the grandson’s presence during the murder particularly troubling. In the lower court’s opinion, the case “would cry out for a jury ... not to grant any mercy.” The final sentence was life without mercy, notwithstanding the State’s recommendation that mercy be granted.

While acknowledging that the lower court was not bound by the State’s recommendation, the defendant felt the Court had not adequately demonstrated in its sentencing order that it

had made a “thorough contemplation” of the plea agreement and “must give the State’s recommendation more than mere lip service.” The defendant wanted the Supreme Court to impose a requirement that rejection of a “Type B” agreement’s recommendation on sentencing required the Court to “make a specific finding that the plea agreement fails to serve the interests of justice.”

The Supreme Court found that the lower court’s order contained sufficient language to demonstrate, “plainly,” that the Court had “carefully weighed the interests of justice in this particular instance against the general systemic interest in permitting the parties to a negotiated plea agreement to realize their expectations regarding its effect.” The lower court showed no “predisposition.”

The most poignant discussion was that Type B plea agreements “allocated to ... [the defendant] the risk that she and her counsel would overestimate the circuit court’s inclination to be persuaded by the prosecution’s recommendation.” The Supreme Court’s assessment was, simply, “that is how agreements are supposed to work.” The Supreme Court noted that if the defendant had been in a “stronger bargaining position,” she might have negotiated a “Type C” agreement. In other words, if the defendant had not killed her victim during a robbery in front of his grandson, then she might have made a better deal.

In reliance upon an opinion of Justice Blackman in *Williams v. New York*, 337 U.S. 241 (1949), the Court noted that due process was not involved because, “there is possibility of abuse wherever [sic] a judge must choose” between two sentencing alternatives. A trial

court is given “awesome power,” and “society relies on sentencing judges to wield that discretion with solemnity and due deliberation.” The only editorial comment to be made is that, in this state, society popularly elects the sentencing judges.

Now is the Time for all Bad Men to come to the Aid of the Party Defendant.

In *State v. Herbert*, ___ S.E.2d ___, 2014 WL 6734007, the defendant shot a man twice in the back after the two had been involved in a confrontation. By all accounts, this victim was not an upstanding citizen and was, in fact, incarcerated in a federal penitentiary at the time of the defendant’s trial. The defendant’s primary problem was that he chased the man in order to shoot him and, in the course of the chase, shot and wounded an eight-year old girl.

The defendant claimed self-defense. The intended victim was a recalcitrant witness, refusing to testify voluntarily even after a grant of immunity was made when the victim invoked the privilege against self-incrimination. Indeed, the victim created significant security concerns. At the time of the defendant’s trial, the victim-witness was incarcerated in a federal prison.

The defendant desperately wanted the victim to appear in front of the jury and behave badly. Indeed, the defendant hoped that the victim would get on the stand and invoke his privilege against self-incrimination. In this manner, the defendant was certain that the claim of self-defense would be bolstered.

The court confined all activity with the victim to the courtroom outside the presence of the jury.

Eventually, the court entered a contempt order against the victim for his refusal to testify, even when given immunity, but the victim was never required to appear in front of the jury.

The defendant’s issue on appeal was that the failure to have the victim appear in front of a jury and invoke his privilege was constitutional error.

Rejecting the “shortcut majority approach of some federal courts,” the Supreme Court of Appeals of West Virginia held that “when a non-party witness intends to invoke the constitutional privilege against self-incrimination, the trial court shall require the witness to invoke the privilege in the presence of the jury.” The Supreme Court further held that “the constitutional privilege against self-incrimination may only be invoked when a witness is asked a potentially incriminating question.” Otherwise, the defendant’s “fundamental right to present a complete and strong defense, a principle which is embodied in the Compulsory Process Clause of both the Sixth Amendment of the U.S. Constitution and Article III, Section 14 of the *West Virginia Constitution*,” is impeded. Essentially, “even though juries are instructed to presume a defendant’s innocence, they may still improperly infer a defendant’s guilt when an important witness fails to testify – particularly if defense counsel, in opening statement, refers to this person as a witness to the events that occurred.”

The lower court erred, therefore, in permitting the victim to avoid testifying by a “blanket assertion of the Fifth Amendment.” Specifically, “we find the

circuit court’s decision not to make ... [the witness] appear in front of the jury was error and violated the Defendant’s constitutional right to compulsory process.”

But, alas, the error was found to be harmless. Although the Supreme Court recognized that “in self-defense cases, the physical stature and demeanor of a victim-witness is important,” the appellate court determined that “no reasonable jury would have found that the Defendant acted in self-defense.” This was based upon the existence of eight eye-witnesses who saw the defendant chase the man, shoot him in the back, and wound an innocent bystander.

The Supreme Court also rejected the defendant’s claim that the trial on the charge of being a felon in possession of a firearm should have been bifurcated so that the jury was not informed of his prior convictions while evaluating his claim of self-defense. The Supreme Court clarified its previous opinions stating that, if the prior conviction is an element of the crime, a unitary trial should be held and evidence of the conviction should be produced unless the defendant stipulates to the fact of his status as a convicted felon. The factor tipping the opinion in this manner was the Supreme Court’s belief that a jury should not be left wondering why they were being asked to convict a person of conduct that was seemingly legal for them, i.e., possessing a firearm. If the prior conviction was merely to enhance a penalty for a crime and was not an actual element of the crime, then bifurcation of the issue of the prior conviction would be mandated if the defendant had some *prima facie* challenge to the conviction. In all instances, however, the defendant’s

stipulation to the status of a convicted person would preclude the nature of the charges being discussed with the jury.

Don’t become a Twit by Tweeting.

In the case of *State v. Keffer*, 2014 WL 6724747, the defendant responded to the following question posted on a local internet forum, Topix.com: “What local issues do you have issues with and what would you do to try and change them [?]” One succinct and eloquent posting was: “Like to see all cops die and judges get capped.”

Search warrants were obtained and served on Topix.com and Frontier in order to determine who posted the comment. The ground for the warrants was that the post had been “made by an individual who unlawfully used an electronic device to deliver harassing or abusive communications with the intent to threaten or commit a crime against a person or property, in violation of West Virginia Code § 61-3C-14a.” The defendant was identified as the person who made the post and another search warrant was obtained for the defendant’s “residence, outbuildings, and curtilage of” the residence in order to seize any “computer, hard drives, smart phones, or other devices that could be used to access the internet ... or to make posts on social media websites[.]”

When the police arrived, the defendant admitted to making the post. A search of the home resulted in the discovery of marijuana seeds, five marijuana plants, and eighteen grams of marijuana. The defendant’s unfortunate circumstance was that he was on parole and a hearing was held on the revocation of the parole. In the first hearing, the search warrants were not introduced

by the State. After both parties had completed their respective cases in chief, the State moved to reopen the case in order to admit the search warrants. The lower court held a second hearing on the revocation over the defendant's objection. The search warrants were then admitted over the defendant's objections that no probable cause existed for the execution of the warrants. The lower court revoked the parole and re-sentenced the defendant to five years in prison.

The Supreme Court of Appeals of West Virginia found no error in the ruling that the search warrants were valid. The criminal statute made it unlawful to anonymously contact a person with the intent to harass or abuse or to threaten to commit a crime against any person or property. Obviously, someone saw the post as the police department moved quickly to obtain the warrants.

The Supreme Court also found that reopening the case to admit the search warrants was not error based upon its precedent that "it is within the sound discretion of the court in the furtherance of the interests of justice to permit either party, after it has rested, to reopen the case for the purpose of offering further evidence and unless that discretion is abused the action of the court will not be disturbed." Syl. Pt. 4, *State v. Fischer*, 158 W. Va. 72, 211 S.E.2d 666 (1974).

Inconsistency is the Hobgoblin of Twelve Person Juries.

In the case of *State v. Johnson*, 2014 WL 6634483, the issue on appeal was the possibility of inconsistency in the jury's verdict in which the defendant was acquitted of

two of the three counts alleging his abuse of the same victim in the same manner.

The defendant petitioned the Court to re-examine its precedent that "[a]ppellate review of a claim of inconsistent verdicts is not generally available." Syl. Pt. 5, *State v. Bartlett*, 177 W. Va. 663, 355 S.E.2d 913 (1987).

Ironically, the Court reviewed the matter by finding that the verdicts were, in fact, not inconsistent. More evidence existed for the one count than the other two counts because the defendant had admitted in a text message that he had improperly touched the victim on that occasion, and, therefore, conviction on the one count was not inconsistent with the acquittal on the other two counts. No explanation is provided by the Court as to why a jury would fail to extend the credibility of the claims on the one count, due to the defendant's admission, to the remaining counts.

Bad is as Bad does.

In the case of *Sate v. Nathan S.*, 2014 WL 6676550, the State sought, in a child abuse case, to admit "acts petitioner allegedly had perpetrated against his wife's oldest daughter, A.F., who was not named as a victim in petitioner's indictment." Specifically, the Rule 404(b) evidence was to be the defendant's alleged rape of the now twenty-three year old daughter when she was thirteen years old. Notably, no such allegations were made in the current matter. The adult daughter also testified to other alleged acts purportedly establishing that the defendant had abused her during her childhood similar to the physical abuse that had been inflicted upon her

siblings in this matter.

The defendant's first challenge on appeal was that the State's Rule 404(b) notice did not identify the "specific and precise purpose" for the admission of evidence. The Supreme Court of Appeals of West Virginia found that the only requirement in the rule was that the State had to "provide reasonable notice ... of the general nature of any such evidence." The Supreme Court found that the sixteen pages of the notice listed one hundred and twenty-nine alleged incidents with specificity and stated several, but not all, of the general grounds set forth in the rule for admission of the evidence. The Supreme Court also found that the evidence was primarily intrinsic to the current offenses and thus was not governed by Rule 404(b). Accordingly, the Supreme Court did not find the notice to be legally insufficient or defective.

The defendant's next challenge was that the evidence was prejudicial and should be precluded by Rule of Evidence 403. The Supreme Court found the argument unpersuasive because the acts were deemed to be intrinsic to the current charges and thus not subject to the rule. Moreover, the trial court had carefully reviewed the admission of the evidence and gave a limiting instruction for each piece of the evidence, so no prejudice could have resulted.

Justice Ketchum issued a strongly worded dissent directed at the prosecutor's decision to bring in the ten year old allegation of a sexual assault of a victim not included in the indictment. He reminded the bar that "five years ago, I wrote about my chagrin to find, routinely, prosecutors are using bad

acts' evidence to prejudice defendants and to divert jurors' attention from the evidence surrounding the charged crime ... I noted then that the abusive use of uncharged 'bad acts' evidence seemed to be popping up in virtually every criminal appeal presented to the Court." (citations omitted). Justice Ketchum concluded that, in this matter, no fair trial was had because the defendant "got kangarooed" and the continuing introduction of this evidence would "lead to the conviction of innocent people who may have bad character."

A Slam Dunk means a Dunk in the Slammer.

In the case of *Edward M. v. Ballard*, 2014 WL 6607582, one of the issues raised in the habeas corpus proceeding was the purportedly ineffective assistance of counsel. The defendant's criticism of the counsel included his "representations guaranteeing an acquittal in his case." Based on this guarantee, the defendant had not "encouraged his counsel to seek out a plea agreement rather than take the case to trial."

The Supreme Court emphasized that "there is no absolute right under either the West Virginia or the United States Constitutions to a plea bargain." But, notwithstanding, the defendant had failed to present any evidence from the record that the State had made, or was inclined to make, a plea offer. The question remains, however, what would have been the decision if, in fact, a plea offer could have been substantiated, but was refused due to counsel's guarantee of an acquittal?

The defendant also alleged that his sentence of forty to ninety years was excessive for the nine counts of sexual offenses on which he was found to be guilty. The Supreme Court

emphasized that, “while our constitutional proportionality standards theoretically can apply to any criminal sentence,” the standards are most applicable to “those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence.” The trial court did not abuse its discretion, therefore, because the sentences were within the statutory range of minimum and maximum levels and the sentences could be run consecutively.

Finally, the defendant alleged that he had been incompetent to stand trial due to his frail mental health deriving from the “shock from being persecuted for a crime that he did not commit.” The Supreme Court found that the circuit court was justified in denying a claim that was raised for the first time in the *habeas corpus* proceeding and was apparently “randomly selected from the list of grounds found in the *Losh* opinion.”

I may be Guilty, but I am not that Guilty.

In the case of *State v. Chucci*, 2014 WL 6607461, the issue was the defendant’s *Kennedy* plea to a misdemeanor offense of battery and the application of the provisions of the Sex Offender Registration Act to the resulting conviction. The defendant had been drinking and had lain down with his daughter and her 16 year old friend. The friend testified that she “awoke to find the defendant with his hand under her shirt and bra groping her breasts.” A retrial was granted after the defendant’s conviction. Before the retrial, the defendant entered the *Kennedy* plea. At the sentencing, the defendant’s counsel concentrated on the request for probation. The

request was rejected and the defendant was sentenced to twelve months in jail.

The issue on appeal was whether the defendant was properly required to register as a sexual offender for life as the victim was a minor. The statutory provisions require that if an offense is not specifically listed in the Sex Offender Registration Act, W. Va. Code §15-12-2, the defendant must have been advised prior to the entry of a plea of the possibility that the Court would find the commission of the offense was “sexually motivated.” The statute also requires that the finding be based on proof beyond a reasonable doubt, and “a defendant must be given the opportunity to oppose and contest such a proposed finding with evidence and argument.”

Without a doubt, the sentencing court had informed the defendant at the plea hearing that a finding could be made that the commission of the offense was “sexually motivated.”

But did the defendant have an opportunity to oppose and contest the proposed finding? The Supreme Court noted that the defendant had not objected to the possibility of the finding at the plea hearing and the defendant had not objected to the order setting the matter for sentencing in which the possibility of the finding was again raised. Finally, the prosecutor was said, at the sentencing hearing, to have “clearly described the offense to which petitioner plead guilty as the inappropriate touching of the breasts of a minor child,” which the defendant never disputed on the record. Instead, the “petitioner focused his sentencing argument on avoiding incarceration.”

So, was this sufficient to have given the defendant an opportunity to “oppose and contest” the finding, which he then squandered? The answer is that we do not know because the Supreme Court also relied upon the fact that the trial court had heard, and had recounted, the testimony of the defendant and the victim from the first trial, resulting in a conviction that was set aside. Under all these circumstances, the lower court’s judgment was affirmed, but the question remains, but for the fact of the trial testimony, would the prosecutor’s proffer at the sentencing have been sufficient to meet the standard of proof beyond a reasonable doubt?

Someone’s Knocking at the Door and it’s not Sister Suzy or Brother John.

In the case of *State v. Lusk*, 2014 WL 6607447, the defendant was convicted of several drug charges. A confidential informant had just left the residence in which the defendant was present and in possession of various drugs, drug related paraphernalia, and a drug ledger. Police officers immediately knocked on the back door. The officers entered upon the forthcoming response, “come on in.”

The defendant argues the evidence should have been suppressed because the consent to search was not valid. Acknowledging that “the consent to search must be voluntary and a product of the defendant’s free will,” the Supreme Court upheld the lower court’s admission of the evidence of the search.

An officer had testified that, upon knocking on the door, he identified himself as being from the sheriff’s department to which the defendant responded, “come on in.”

The case is somewhat confusing in that the petitioner is stated to argue that he had not invited the officer into the residence. Nonetheless, the Supreme Court focused on the officer’s testimony that he had been invited to enter and had then obtained a written consent to search. The Supreme Court analyzed whether, in these circumstances, the invitation was “voluntary” or was a “submission to authority.” Because the Supreme Court found that the officer had not told the defendant he was under arrest when he entered and the officer had not stated upon entry that he was going to search the house with or without consent, the consent to search was deemed to be voluntary.

The second issue was the defendant’s claim that the State had identified the wrong co-conspirator. The defendant argued that the State should have been compelled by the trial court to take the statement of another individual who was incarcerated in Oklahoma. This would have been exculpatory evidence on the issue of the conspiracy charge with the co-defendant because this individual would have disclosed that she, and not the co-defendant, had arranged the drug transaction between the confidential informant and the defendant.

The Supreme Court rejected the argument on several grounds. First, the State did not have a statement in its possession and thus no obligation existed to turn it over as exculpatory evidence. Second, the defendant could not demand the State to obtain a statement, especially because defendant knew where the person was and could have obtained the statement for himself. Moreover, the evidence was not exculpatory in that it meant that the co-conspirator was someone other than the co-defendant, but the defendant

was nonetheless in a conspiracy.

The Supreme Court did find error, however. A recidivist information had been filed alleging a previous felony conviction. The Court then doubled the minimum sentence for each of the four counts upon which the defendant was convicted and ran each of the enhanced sentences consecutively. The Supreme Court reiterated that “only one enhancement” is permitted of convictions returned at the same time. The defendant was ordered to be resentenced, therefore.

Bath Salts just Rub us the Wrong Way.

In the case of *State v. Greer*, 2014 WL 6607465, the Supreme Court was confronted with the issue of the admission of Rule 404(b) evidence. The defendant was charged with, and eventually convicted of, possession of three grams of bath salts with the intent to deliver. The substance was found on the defendant when police officers responded to an altercation in which the defendant was involved. The defendant was acquitted of three charges relating to the person with whom he was fighting, but was found guilty of the drug possession charge.

During the trial, evidence had been admitted regarding the defendant’s subsequent arrest in a traffic stop and the resulting seizure of 79 bags of bath salts in a locked backpack in the car. The traffic stop occurred when an officer was dispatched to do a “welfare check” on a car parked alongside a road. Upon the officer’s arrival, the defendant started to leave in the car, but the officer ordered him to stop. The officer testified that he saw a “kitchen spoon” and the

“backpack” and immediately knew the spoon was “drug paraphernalia” because he was in an area known for “drug activity.”

The Supreme Court did not discuss whether the traffic stop was proper. Instead, it immediately analyzed whether the “error, if any” was harmless “beyond a reasonable doubt” since the issue involved the potential infringement of a constitutional right. In the Supreme Court’s opinion, the “evidence taken from petitioner’s prior arrest was wholly unnecessary to the jury’s finding of guilt.” This was based on the testimony of the person with whom the defendant was involved in the altercation and regarding whom the defendant was acquitted of robbery, kidnapping, and assault. If the jury did not believe the testimony regarding those charges, why did it believe the testimony on the remaining charges? Why was the subsequent arrest for 79 bags of bath salts not deemed to have harmed the defendant with respect to the defense of the charges for 3 grams of bath salts because, remember, the charge was with “intent to deliver.” The larger amount was clearly related to the sale of the substance, but the 3 grams could be argued as personal use. Nonetheless, the conviction was affirmed on the basis of harmless error.

Another issue revolved around the judge’s bench conference in which the judge informed the prosecutor that the ownership of the backpack had not been tied to the defendant. At that point, the prosecution requested, and the court granted, the right to recall a police officer who produced a property receipt signed by the defendant for the backpack.

The defendant argued that

the judge had demonstrated a “lack of neutrality.”

The Supreme Court recited language from a federal case that “the role of a judge is not to sit as a bump on a log or act as a referee at a prizefight, but a judge has a duty to participate in witnesses examinations when it is necessary to expound upon matters not sufficiently developed by counsel.” It is noted that the judge is the “only disinterested lawyer connected with the proceeding.” In this matter, the Supreme Court found that the judge was doing only that which was necessary “to ascertain the truth.” The issue was rejected as a ground for an appeal.

What’s a Little Hearsay Among Professionals?

In the case of *State v. Richard P.*, 2014 WL 6607496, the Supreme Court recited the standards that are applicable in the trial of sexual offenses. The reality of such charges is that the only witnesses may be the accuser and the accused. In this matter, the defendant appealed his six convictions on five counts of third degree sexual assault and one count of attempted third degree sexual assault. The argument was that the fifteen year old victim’s testimony was uncorroborated and inherently incredible. In part, the argument was based upon the victim’s purported inability to provide any details regarding some of the incidents of alleged assault.

The Supreme Court reiterated its syllabus point that “a conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible....” The Supreme Court further explained that “inherent

incredibility ... is more than contradiction and lack of corroboration; ... rather, inherent incredibility requires a showing of complete untrustworthiness ... testimony which defies physical laws.” The issue of credibility is entirely a question for the jury. The Supreme Court concluded, nonetheless, that the victim’s testimony was not inherently incredible simply because the accounts may have been lacking in detail.

Another issue on appeal was that hearsay testimony had been admitted to contradict the defendant’s alibi. On cross-examination of the defendant, the prosecutor started with the question, “do you know” this person? The next question was, “so if there was information” that contradicted the times set forth in the alibi, that “would be incorrect?” The hearsay objection was overruled at that point.

The defendant argued on appeal that the question was “hearsay by implication;” that is, “the attempt to avoid an explicit reference to an out-of-court statement by artful questioning.”

Was it hearsay? The Supreme Court does not answer the question, concluding instead that, even if it was hearsay, the error was harmless “because it is clear that after stripping the erroneous evidence from the whole, that the remaining evidence was independently sufficient to support the verdict, and the jury was not swayed by the error.” One should be reminded, however, that the “enormous evidence” in this matter consisted solely of the victim’s testimony.

Finally, the defendant complained that he had not been informed of a crucial detail regarding the assaults until the first day of trial – that the alleged assaults occurred

after midnight. The defendant had been granted, pretrial, a bill of particulars requiring the state to provide the time frames for the alleged assaults. The lower court had stated that, due to the victim's young age, the time frames might not be, and were not required to be, exact. However, the time in the day of the assaults had not been provided because, according to the prosecution, it was not known to their office until the day of trial. The defendant did not move for a continuance to obtain records that he believed would exonerate him, but, instead, proceeded to trial and submitted employment records that were somewhat discredited on cross-examination. The Supreme Court stated that no foul occurred because the prosecution and the defendant had the same information at the same time, notwithstanding the bill of particulars that had been granted.

What goes Around, Comes Around, especially if it is a Wagon Wheel in a Yard.

In the case of *State v. Harper*, 2014 WL 6607659, the defendant entered his plea of guilty to the possession of marijuana on the condition, however, that he could challenge on appeal the denial of a motion to suppress the search of the defendant's detached garage.

The motion to suppress was based on the fact that the search warrant did not authorize the search of the detached garage. The uncontested fact is that the address for the defendant's residence set forth in the search warrant, which was based upon details provided by a confidential informant, was incorrect. When executing the warrant, the officers did not find the

address, but did find a house matching the description of a "white house with a wood porch next to a red and white trailer." A sign on the house indicated residency by the defendant.

The Supreme Court relied upon federal precedent that "it is enough if the description of the place intended to be searched in a search warrant is such that the executing officer can, with reasonable effort, ascertain and identify the place." The Supreme Court's own precedent was that "although the description of the premises to be searched need not be accurate in every detail, it must furnish a sufficient basis for identification of the property so that it is recognizable from other adjoining and neighboring properties." The opinion was that the description provided of the premises, notwithstanding the inaccurate address, distinguished the defendant's residence from any other properties in the small town.

The Supreme Court further found that a detached garage is sufficiently covered by the term "outbuilding." Because the garage was on the defendant's property, the incorrect address did not invalidate the search.

The final issue was whether the lower court properly considered the information about a "wagon wheel" on the property to determine the sufficiency of the search warrant since this detail was not included in the warrant or the supporting affidavit. The detail had been provided by the confidential informant. The wagon wheel was the first detail spotted by the officer when trying to find the actual address of the defendant's residence. At the suppression hearing, an objection was

made that the "wagon wheel" was not to be considered regarding the identification of the premises to be searched. The prosecution agreed. Subsequently, the circuit court confirmed that it had not considered this fact in deciding to deny the motion to suppress. The Supreme Court took the circuit court at its word. The appeal was not granted.

Being Blind Drunk doesn't Mean you Can't See your Way to a Confession.

In the case of *State v. Wisotzkey*, 2014 WL 6607462, the defendant and his co-defendant were found by the jury to have invaded the home of the co-defendant's mother and step-father. Once in the home, the mother was beaten and stabbed, resulting in her death, and the step-father was seriously beaten. The co-defendant was found with property of the step-father on his person.

The defendant was convicted of robbery in the first degree and felony murder.

The issue on appeal was whether the jury should have been instructed on the lesser included offense of petit larceny because the stolen property had a value approximating \$500. If convicted of this misdemeanor offense, the felony murder conviction could not have been obtained.

The Supreme Court distinguished petit larceny from robbery in that petit larceny is "the taking of property without violence" and robbery in the first degree requires either violence or the threat of deadly force. Because no evidence was presented that any property had been taken before the violence was inflicted, the Supreme Court determined

that no instruction for petit larceny should have been given.

The defendant also argued that his statements to the police should have been suppressed because he was "intoxicated." The Supreme Court acknowledged that "a claim of intoxication may bear upon the voluntariness of a defendant's confession, but, unless the degree of intoxication is such that it is obvious that the defendant lacked the capacity to voluntarily and intelligently waive his rights, the confession will not be rendered inadmissible." The Supreme Court then relies upon the defendant's own answer to the question, "And you are okay and you're voluntarily going to answer some questions for me?" in order to determine if it was voluntary and knowing. The defendant's answer was "Yeah ... that's fine." The implication is that intoxication will be a defense only when it renders the defendant unable to speak.

Moreover, the defendant's ability to lie in the first interview belied, in the Supreme Court's opinion, the defendant's purported intoxication. The implication is that intoxication will be a defense only when it renders the defendant unable to lie.

Also, the defendant took exception to the officer's statements that, if the defendant did not cooperate, "life as he knew it could come to an end," "that he could go away," and that "it was your own ass right now." The Supreme Court stated, "whether an extrajudicial inculpatory statement is voluntary or the result of coercive police activity is a legal question to be determined from a review of the totality of the circumstances." The Supreme Court found that the petitioner's life could change and he could go away and, therefore, the

statements were true, not coercive. The statement regarding the defendant's own ass was merely a reference to the fact that the defendant should not worry about his co-defendant's reaction to any statement. In the circumstances, the Supreme Court found no coercive activity, noting that the officers had volunteered to leave, and on occasion did leave, the room so the defendant could "compose himself."

Further, the defendant's statement "I should have a lawyer, shouldn't I?" was not considered to be an assertion of right to counsel, thus requiring the custodial interrogation to stop. The answer was, for the record, "That's up to you, sir." Because the defendant's question was an ambiguous statement in the Supreme Court's opinion, the officer was neither obligated to stop or to advise the defendant whether he should retain counsel.

Finally, the issue was raised whether the trial court erred in proceeding to one trial on both of the robbery charges of the two victims. The argument was, apparently, that both charges should have merged into the felony murder charge, thus creating a double jeopardy issue. The Supreme Court reiterated its previous opinions that "where there is more than one underlying felony supporting a felony murder conviction and one of the underlying felonies is committed upon a separate and distinct victim from the victim who was actually murdered, that underlying felony conviction does not merge with the felony murder conviction for the purposes of double jeopardy."

I Deserve what He got.

In the case of *State v. Stitley*, 2014 WL 5546524, which is the companion case to the previous case, *State v. Wisotzkey*, the defendant was dismayed because his co-defendant's sentences were to run concurrently, but his sentences were imposed consecutively. The Supreme Court reiterated its syllabus point that "disparate sentences for codefendants are not per se unconstitutional," but "if codefendants are similarly situated, some courts will reverse on disparity of sentence alone." The factors to be considered in determining if defendants are similarly situated are, "each codefendant's respective involvement in the criminal transactions (including who was the prime mover), prior records, rehabilitative potential (including post-arrest conduct, age and maturity), and lack of remorse." In the court's opinion the disparate sentencing was justified by the facts that the defendant planned the crimes against his own mother and stepfather and, after the crimes, returned to the home of the victims and consumed alcohol while his mother lay dead and his stepfather was bleeding.

Five Years can seem like a Lifetime.

In the case of *Gardner v. Ballard*, 2014 WL 5546202, the petitioner appealed the denial of his *habeas corpus* petition. The petitioner had pled guilty to the crime of distribution and display to a minor of obscene material, but reserved the right to appeal whether a telephone call in which a recording of the rape of a child is played constitutes distribution to a minor. The appeal was denied. The problem for the petitioner is that the plea to a charge

carrying a five year sentence of imprisonment was followed by the state's filing of a recidivist information. In the habeas proceeding, the petitioner argued that he pled guilty, because he was led to believe no recidivist information would be filed and, in fact, the plea agreement referenced the maximum sentence of five years.

The trial counsel testified that he asked for the waiver of a recidivist action, but the State refused. The trial counsel further testified that no promise was made by the State regarding the recidivist procedure.

The Supreme Court found no basis, therefore, for setting aside the plea agreement.

The Supreme Court further stated that, when entering the plea, the sentencing court "had no duty to inform petitioner about a possible recidivist action because such an action was not a direct consequence of his guilty plea."

The summary of this case is provided only to suggest to trial counsel that, when advising a client to enter a plea, the possibility of a recidivist action should be considered and discussion of the possibility with the client should be documented.

I'm Okay; You're Okay; and It's All Okay.

In the case of *State v. Cottingham*, 2014 WL 5545930, an interesting issue arose out of the testimony of a young victim. The State asked leading questions, which the Supreme Court found was not error considering the reticence of the victim to testify and the victim's continued failure to speak up and answer unless prompted to do so. However, the State apparently was

saying "okay" after many of the answers. The petitioner believed that this was improper encouragement to the witness to answer in a manner that "was pleasing to the State." When brought to the trial court's attention in this bench trial, the presiding judge replied that the State was merely affirming that the young victim had answered and that, "with respect to [the] affirmations, they've had no impact on me as a finder of fact."

As another practice pointer, an assignment of error included the fact that the trial court failed to set forth any "substantial findings" when it denied the post-trial motion for judgment of acquittal. The Supreme Court noted that the petitioner "did not request such findings" and had not provided any authority that required such findings.

Volunteering may be honored in Tennessee, but it may put you in Prison here.

In the case of *State v. Marcum*, 765 S.E.2d 304 (W. Va. 2014), the voluntariness of the defendant's statement was the issue and the manner in which the suppression hearing was held was raised as constitutional error. The defendant and a cousin ended a day of drinking with sword play. The cousin stabbed the defendant twice, and the defendant then stabbed the cousin three times fatally.

The defendant was approached in his room in a Kentucky hospital at or around midnight by a West Virginia state trooper. The defendant was recovering from surgery to repair the stab wounds to his abdomen. The trooper informed the defendant that the trooper did not have jurisdiction, was not arresting the defendant, and did not know exactly what the facts were. Indeed, the only witnesses to the actual

altercation were the deceased victim and the defendant. The defendant gave a statement admitting to stabbing his cousin.

At the suppression hearing, the Court instructed the defendant's counsel that he had to first produce evidence showing the statement was voluntary. This forced the defendant to have his client testify. After the defendant raised issues regarding voluntariness, the Court required the State to produce evidence that the statement was knowing and voluntary. The defendant never alleged that the statement was the result of coercion. The motion to suppress was denied. At the jury instruction conference, the Court admitted its error in requiring the defendant to first produce evidence regarding the voluntariness.

The defendant was convicted of second degree murder.

The Supreme Court did not find error in the lower court's ordering of the proof on voluntariness. The Supreme Court noted that the defendant conceded he was not in custody at the time, that the state police did nothing wrong, and that he had waived any *Miranda* rights so the only issue that remained was whether the statement was involuntary due to the administration of the drugs. The Supreme Court concluded that, at this point, requiring evidence of the effect of the drugs from the defendant was not a shifting of the burden of proof, but was merely the lower court's prerogative under Rule 611 of the West Virginia Rule of Evidence to "exercise reasonable control over the mode and order of interrogating witnesses so as to ... make the interrogation and presentation effective for the ascertainment of the

truth...." The Supreme Court noted that the trial court did not "require" the defendant to testify, but, rather, the defendant chose to do so. The Supreme Court finally concluded that the defendant's counsel did not object to this procedure on the basis that it forced the defendant to testify and, therefore, waived the right to raise the issue on appeal.

With respect to the actual voluntariness of the defendant's statement, the Supreme Court cited to the precedence requiring deference to the lower court's findings. The lower court had found that the defendant recalled making the statement, the defendant never asserted that he did not understand his rights, and the defendant did not feel coerced, and, upon review of the videotape, the defendant appeared to understand the questions and answers. Accordingly, the Supreme Court deferred to these findings. Interestingly, no discussion was made regarding the effects of the pain medication on the defendant's exercise of free will; instead, as in many cases, the trooper's opinion that the defendant was cooperative and understood the situation seemingly prevailed.

Let's make a Deal but Only after Playing Ring Around the Rosie.

In the case of *State v. Shrader*, 765 S.E.2d 270 (W. Va. 2014), the Supreme Court of Appeals of West Virginia pulled no punches when characterizing the resulting plea agreement in the matter, thusly: "Cobbling together a montage of each of the concepts referenced supra (*Kennedy* plea, *nolo contendere* plea, pre-trial diversion, suspending sentence and imposing probation with conditions), the process did not

fully comport with any of them, and the work in this case, all the way around, can only be characterized as sloppy."

The defendant entered into a written plea agreement in which he agreed to enter a "nolo contendere or no contest plea" to one count of sexual abuse in the first degree. No details are provided about the plea except for the notations in the opinion that "the plea ... was with the consent of the victim and the victim's family" and that the prosecutor represented the plea agreement "was the best thing for the State, I can tell you with certainty [in that] I very rarely enter into plea bargains."

The plea agreement set forth that the Court was to defer any adjudication of guilt for a period of time under conditions to be set by the Court including "undergoing a sexual offender psychiatric evaluation by an appropriate mental health professional selected or approved by the State." If the conditions were met, then the plea agreement was to be withdrawn and the criminal charges dismissed. The Supreme Court acknowledged that this had the elements of a pretrial diversion which, under the governing statutes, is not available for sex offense crimes.

The first issue arose when the service provider selected by the prosecutor refused to treat the defendant because the defendant would not admit his guilt. At the revocation hearing, the prosecutor agreed that this was a mistake and the Court relented allowing the defendant to seek treatment from a provider who would not require him to admit his guilt. A provider was found and the defendant completed the two year program. Moreover, he

was deemed to be a model probationer. However, the Court did not want to end the period of probation and ordered the defendant to undergo treatment with the Day Care Center. The Supreme Court described this condition to be a "moving target." In the final analysis, the Supreme Court attributed the problem to the lower court's continuing discomfort with the plea, but directs that the solution was to have rejected the plea, not accept it and then make the conditions impossible to meet.

At that point, the defendant faced revocation of the probation again because he was now in a program which required him to admit that he was a sex offender, notwithstanding that his plea did not require him to admit guilt. At this point, the Court adjudicated him to be guilty, resulting in a period of home confinement and the requirement that he register as a sex offender.

The Supreme Court evaluated the plea agreement and decided to ignore the potential legal impropriety of the deal because no parties raised the argument.

The Supreme Court then determined that the defendant had completed his side of the bargain. It was noted that the "plea agreement is subject to principles of contract law insofar as its application insures a defendant receives that to which he is reasonably entitled." Moreover, "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 in the plea agreement is imposed on the state." Accordingly, the Supreme Court remanded the matter so that the lower court could perform the specific obligations under the plea

agreement which meant allowing the petitioner to withdraw the plea agreement and the state dismissing all charges. (Justices Benjamin and Loughery dissented).

Run-on Sentences are not just a Grammatical Problem.

In the case of *State v. Jenkins*, 2014 WL 5328684, the issue was the sentencing of the defendant. After the defendant's conviction on the current charges, a recidivist information was filed. The lower court then sentenced the defendant to consecutive sentences on three charges. Due to the recidivist information, the circuit court then imposed a single life sentence for all three charges.

The State then moved to withdraw the recidivist information. The reason for this is not certain except that, perhaps, the State did the math and realized that, with the single life sentence, an opportunity for parole would be afforded after fifteen years, but under the consecutive original sentences, the effective sentence was twenty-one to sixty-five years in prison. The Court granted the motion.

The final analysis is that the recidivist information could not be withdrawn. Once the information is filed, "the court is without authority to impose any sentence other than as prescribed" in W. Va. Code §61-11-18.

The defendant moved to correct the sentence. The lower court explained that if the motion was granted, the defendant could receive an increased sentence if the admittedly illegal sentence was set aside. The motion was granted and the lower court then ran the sentences concurrently, but enhanced one of the charges to a life

sentence to run consecutively. Accordingly, the period of incarceration could range from twenty-six to forty years.

The defendant argued that this increase in his sentencing violated principles of double jeopardy. The Supreme Court noted that the original sentence was illegal and the defendant was entitled to receive a corrected sentence. Because the corrected sentence was within the statutory guidelines, no appeal was merited.

The Five Finger Discount could bring a Heavy-Handed Charge.

In the case of *State v. Clemens*, 2014 WL 5312301, the defendant and his wife had a shopping day that resulted in charges of entering without breaking and child neglect creating substantial risk of injury. Somehow in the course of shopping at a department store, the couple engaged in "fraudulent return, merchandise concealment, and price-switching." This was done while the couples' nine-year old son was left in the family car with the windows partially open.

The issue on appeal was whether the defendant should have been charged with shoplifting rather than breaking without entering. Without evidence of "selective or discriminatory prosecution," the Supreme Court was not going to disturb the prosecutor's discretion in determining what charges to bring.

The remaining issue was the defendant's assertion that the State "recognizes a simple child neglect misdemeanor offense," which should be a lesser included offense of "gross child neglect creating substantial risk of serious bodily injury or death."

The Supreme Court disagreed that the provisions of W. Va. Code §49-7-7 establishes a misdemeanor offense of child neglect. Instead, the Supreme Court stated that the charge was "contributing to the delinquency of a minor" which requires an "act or omission that causes or encourages juvenile delinquency." Because it does not deal with the "neglect" of a child, this misdemeanor offense is not a lesser included offense of the more serious charge made against the defendant.

Being a Liar doesn't make me a Criminal, does it?

In the case of *State v. Lytle*, 2014 WL 5311366, the defendant was found guilty of first degree murder. The two issues on appeal were whether a jury instruction regarding the defendant's "consciousness of guilt" was proper. The term "consciousness of guilt" is more commonly referred to as a guilty conscience. The jury instruction was that the jury could find that a willfully and deliberately false or misleading pretrial statement given to the police was an indication of the defendant's guilty conscience, if no other reason for such a statement could be discerned. The jury was also instructed that this was only "one factor" which the jury could consider in "weighing the evidence on the defendant's guilt or innocence."

The Supreme Court noted that the jury instruction was taken from language in its opinion in *State v. Berry*, 342 S.E.2d 259 (1986), in which "evidence of false or misleading statements given by the accused to the police as to matters under investigation" was equated to "evidence of flight" and was "relevant and admissible as a circumstance indicating consciousness of

guilt." The defendant argued that this precedent was related to "credibility determinations" and not "jury instructions." The Supreme Court rejected this argument, stating that it was "clear" that the matter related to instructions to the jury about what constitutes a guilty conscience.

The remaining issue on appeal was whether the alleged violation of the "prompt presentment rule" vitiated the defendant's confession. In this matter, nine and one-half hours passed between the defendant's handcuffing and arraignment. The Supreme Court reiterated that certain delays between arrest and presentment to a magistrate are not offensive, including "delays in the transportation of a defendant to the police station, completion of booking and administrative procedures, recollection and transcription of a statement, and the transportation of a defendant to the magistrate."

The two hours spent by the trooper at the scene was seen as "administrative duties." The additional one-half of transport to the station was not found to be offensive. The time then spent in recording the defendant's statement was not to be counted. The next four hours were expended trying to comply with the defendant's request for a polygraph examination and, thus, were not counted. The defendant then confessed and the time spent taking the recorded statement before transport to the magistrate was deemed to be "inconsequential."

Essentially, the Supreme Court found no evidence of the evils designed to be addressed by the prompt presentment rule: "prolonged interrogation" or "delay which precedes, and can therefore be used to induce, the confession." The appeal was denied.

A Couple who uses One Getaway Car Together, Stays Together.

In the case of *State v. Roberts*, 2014 WL 5311317, the defendant's husband robbed a store, but was shot leaving the store by the clerk's boyfriend, who had a concealed weapon. The dutiful spouse was parked fifty yards from the store. Hearing the shots, the defendant pulled to the front of the store and asked if she could take her husband to the hospital. The clerk and her boyfriend did not permit the defendant to move her husband, so the defendant scooped up the money dropped by her husband and fled. The money totaled about \$700. The husband died.

The defendant was convicted of first degree robbery and conspiracy.

The defendant argued "duress" as a defense. She had presented expert testimony that, as a victim of severe domestic violence during her eleven years of marriage, she had no real choice but to capitulate to her husband's instructions when a shopping trip turned into a robbery. Accordingly she claimed that she lacked the criminal intent to commit the crime and the lower court should have given a "duress" instruction.

The Supreme Court opined that, based upon the actual evidence, no evidence existed that she was coerced into committing the robbery through "imminent, impending, and continuous" threats. Moreover, the jury was given a "battered woman's syndrome" instruction and a "diminished capacity" instruction. Accordingly, the failure to have a "duress" instruction did not impair an

argument regarding lack of criminal intent.

The defendant also raised as an error the fact that the jury heard her state that she had been arrested in the past when she responded to the question of whether the *Miranda* rights had ever been read to her. This was found to be harmless since the defendant's expert testified regarding her drug use in formulating a defense for her of voluntary intoxication.

Finally, because no maximum sentence for the charge existed, the defendant argued that the thirty year sentence was unconstitutionally disproportionate to her role in the crime. Her husband was the prime mover and the expert testimony was that she was in "survival mode" and did not appreciate the wrongfulness of her acts. The Supreme Court determined that the sentence did not "shock the conscience" which is the subjective part of the two part test of whether a sentence is unconstitutionally disproportionate. The defendant was said to have driven her husband to the store and, when he was shot, she drove to the store and took the money and fled. For these reasons, "we cannot find that the sentence shocks the conscience."

Don't Look Them In the Eyes Whatever You Do.

In the case of *State v. Cox*, 2014 WL 4930264, the issue on appeal concerned the conduct of the trial of an inmate at the Mount Olive Correctional Complex for the murder of another inmate. The witnesses were, understandably, either correctional officers or inmates. At the trial, the correctional officers, as the State's witnesses, appeared in person. The inmates were

deemed to be a security risk and appeared by videoconference in their prison garb and in shackles.

The inmate was convicted.

On appeal, the Supreme Court found that the management of the trial was within the discretion and authority of the lower court. The Supreme Court found no "specific rule or statute addressing whether witnesses generally can testify by videoconferencing during trial." A trial court rule did exist to permit videoconferencing to obtain the testimony of a child witness. Moreover, a rule permitted videoconferencing to "take and preserve the testimony of prospective witness for use at trial..." Other jurisdictions were noted to permit videoconferencing, especially to protect witnesses. The Supreme Court found videoconferencing to be an acceptable form of presenting testimony in the circumstances of this case, which was the presence of six inmates in one courtroom.

Notably, the Supreme Court distinguished teleconferencing from videoconferencing because the jury is purportedly able to "fully observe the witnesses as they testified."

The defendant's counsel had not asked for the inmate witnesses to be unshackled and to be dressed in civilian clothing. Without such a request, the trial court could not be found to have committed error because the governing precedent placed the burden on defense counsel to move the court to have an incarcerated witness testify in civilian clothes.

Stop while you are Ahead or while the Police are directly Behind.

In the case of *State v. Burks*, 2014 WL 6634384, the defendant was caught on radar doing "75" in a "55" zone. So, why he was sentence to one to five years in the penitentiary? Because when the sirens were activated and the lights were flashed, the defendant "proceeded up the exit ramp and ran through a stop sign at the end of the ramp." Then, the defendant "proceeded to drive towards a night club, again failing to stop at stop sign." Then, the defendant "drove through the parking lot and attempted to turn back onto the main road." Then the defendant was stopped by another officer.

The defendant's actions resulted in a conviction of felony fleeing from an officer, second offense driving while revoked for driving under the influence, speeding, and failing to stop at a stop sign. The charge of carrying a deadly weapon without a license was dismissed.

The one to five year prison sentence was imposed on the charge for felony fleeing from a police officer.

The issue was whether the requirement of "reckless indifference" was unconstitutionally vague. The standard to be met was whether the criminal statute was "set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication." The Supreme Court opined that if a person was fleeing from the police at a high rate of speed and potentially was endangering others, the person should be intelligent enough to know that this was a crime.

The next issue was whether a patrolman could give an opinion regarding whether

conduct demonstrated a reckless indifference. The Supreme Court found that the lay opinion testimony was permissible under Rule 701 of the West Virginia Rules of Evidence because the circumstances did not require any specialized expertise to testify about the potential impact of the defendant's actions and was based upon the officer's personal testimony.

Public Defender Services Logo



VOUCHER UPDATE

For the period of July 1, 2014 through December 31, 2014, West Virginia Public Defender Services has processed 15,865 vouchers for payment in a total amount of \$11,451,848.61



Most Highly Compensated Counsel

For the period of July 1, 2014, through November 30, 2014:

| | |
|--------------------------------------|---------------|
| Law Office of Daniel R. Grindo, PLLC | \$ 125,575.00 |
| Harvey & Janutolo | \$ 103,263.00 |
| William T. Rice | \$ 91,265.00 |

Most Highly Compensated Service Providers

For the period of July 1, 2014, through December 31, 2014:

| | |
|-----------------------------------|--------------|
| Jones, Dykstra & Associates, Inc. | \$ 60,807.36 |
| Tri S Investigations, Inc. | \$ 39,713.68 |
| Forensic Psychiatry, PLLC | \$ 24,300.00 |

Honorable Earl Ray Tomblin - Governor

Jason Pizatella - Acting Secretary of Administration

Dana F. Eddy - Executive Director

Public Defender Services

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Criminal Law Research Center

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"Quotes" to Note

"The duty of a prosecutor is to seek justice, not convictions. ... Even if prosecutors can get a jury to convict someone, it does not necessarily mean they *should* ask them to do so. More importantly, just because a prosecutor can convince a judge into admitting inadmissible bad acts evidence doesn't mean a prosecutor should go all out to get the evidence admitted. It's a question of fairness, and the perception of fairness. In this case, the prosecutor snookered a judge into admitting totally irrelevant, phenomenally prejudicial evidence of a decade-old uncharged rape that may or may not have happened. I say 'may not have happened' because no police officer or prosecutor ever charged the petitioner for the alleged offense. And even with this bad acts evidence, the prosecutor still only got convictions on four counts of a thirteen-count indictment. In sum, I dissent. The prosecutor in this case had a dead lock for conviction. Why does a prosecutor who is confident on their feet need to put in old, irrelevant bad act evidence?" Justice Menis E. Ketchum, Supreme Court of Appeals of West Virginia, dissenting in *State v. Nathan S.*, 2014 WL 6676550.

Did you know.... The Supreme Court of Appeals of West Virginia recently articulated the manner in which a defendant's prior convictions are to be handled in the trial of the defendant on charges for which the prior convictions have some relevance, either as an element of the crime, i.e., a felon in possession of a firearm, or as an enhancer of a penalty, i.e., third-offense DUI. Specifically, in *State v. Herbert*, __ S.E.2d __, 2014 WL 6734007, the Supreme Court instructed as follows:

[W]hen a defendant is charged with a crime in which a prior conviction is an *essential element* of the current crime charged (e.g. being a felon in possession of a firearm under W. Va. Code §61-7-7(b)(1) [2008]), and *does not stipulate* to having been previously convicted of a crime, the trial court shall not bifurcate the prior conviction from the remaining elements of the crime charged. To the extent *State v. McCraine*, 214 W. Va. 188, 588 S.E.2d 177 (2003), is inconsistent with this holding, it is hereby overruled.

Furthermore, when a defendant is charged with a crime in which a prior conviction is an *essential element* of the current crime charged (e.g. being a felon in possession of a firearm under W. Va. Code §61-7-7(b)(1)), and *stipulates* to having been previously convicted of a crime, the trial court shall inform the jury that the defendant stipulated to the prior conviction. The jury shall be informed that the defendant was convicted of a prior felony or misdemeanor, but shall otherwise not be informed of the name or nature of the defendant's prior convictions. To the extent *State v. Dews*, 209 W. Va. 500, 549 S.E.2d 694 (2001), is inconsistent with this holding, it is hereby modified. ...

We ... hold that when a defendant is charged with a crime in which a prior conviction merely *enhances the penalty* of the offense currently charged and *does not stipulate* to having been previously convicted of a crime, the defendant may request that the trial court bifurcate the issue of the prior conviction from that of the underlying charge and hold separate jury trials for both matters. The decision of whether to bifurcate these issues is within the discretion of the trial court. In exercising this discretion, a trial court should hold a hearing for the purpose of determining whether the defendant has a prima facie challenge to the legitimacy of the prior conviction. At the hearing, the defendant may proffer evidence that the prior conviction does not exist or is otherwise invalid. If the trial court is satisfied that the defendant's challenge has merit, then a bifurcated proceeding should be permitted. However, should the trial court determine that the defendant's claim lacks any relevant and sufficient evidentiary support, bifurcation should be denied and a unitary trial held. To the extent *State v. McCraine*, 214 W. Va. 188, 588 S.E.2d 177 (2003), is inconsistent with this holding, it is hereby overruled.

Where the defendant stipulates to a prior conviction that enhances the penalty of the current crime charged, there will necessarily only be one trial. We are mindful that a jury's knowledge of a defendant's prior crime by mention of his/her 'stipulation has the same unfairly prejudicial effect as presenting the jury with other evidence of the offense[.]' *State v. Dews*, 209 W. Va. at 504, 549 S.Ed.2d at 698. Furthermore, when the prior conviction is a penalty enhancer, as opposed to a necessary element of the current crime charged, the jurors would not be required to determine whether the defendant committed an act which is not itself illegal if they are not informed of the prior conviction. Therefore, when a defendant *stipulates* to a prior conviction that merely *enhances the penalty* for the current charge, the jury shall not be informed of the prior conviction.