

THE CAPITOL LETTER

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From the Executive Director

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THE WATCHLIST

The mandatory online voucher preparation software permits Public Defender Services ("PDS") to review an attorney's cumulative submissions for a day. Restated, if an attorney submits twenty (20) vouchers, all of which include time for a particular day, PDS can now generate reports with a point and click that will provide the cumulative total for that day. In the past, this effort could only have been made through the effort of two to three personnel entering data from the twenty (20) vouchers into a spreadsheet. Moreover, the information might have been documented two to three years after the submission of the vouchers, but, with the voucher preparation software, the report can be generated immediately after the submission of the vouchers.

At this time, the reports are being generated periodically for a general review. Moreover, the system automatically alerts PDS when certain thresholds are reached in the billing for a particular day.

In a recent report, an attorney was found in the month of July, 2014, to have billed in excess of twenty-four (24) hours on three (3) days and in excess of twelve (12)

hours on eleven (11) days. The total hours for the month would have extrapolated to a year in excess of four thousand (4,000) hours.

This attorney was the first person identified on the agency's new "Watchlist." The agency is making no accusations by placing the attorney on the Watchlist, but the billing activity raises questions that merit the agency's close review. When on the Watchlist, an attorney will be notified by the agency. The agency will explain the additional requirements that will be imposed on the attorney. One condition will be that for all entries, the period of time will have to be entered in the "Comments section" next to the service for which the time is being charged to the agency. In this manner, the agency can see what services are being provided at 2:00 a.m. on those days in which the services equal or exceed twenty (24) hours. Another condition might be a requirement that the attorney describe the actual research being done.

The agency will then review the vouchers submitted after notification is sent to the attorney. If the conditions are not met, then the voucher will be returned to the court approving payment of the

voucher with a detailed explanation as to why it is being returned. This will be the first time that the Court will know the attorney is on the Watchlist.

The agency does not intend to create an extensive list. The list will be used only when it is clear from a review of an attorney's vouchers that anomalies consistently arise requiring the agency's more intense review of the vouchers.

Again, the majority of the panel attorneys will not be affected by this new procedure. And, indeed, many attorneys may provide explanations regarding the discovered anomalies or may be more careful in their preparation of vouchers and find that they have been removed from the Watchlist. But, if you are on the Watchlist, you should take notice that the billing issues have been perceived to be extremely serious and to be repeated behavior.

VOUCHER ISSUES

The agency is more closely reviewing vouchers for compliance with the ninety (90) days' rule; that is, the statutory rule requiring vouchers to be submitted within ninety (90) days after the "last date of service." Attorneys have been quite inventive in adding time

to a voucher in order to be within the time frame.

However, the agency will return vouchers in which the last service, other than a review of the file, a review of the order, or the preparation of a voucher, occurred more than ninety (90) days before submission of the voucher.

The agency has no problem paying vouchers which are submitted outside the time frame if the agency receives a court order indicating that good cause has been shown for the late submission. So, if you are late in submitting a voucher, simply inform the court that it is late, provide an explanation as to why it is late, and prepare the order approving payment outside the statutory time frame and insert the language, "for good cause shown."

Inside this issue:

From the Executive Director	Cover
Agency News & Information	Pg. 2
U.S. Supreme Court: It is so ordered....	Pg. 3 - 4
WV Supreme Court	Pg. 4 - 9
Voucher Update	Pg. 9
Sept. / Oct. Days to remember	Pg. 10
Points of Interest & "Quotes to Note"	Pg. 11 & 12

AGENCY NEWS & INFORMATION

APPELLATE ADVOCACY DIVISION:

A regular feature of the newsletter is a column authored by members of the Public Defender Services Appellate Advocacy Division ("AAD").

The column will feature advice from the AAD's attorneys regarding trial practices that will benefit the client, will hone the trial attorney's advocacy skills, and will aid any appellate effort.

The attorneys in the agency's Appellate Advocacy Division are available, generally, for consultation with trial counsel or appellate counsel. If you have an issue that you want to properly preserve for appeal during a trial or if you have an issue that you want to brainstorm, you should contact the agency and ask to speak to an attorney in the appellate advocacy division. If you want to do a moot court for any argument that you might be making before a court, the agency can accommodate you with space and judges. The mission of the division is not only to represent clients on appeals, but to provide support to those in the private sector who are doing the same. Seventy-five (75) years of legal experience, collectively, is a significant resource for you.

AADvice - Do you have a case that involves eyewitness identification?

If you have a client that has been identified in a photo lineup or an in-person lineup or showup, you should closely examine the West Virginia Eyewitness Identification Act to determine whether the lineup or showup was procedurally proper. W.Va. Code §§ 62-1E-1 to 3 (2013). This Act imposes numerous procedural requirements for the proper administration of lineups and showups. These statutes are a response to recent scientific developments in the area of memory and eyewitness identifications. In addition to the Act, the Supreme Courts of Oregon and New Jersey have written opinions on this subject that are educational to the practitioner and provide fertile ground for cross-examination. See *State v. Lawson*, 291 P.3d 673 (Ore. 2012) and *State v. Henderson*, 27 A.3d 872 (N.J. 2011). West Virginia's common law understanding of what constitutes unreliable eyewitness identification is based upon a relatively ancient case that is not up-to-date with modern science. See Syllabus Point 3, *State v. Casdorff*, 159 W.Va. 909, 230 S.E.2d 476 (1976) and *Neil v. Biggers*, 409 U.S. 188 (1972). We must litigate this issue and introduce expert

testimony when necessary to ensure that our Supreme Court stays in step with the science of memory and eyewitness identification.

ANNUAL CONFERENCE AND PANEL ATTORNEYS:

An inquiry was made about why panel attorneys were not as well represented at the annual conference as those who worked in public defender offices. A few responses were received. The common theme was the cost. The cost of this year's conference was \$135 which included the banquet meal and more than 12 CLE credits. Compared to the costs of other seminars, this is a substantially modest sum. Seemingly, the underlying, but unstated, complaint was that the public defender offices attend for free and it is not fair to require panel attorneys to pay. This presumption is simply untrue. The agency has to pay for the accommodations, the conference rooms, the speakers' travel, and the other expenses of a conference. The agency does not receive general revenue for this purpose. Accordingly, the agency has to charge for the provision of this service. The public defender corporations are assessed the cost of their attorneys' attendance and the amount is collected from the grants that are made to the

corporations. The cost to the corporations is identical to the cost assessed the panel attorneys. The immediate reaction might be that the attorneys in the public defender offices do not have to pay personally. However, the amount that is assessed to the corporations reduces the overall amount of the grant and, therefore, represents funds that could otherwise have gone to salaries or benefits or equipment. Accordingly, the public defender employees are affected. So, the agency is aware that the panel attorneys are cost conscious, but so are the public defender corporations. If you do not believe this, you need only to attend a budget conference between the corporations and the agency. The reality remains that the annual conference is offered at the lowest cost possible to both panel attorneys and attorneys in the public defender offices. So, I hope to see you at the next conference.

SAVE THE DATE:



The 2015 Annual Conference is being planned for the dates of June 18th & 19th, 2015.



The 5-4 opinion in *Miller v. Alabama*, __ U.S. __, 135 S.Ct. 2455, was decided in 2012. However, the opinion was the impetus for juvenile sentencing reform in the State of West Virginia culminating in the passage of HB 4210, effective June 6, 2014. The two new statutory provisions prohibit the imposition of a sentence of life without the possibility of parole if the defendant was less than eighteen years old at the time the offense was committed. The statutory provisions further establish that a juvenile shall be eligible for parole after serving fifteen years of a sentence greater than fifteen years imposed for an offense or combination of offenses. Finally, many mitigating factors are mandated to be considered at sentencing and parole hearings for juveniles. The factors include age, family and community environment, ability to appreciate the risks and consequences of conduct, intellectual capacity, and peer pressure.

Upon the effective date of this juvenile sentencing reform legislation, seven (7) inmates became eligible for parole notwithstanding their original sentence was life imprisonment without the possibility of parole.

For these reasons, a discussion of the 2012 decision in *Miller* remains timely.

The case involved two 14 year old boys who had been separately convicted of serious crimes resulting in homicides. Under the respective laws of Alabama and Arkansas, the sentencing courts had to impose life imprisonment without the possibility of parole.

The Court first reviewed its historical precedent. In 2005,

the United States Supreme Court of Appeals “invalidated the death penalty for all juvenile offenders under the age of 18.” *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183. In 2010, the Court held that “life without parole violates the Eighth Amendment when imposed on juvenile non-homicide offenders.” *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011. Based on this historical precedent, the appellate counsel in *Miller* tried to extend the Eight Amendment prohibition on “cruel and unusual punishment” to life sentences, without the possibility of parole, imposed on juveniles in homicide cases.

The Eighth Amendment “flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense.” Indeed, the “concept of proportionality is central to the Eighth Amendment.” And, notably, the courts are to view that concept “less through a historical prism than according to the evolving standards of decency that mark the progress of a maturing society.”

The Court stated that “children are constitutionally different from adults for purposes of sentencing.” The Court explained that “juveniles have diminished culpability and greater prospects for reform” and, therefore, are “less deserving of the most severe punishments.” The Court noted three “significant gaps between juveniles and adults.” First, “children have a lack of maturity and an underdeveloped sense of responsibility leading to recklessness, impulsivity, and heedless risk-taking.” Second, “children are more vulnerable to negative influences and

outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings.” Third, “a child’s character is not as well formed as an adult’s; his traits are less fixed and his actions are less likely to be evidence of irretrievable depravity.”

The Court relied on the science, as well, that “only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior.” Moreover, “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds – for example, in parts of the brain involved in behavior control.” The Court reasoned that “those findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child’s moral culpability and enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed.”

With this perspective, the Court found that justification for imposing the harshest sentences on juveniles, “even when they commit terrible crimes,” did not exist. Because the goal of retribution “relates to an offender’s blameworthiness, the case for retribution is not as strong with a minor as with an adult.” With respect to the goal of deterrence, “the same characteristics that render juveniles less culpable than adults – their immaturity, recklessness, and impetuosity – make them less likely to consider potential punishment.” With respect to the goal of incapacitation, “incorrigibility

is inconsistent with youth.” With respect to the goal of rehabilitation, “life without parole forswears altogether the rehabilitative ideal” and “reflects an irrevocable judgment about [an offender’s] value and place in society at odds with a child’s capacity for change.”

Notably, the Court reaffirmed the principle that “an offender’s age ... is relevant to the Eighth Amendment and so criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.”

Accordingly, the mandated imposition of life imprisonment without the possibility of parole upon juveniles, even for homicides, has several constitutional defects. One, the sentencing authority cannot be forced to impose the harshest penalties on juveniles “as though they were not children.” Two, the imposition of such sentences on a juvenile is “harsher” than on an adult because the juvenile will “almost inevitably serve more years and a greater percentage of his life in prison than an adult offender.” Restated, such a sentence “when imposed on a teenager, as compared with an older person, is therefore the same in name only.” Third, it precludes “individualized sentencing” and gives “no significance to the character and record of the individual offender or the circumstances of the offense,” including, especially, the “mitigating qualities of youth.”

The Court ruled, therefore, by the barest majority, that the Alabama and Arkansas sentencing statutes were unconstitutional under an Eighth Amendment analysis.

The most significant feature of *Miller*, however, is that the Court did not impose a categorical bar on the imposition upon juveniles of life imprisonment without the possibility of parole as it had for the death penalty or the imposition of life sentences in non-homicide cases. Instead, the Court mandated that sentencing authorities “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” However, any statutory scheme that makes the punishment mandatory would not survive scrutiny.

The states’ most significant argument against this individualized sentencing scheme was that the transfer to adult status provided this analysis. The Court noted, however, that 29 jurisdictions have mandatory transfer laws, precluding the individualized assessment required by the Court. The Court rejected the argument, therefore.

For these reasons, the State of West Virginia enacted the changes to the sentencing law for juveniles, as codified at W. Va. Code §61-11-23 and W. Va. Code §62-12-13b. Significantly, the state imposes a categorical ban on the imposition of life sentences without the possibility of parole, taking a step farther than the United States Supreme Court of Appeals did in *Miller*.

THANK YOU !!!

In the past legislative session, House Bill 4210 was enacted to conform state law to the constitutional mandate that juveniles who were sentenced to life terms of imprisonment should be deemed to be eligible for parole. The *Campaign for the Fair*

Sentencing of Youth and Juvenile, by its Legal Director, Jeff Howard, sought assistance from attorneys in preparing 7 inmates for the parole hearings that were now mandated. The call went out from Public Defender Services for volunteers. Mr. Howard stated that he received responses from more attorneys than were needed. As executive director of Public Defender Services, I am thankful to those who volunteered. You have more than demonstrated what I have always known to be true – law is a noble profession and legal professionals act nobly when called upon to do so. Again, thank you.

WV SUPREME COURT UPDATE:

Time is precious; Timing not so much.

In the case of *State v. White*, 2014 WL 4347130, the defendant raised the fact that he had been incarcerated for more than two terms of court awaiting indictment. Section 12, Article 2, Chapter 62 of the West Virginia Code, W. Va. Code §62-2-12, establishes the “two term rule,” requiring that a “person in jail ... shall be discharged from imprisonment if he be not indicted before the end of the second term of the court.” Without question, the defendant had been incarcerated beyond the end of the second term. Accordingly, the defendant stated it was error for the circuit court to deny his motion to be discharged.

Before this appeal was heard, however, the defendant had been indicted, although untimely so, and convicted.

So, what did the Supreme

Court of Appeals determine with respect to the obvious denial of the defendant’s rights? The Court declared the issue moot due to the defendant’s conviction and resulting sentence of incarceration. The Court noted that a “violation of the two-term rule does not prohibit further prosecution or incarceration on a subsequent indictment, conviction and sentence.” A direct appeal of the issue after an indictment and conviction availed the defendant nothing. The Court was not going to grant a discharge at this point.

The defendant did not give up. The defendant then stated, again correctly, that, as a person in custody, he was not tried in the same term of court in which he was indicted as required by the provisions of Section 1 of Article 3 of Chapter 62 of the West Virginia Code, W. Va. Code §62-3-1. The defendant was indicted on September 20, 2012 and arraigned on Friday, September 28, 2012. The next term of court began on Tuesday, October 2, 2012. The defendant argued that his trial should have begun on the one court day remaining in the term in which he had been indicted, *i.e.*, Monday, October 1, 2012.

According to the Supreme Court of Appeals, the fact that only one court day remained in the term was, in itself, sufficient grounds for the court to invoke the good cause provisions of the rule in order to extend the trial beyond the term of court in which the indictment was made.

The defendant then combined these two timing issues to claim prosecutorial delay. The Court refused to find that the failure to meet the required timeframes in the statute meant that the

prosecution “intentionally or oppressively” sought to delay prosecution. The defendant was required to show “authority or instances in the record” to support this claim, although the Court did not articulate what constituted potentially acceptable authority or instances. So, apparently, if the prosecutor’s timing is off, it does not mean that the defendant gets off.

Youth is Wasted on those Eligible for Parole.

In the case of *State v. Hamon*, 2014 WL 4347136, the defendant pleaded guilty to one count of grand larceny for which an indeterminate sentence of one to ten years in prison was imposed. The Court suspended the sentence, however, designating the defendant as a youthful offender pursuant to the provisions of the *West Virginia Youthful Offender Act*, W. Va. Code §§25-4-1, *et seq.* The Court then ordered the defendant to be transported to the Anthony Correctional Center for a period of six months to two years, with credit for time served of 312 days.

The issue in this case arises, however, because the defendant objected to being designated as a youthful offender.

The inventive argument was that the designation as a youthful offender violated the constitutional guarantee of the equal protection of the law. The defendant stated that, with the time already served, she could be released on parole in just fifty-three days. Under the terms of the commitment to the Anthony Center, she would serve no less than six months. This meant she was incarcerated for a longer period of time than

someone similarly situated, i.e., convicted of grand larceny, but who was older than she was.

The Supreme Court of Appeals did not find an abuse of discretion by the sentencing court. As for the equal protection argument, the Court found the fatal flaw to be the “presumption that she is entitled to release upon her parole eligibility date.” According to the Court, this presumption is incorrect because “parole is not a right and eligibility for parole does not guarantee the defendant’s release from prison.” Accordingly, the defendant was merely speculating that she would have spent less time incarcerated in prison than at the center.

Notably, for counsel, the remaining issues in the appeal were not considered because “issues ... mentioned only in passing but are not supported with pertinent authority are not considered on appeal.”

A double-edged sword just mean it’s going to hurt twice as much.

In the case of *State v. Jackson*, 2014 WL 2681081, the testimony was that, based primarily upon DNA evidence, it was “99.9999 percent certain” the defendant was the father of his eighteen year old daughter’s child. Or, alternatively, the defendant was 2,482,848 times more likely “than a random man from the same ethnic group” to be the father.

Not surprisingly, therefore, the defendant was convicted of incest. However, the defendant was not convicted of charges of sexual assault of the daughter. The defendant was also not convicted of other charges of sexual abuse for

other periods of time. Again, the incest charge was the only conviction.

The defendant argued that these were inconsistent verdicts and, therefore, “there may have been juror misconduct.” The implication was that the jury did not believe the instances of abuse and assault occurred, but convicted on the basis of the DNA evidence.

The Supreme Court of Appeals “soundly rejected” this contention. While error occurred in that the jury did not follow the court’s instructions, it could not be known, says the Court, whether the jury was favoring the defendant or the State. The Court cited to the United States Supreme Court’s expressed belief that inconsistent verdicts are often a “product of jury lenity” and represent the “jury’s historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch.” Because inconsistent verdicts may benefit a criminal defendant, “an inconsistent verdict militates against a review of such convictions.”

Another issue raised was the fact that the expert testimony was provided by a supervisor and not by the actual technician. This argument might have some traction except for two facts. One, “petitioner failed to preserve this issue for appeal by not objecting to the supervisor testifying at trial.” And, two, appellate counsel was the trial counsel, and, at trial, “took the opposite position to what he argues on appeal” in that “he objected to the technician testifying, arguing she lacked the education and experience to be considered an expert,” but “admitted he had no grounds to object to Ms. Beatty testifying.” Inconsistent verdicts

are not grounds for appeal and neither, apparently, are inconsistent arguments.

It’s as plain as the proboscis on your countenance.

In *State v. George K.*, 760 S.E.2d 512 (W. Va. 2014), the issue was whether the finding that the defendant was incompetent to stand trial should result in the dismissal of the charges or should result in his remaining in the court’s jurisdiction for fifty years, which was the maximum period of possible incarceration for the alleged crime. The defendant was thirty-nine years of age and had intercourse, non-forcibly, with his girlfriend’s fifteen year old daughter. The defendant’s IQ was 60 or below. Eventually, the psychiatric evaluations concluded that the defendant was “not likely to attain competency in the foreseeable future.” The defendant “did not have the ability to follow the proceedings because of problems with retention, and is not able to participate in his defense because of cognitive limitations.”

The disposition of the defendant depended upon whether the alleged crimes of third degree sexual assault and sexual abuse by a custodian involved “acts of violence against a person.” If the acts did not, then the charges would be dismissed, subject to a stay to permit an application for a civil commitment. See W. Va. Code §27-6A-3(g). If the acts did involve violence against a person, then the defendant would remain in the Court’s jurisdiction for the length of time equal to the maximum period for which the defendant could have been incarcerated if convicted of the charges. See W. Va. Code

§27-6A-3(h). The practical result of the latter determination is that the defendant would be institutionalized for that period of time in the least restrictive “mental health facility.”

The term “violence,” as used in the governing statute, is not defined.

The defendant’s argument was that the phrase should be defined by the ordinary meaning of a “violent offense”; that is, a “crime characterized by extreme physical force.” The defendant’s acts did not “involve the application of force, threats, or physical violence.” Moreover, the elements of the crime did not include “force, threats, compulsion or physical violence.”

The state’s position was that the phrase “acts of violence” was not “limited by the adjective ‘physical’.”

The Court rejected the defendant’s “plain meaning” argument and found the phrase to be ambiguous. Due to the “uncertainty as to the meaning of the statute,” the Court deemed “to give effect to the intent of the Legislature.” The Court did not view the statute as penal in nature and, therefore, would not construe the statute against the state. The statute was seen as a “commitment statute” that was not intended to “punish someone suffering a mental illness,” but which, at its core, had a salutary purpose.

The Court then scoured the code to find the use of the term in other statutes relating to the same subject matter. The defendant had provided the Court with the definition of “sexually violent offense” contained in the Sex Offender Registration Act, W. Va. Code

§15-12-2(i)(2012), which identified offenses other than the ones with which the defendant was charged. The Court rejected this definition as not involving the same subject matter because one dealt with commitment of a mentally ill person and the other dealt with registration of a sex offender. Also, the Sex Offender Registration Act limited the definition to its provisions and, unless it was specifically referenced in the governing commitment statute, the statute's later re-enactment meant the Legislature did not intend for this definition to be used. So, according to the Court, no similar statutory definition on the same subject matter could be found.

The Court then moved on to the next step, which was determining the purpose of the legislation. Indeed, this step reveals the entire dynamic in the opinion. The defendant's argument was focused on a standard definition of "violence," but the Court was determined to focus on when a person should be committed. The purpose of the governing statute, in its opinion, was not punitive, but was "to treat the illness and protect society." The result is that the Court was going to broadly construe the requirement of violence in furtherance of the statute's purported salutary purpose. This meant construing the term "violence" as "an act that indicates an incompetent defendant poses a risk of future harm to the public." It further meant concluding, as a matter of law, that the act of violence need not be an element of the crime which was charged.

Finally, the Court extended the potential harm to "emotional and psychological harm," relying upon a prior decision relating to the

conditions of granting bail. In this instance, the subject matter was deemed to be the same, i.e., the protection of the public.

Because children are the "most vulnerable members of society," sexual assaults on children result in severe emotional and psychological harm. Accordingly, the Court found that the charges in this matter involved "acts of violence," even though no physical violence was involved, and the charges were not subject to dismissal. The defendant was committed to a mental health facility and subject to the Court's jurisdiction for fifty years.

The complexity in the case is the reasoning that a statute dealing with violent sexual offenses was deemed to be a different subject matter than a statute dealing with the disposition of a defendant incompetent to stand trial on a sex offense, but case law regarding bail for a violent crime was deemed to have the same subject matter as the dispositional statute. The distinction is somewhat elusive.

Justice Ketchum dissented, relying upon the plain meaning of "violent offenses."

An Argument that you have been Railroaded may be Chewed-Chewed Up and Spit Out; or, Alternatively, A Bathroom Break Affords Sufficient Relief in itself.

We have the curious case of *State v. Rollins*, 760 S.E.2d 529 (W. Va. 2014), in which a *per curiam* opinion is issued, but then three of the five justices filed a concurring opinion. *Per curiam* means "by the court as a whole" and results in an opinion that is not attributed to a particular justice. So, this

case represents a result by the court as a whole, but with three of the five justices of the court filing separate opinions.

The *per curiam* opinion affirmed the defendant's conviction of the first degree murder, without a recommendation of mercy, of his wife.

The victim's body was found in a pond, under the water, pinned by a fallen tree that was sixty feet tall in height and a thousand pounds in weight. The autopsy and the medical examiner concluded that the death was accidental, caused by drowning when the victim was struck by the falling tree and pinned in the pond.

This brings us to the next curiosity in the case. The victim's family contacted Governor Manchin's office who, according to the defendant, then instructed the State Police to conduct an investigation. The State Police unearthed the recently acquired insurance policies on the defendant's wife and other suspicious activities of the defendant and his girlfriend. The most suspicious evidence from the investigator's perspective was the girlfriend's 911 call in which the girlfriend purportedly gave the details of the victim's circumstances even though she had not seen the crime scene and the defendant purportedly told her only to call an ambulance without providing details.

Murder charges ensued. And, of course, the girlfriend, after her arrest, informed on the defendant despite two years of denying any knowledge of foul play.

The defendant's evidence consisted of allegations regarding the governor's influence in the prosecution of

the case and medical testimony that the death was consistent with being struck by a falling tree. The jury took one hour and twenty-five minutes to convict the defendant and to decide not to recommend mercy.

One issue for appeal was a purported material misrepresentation by the prosecutor in his rebuttal argument during closing. The defendant had articulated its theme in closing that the girlfriend's "fifteen seconds of fabrication" meant she had "gotten on the --- governor's freight train express" for the purpose of "railroad[ing]" the defendant. The defense counsel asked what did the girlfriend "gain"? The defendant then stated that she got her freedom because she was not going to be indicted.

In the rebuttal, the prosecutor stated, "You can bet your behind that I'm going to indict her next month." This statement, the defendant argued on appeal, "improperly bolstered" the girlfriend's "credibility." The Court first deemed the objection to be waived because no objection was made contemporaneously with the statement at trial. The Court then deemed it to have been "invited error," stating that this "cardinal rule of appellate review" is a "branch of the doctrine of waiver which prevents a party from inducing an inappropriate or erroneous response and then later seeking to profit from the error."

The defendant further objected to the introduction of incidents of domestic abuse as "bad character" evidence. Because the defendant was arguing that his wife's death was an accident, the Court held that such evidence was admissible under Rule 404(b)

of the Rules of Evidence as “proof of an absence of accident or mistake.”

The Court did agree that a witness’ testimony regarding the defendant’s responsibility for bruises depicted in a photograph was hearsay as the witness repeated the words of the wife who was obviously unavailable for cross-examination. While an exception exists for third party testimony regarding an out of court identification, the third party and the identifying witness must be both available for cross-examination. The Court agreed, however, that the circuit court properly admitted the hearsay testimony upon a showing of a “particularized guarantee of trustworthiness.” This is somewhat difficult to fathom because the standard is that cross-examination of the declarant would be of marginal utility. The declarant was the wife who accused the husband of inflicting bruises. This is the field upon which many a battle is decided by cross-examination. Accordingly, it is difficult to determine why, in the “totality of circumstances,” the wife’s statements were uniquely trustworthy unless it is the perception that victims of domestic violence do not falsely report incidents of abuse.

The defendant also argued that he had been unfairly surprised at the trial by the change in testimony of an expert witness as to the cause of death. The Court noted that, “[i]n order to preserve for appeal the claim of unfair surprise as the basis for exclusion of evidence, the aggrieved party must move for a continuance or recess.” This is to permit time for the defendant to cure the prejudice resulting from the

surprise. In this case, the defendant asked for a recess, primarily to use the bathroom and, to “kill two birds with one stone,” determine how to address the prejudice. And, notably, the defendant only requested the five minute bathroom break and asked for no more time when his counsel returned to the courtroom and resumed the trial. As noted by the Court, the defendant “cannot now be allowed to alter retroactively their trial strategy.”

Justice Workman concurred to emphasize that the lower court had correctly analyzed the admission of the photographs in its twenty-eight page order and the photographs should have been admitted as non-hearsay pertaining only to matters of identification or as present sense impressions. In other words, it was not necessary to label the testimony as hearsay and then admit the hearsay testimony under the residual exception. Finally, the Justice emphasized that “evidence of prior acts of domestic violence also would have been admissible in this case to show motive, or even intent.” In other words, it was not necessary to admit the evidence on the basis that it proved the lack of an accident or mistake.

Justice Loughery concurred, joined by Justice Ketchum, to find “no error” in the prosecutor’s remarks as the prosecutor was not vouching for the witness, but, instead, was merely rebutting an argument made by the defense counsel. The Justice was attempting to make clear for the record in any future federal habeas corpus proceeding that no “error” existed, including an “invited error.” The Justice also substantiated the Rule 404(b)

evidence by citing further authority for the proposition that the “absence of an accident or mistake” exception is a proper use for prior acts even when the accident is attributed to actors other than, or circumstances not created by, the defendant.

A Right does not Make it Plain; but A Wright Made a Plane.

In the case of *State v. Johnson*, 2014 WL 2681500, the defendant was convicted of three charges. The resulting sentences were to run consecutively. However, the Court enhanced each of the three sentences due to the defendant’s recidivism. The Court noted its previous ruling that “authorizing criminal convictions returned against the defendant at the same time to be separately enhanced by a prior felony ... may not be done and only one enhancement is permissible.” The matter was remanded for sentencing in accord with this ruling.

The petitioner had rejected a plea agreement proclaiming to the lower court his innocence. The petitioner on appeal argued that the circuit court was mandated in open court to explain the option of entering an *Alford/Kennedy* plea. The Supreme Court of Appeals found no such mandate in the case law.

The petitioner also argued that the State had impermissibly exercised its peremptory challenge to remove the “last ‘person of color’” from the jury. However, the State had challenged the juror for cause because the juror denied that she had been arrested, but, when confronted with her records, she subsequently confirmed that she had been

charged with obstructing a police officer and driving on a suspended or revoked license. The lower court refused to remove the juror for cause but “explained to the State that there was sufficient evidence in the record for the State to use a peremptory challenge to remove her.” Accordingly, the State had a “non-racial, credible reason” for the peremptory challenge.

The petitioner finally argued that the court “plainly erred” in failing “to offer malicious assault and unlawful wounding as possible lesser included offenses” of first degree attempted murder. The petitioner had not raised this issue in the lower court. By admitting that the case law did not provide that these offenses were lesser included offenses of first degree attempted murder, the petitioner “failed to show that there was error sufficient to trigger the plain error doctrine.” For this reason, “we [the Court] decline to address the merits” of this assignment of error.

The reasoning is somewhat circular. Because this issue had not yet been decided in the case law, the lower court did not “plainly” err, so the appellate Court will not decide the issue to determine if there was, in fact and law, actual error.

Again, the matter was remanded so that only one of the sentences would be enhanced.

You can take the Drugs out of Detroit, but You can’t take Detroit out of the Drugs.

In the case of *State v. Rogers*, 2014 WL 2683047, the defendant challenged the legality of the warrantless

search of a car that had been stopped for speeding. The defendant was a passenger in the car. A search was made and extended to the defendant's bag. Twenty-nine and one-half Vicodin tablets, seventeen and one-half ecstasy tablets, twenty-three alprazolam tablets, and thirty-four OxyContin tablets were found in the bag.

The defendant argued that the stop was for a traffic violation which could not conceivably justify the search of bags within the car that were not within the reach of the passengers.

The appellate counsel conceded that, under federal law, the car could be searched, but argued that the West Virginia Constitution provided greater protection by requiring in its case law that probable cause must exist to believe that evidence of the crime is in the car and exigent circumstances must exist that prevents the officer from obtaining a warrant.

The Court's opinion canvassed both state and federal law in its analysis of the traffic stop in this matter.

The actual stop was initially justified because the vehicle was speeding. The stop was further justified, however, because an anonymous tip was confirmed by actual observation that an African-American from Detroit, Michigan, "a known source of drugs," would be exiting a Greyhound bus in Ashland, Kentucky, and would be picked up by another person from West Virginia. The further tip that the person would be carrying drugs for sale was thus deemed to be reliable. The observing officer than followed the car, which was speeding. Other officers were notified who stopped the

car, ostensibly for speeding.

The questioning of the car's occupants was justified, even though the stop was purportedly for speeding, because "it is common to do so" and because it was legitimized by an opinion of the Fourth Circuit Court of Appeals which held that the questioning is proper "provided that the unrelated questioning does not extend the encounter beyond the period reasonably necessary to effectuate the purposes of the lawful detention." And, again, the anonymous tip stated that the African-American male from Detroit, "a known source of drugs," would be carrying drugs for sale.

The Court then notes that, "upon questioning [by the police officer], the stories of the occupants 'weren't jiving' as petitioner was from Detroit, 'a known drug area,' and the two front passengers were from Charleston and claimed they did not know petitioner and were paid to go pick him up." Moreover, one of the occupants admitted that he was carrying a gun, for which he had a permit. Accordingly, the questioning was considered reasonable in the totality of the circumstances.

The request for the K-9 unit was then justified. Based on the questioning, the police officer had "more than a mere hunch that there were drugs in the vehicle." The K-9 alerted to the defendant's bag, which was within the car and was subject to search. The drugs were found.

The Court finally responded to the petitioner's claim that state law provided more protection than federal law. The Court stated that the Syllabus Point on which the petitioner was relying came

"from federal law in what has become known as the *Carroll* doctrine." See *Carroll v. United States*, 267 U.S. 132 (1925). The doctrine makes the warrantless search of an automobile justified if probable cause exists to believe that the "automobile contains contraband or evidence of a crime" and "exigent circumstances" exist "which prevent the obtaining of a search warrant." Obviously, this is the source of the identical state standard. The Court opined, therefore, that no greater protection was afforded under state law than is afforded under federal law.

The Court then concluded that the very nature of the automobile created the exigent circumstances. Simply stated, it can be driven away. So, the warrantless search was justified.

The conviction was affirmed.

A "Bum" Rap.

In the case of *State v. Johnson*, 2014 WL 2681579, the defendant, whose nickname was "Bum," was convicted of malicious assault. However, he was acquitted of charges of first degree robbery, assault during the commission of a felony, breaking and entering, conspiracy, and brandishing a firearm. The victim alleged that the defendant had followed him and, with the assistance of another individual, had forced their way into his motel room where he and his girlfriend were living and then repeatedly struck him in the head with handguns, for the purpose of obtaining money that the victim purportedly owed. The defendant's partner on that day, "Bo Bo," testified that the victim allowed them into the motel room and then struck him with a baseball bat, breaking

his arm. Any resulting injuries to the victims were matters of self-defense. "Bo Bo" denied that either he or the defendant possessed handguns.

The defendant first argued that the emergency room doctor should not have given an expert opinion that the victim's head wounds were consistent with being struck by a firearm. The defendant claimed that the doctor's opinion on this subject was not disclosed by the prosecutor who had merely provided that the doctor would "offer expert testimony regarding his opinion of the injuries and healing." Because the opinion the doctor gave was based on the fact that the victim said he had been hit by a pistol, which was included in the medical records and the investigative report, the Court did not find that the petitioner could have been surprised that the doctor's opinion was the injuries were consistent with being struck by a pistol.

The defendant then argued that the prosecution had violated the *in limine* order barring evidence about the defendant's previous criminal history. The State elicited testimony from an officer that the defendant was known to law enforcement officers.

The testimony resulted, however, from defense counsel's challenge to the victim about whether he correctly identified the defendant as the attacker, because he knew the attacker only as "Bum" Johnson and gave the first name as "Charles." The defendant's name is actually James.

The prosecution elicited from the investigating officer, therefore, testimony regarding how he determined "Bum" Johnson referred to the defendant. Over the

defendant's objection, the questioning was allowed because the court deemed that the defense counsel had made the identity of the defendant an issue. The officer then replied that other officers had helped to identify the defendant because one of the officers used to live by the defendant and knew him as "Bum" Johnson. No mention was made of any prior criminal record. The Court found the issue merited no consideration.

The conviction was affirmed.

It's a Privilege to be Wiretapped.

In the matter of *State ex rel. State v. Burnside*, 757 S.E.2d 803 (W. Va. April, 2014), Justice Ketchum wrote an opinion addressing the electronic surveillance of communications within an attorney's law office.

A confidential informant, who was equipped with a body wire, was sent by law enforcement personnel to meet with an attorney and to attempt to purchase cocaine from the attorney. The confidential informant picked the attorney up at the attorney's residence and then drove to the attorney's law office. Allegedly, the confidential informant met with

the attorney and purchased cocaine from the attorney during the meeting in the attorney's law office.

After his indictment, the attorney moved to suppress the audio recording of the conversation with the confidential informant in the attorney's office. The circuit court granted the motion to suppress.

The issue was whether the provisions of the *West Virginia Wiretapping and Electronic Surveillance Act*, W. Va. Code §62-1D-9(d), prohibited the recording of the conversation between the attorney and the confidential informant.

Notably, the recorded conversation was devoid of any discussion of legal matters.

The Act provides three basic protections for the attorney and a client. See W. Va. Code §62-1D-9(d). First, a privileged conversation does not lose its privileged character even if intercepted. Second, investigating officers are to cease the recording of any conversation that is "attorney-client in nature." Thirdly, "no device designed to intercept wire, oral, or electronic communications shall be placed or installed in such a manner as to intercept ... communications emanating

from the place of employment of any attorney at law licensed to practice law in this state." [italics added]. In the opinion of the indicted attorney, the act clearly "barred the audio recording because the conversation occurred in ... [the lawyer's] office." The circuit court agreed, although it did not bar the confidential informant from testifying about the conversation. The state filed its petition for a writ of prohibition against the lower court's order.

The indicted attorney argued for application of the plain language of the statute. The interception occurred in his office. Ergo, it is barred from use in the courtroom. The state argued that it should be construed in the context of the entire statute and thus had to be a privileged communication because, otherwise, "it would transform a law office into a sanctuary for criminal activity." The confidential informant was not the attorney's client and, therefore, the communication in the office was not privileged.

The Supreme Court of Appeals found the statute to be ambiguous because it referred, seemingly, to any communication but it followed only to "privileged communications." While the

Court engaged in a lengthy discussion of the act and its similarity to the federal counterpart upon which it was patterned, the Court settled on a commonsense construction of the statute. Simply, the Court considered it an absurdity to believe that the Legislature intended to "shield a lawyer, and any other person involved in criminal activity in a law office from being subject to wiretapping or electronic surveillance simply because the criminal activity was occurring in a law office." Accordingly, the provisions of the Act were construed to apply to only privileged conversations. The writ of prohibition against the lower court was granted.

The dissent by Judge Sims, who was sitting by temporary assignment, should be read for its general eloquence, including the references to the majority's "moonwalking" and "tap dance." The essence of the dissent can be distilled, however, from the following quotation attributed to Benjamin Franklin for the Pennsylvania Assembly in its *Reply to the Governor* dated November 11, 1755: "They who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety."

VOUCHER UPDATE

For the period of July 1, 2014 through August 31, 2014, West Virginia Public Defender Services has processed 4,353 vouchers for payment in a total amount of \$3,093,542.41

Most Highly Compensated Counsel

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

Law Office of David B. Kelley	\$ 42,162.00
R. Keith Flinchum	\$ 41,759.00
Harvey & Janutolo	\$ 39,201.00

Most Highly Compensated Service Providers

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

Tri S Investigations, Inc.	\$ 14,585.00
Special Security Services, LLC	\$ 12,772.17
Gary A. Rini	\$ 7,000.00

September/October

Days to remember.....

LABOR DAY SEPT 1ST

HAVE A RELAXING
LABOR DAY

The first Labor Day was held in 1882. Its origins stem from the desire of the Central Labor Union to create a holiday for workers. It became a federal holiday in 1894. It was originally intended that the day would be filled with a street parade to allow the public to appreciate the work of the trade and labor organizations. After the parade, a festival was to be held to amuse local workers and their families. In later years, prominent men and women held speeches. One of the reasons for choosing to celebrate this on the first Monday in September was to add a holiday in the long gap between Independence Day and Thanksgiving.

COLUMBUS DAY OCT 13TH



Christopher Columbus is often portrayed as the first European to sail to the Americas. He is sometimes portrayed as the discoverer of the New World. However, this is controversial on many counts. There is evidence that the first Europeans to sail across the Atlantic were Viking explorers from Scandinavia. In addition, the land was already populated by indigenous peoples, who had 'discovered' the Americas thousands of years before. Columbus Day originated as a celebration of Italian-American heritage and was first held in San Francisco in 1869. The first state-wide celebration was held in Colorado in 1907. In 1937, Columbus Day became a holiday across the United States. Since 1971, it has been celebrated on the second Monday in October.

HALLOWEEN OCT 31ST



Halloween originated as a pagan festival in parts of Northern Europe, particularly around what is now the United Kingdom. Many European cultural traditions hold that Halloween is a time when magic is most potent and spirits can make contact with the physical world. In Christian times, it became a celebration of the evening before All Saints' Day. Immigrants from Scotland and Ireland brought the holiday to the United States. The commercialization of Halloween started in the 1900s, when postcards and die-cut paper decorations were produced. Halloween costumes started to appear in stores in the 1930s and the custom of 'trick-or-treat' appeared in the 1950s.

POINTS OF INTEREST



Did you know.... Under the leadership of West Virginia State Treasurer John D. Perdue, the longest-tenured treasurer in state history, the Treasurer's Office functions as the state's bank, processing some \$13 billion in receipts and invoices each year.

The office transcends its core function, however, with programs friendly to virtually any state resident. An example is its **unclaimed property program**.

Unclaimed property refers to any asset from which an individual has become unintentionally separated. Common examples are forgotten final paychecks or left-behind utility deposits. Treasurer Perdue's office tries to find the person, through the publication of newspaper inserts and a complete database record on the office's website www.wvtreasury.com. Field representatives also work at reuniting people with their lost assets.

Of particular interest to the legal community, perhaps, is the existence of reporting requirements on the part of unclaimed property holders, such as businesses and banks. Those can also be found on the website. Lost proceeds from lawsuits and client trust accounts can become unclaimed property.

SMART529 is the state's officially sanctioned college savings program. Managed by The Hartford, the plan allows investors from anywhere in the country to participate. West Virginia residents may choose WVDirect, which establishes no minimum contribution level to get started and no minimum subsequent contributions.

All plans contain tax advantages but WVDirect is the only plan that allows investors a dollar-for-dollar deduction on taxable income for the purpose of calculating state income tax. Two other options exist under the SMART529 umbrella. All three plans are highly rated by www.savingforcollege.com, a leading website for rating college savings plans. For more information, go to www.SMART529.com or call toll free at 1-866-574-3542.

Another Treasurer's Office program friendly to public employees is **West Virginia Retirement Plus**. Retirement Plus is a deferred contribution plan which, like SMART529, lowers taxable income. The plan contains a wide array of investment options and has grown substantially since July of 2006.

All state employees are eligible to participate and virtually each county in the state also makes the plan available to its employees. This plan is similar to a 401k plan in structure except it is available only to public employees in West Virginia. To date, nearly 250 cities, counties and other entities have joined the plan.

For information about these and other services offered by the State Treasurer's Office, log onto www.wvtreasury.com or visit the office Facebook, Twitter and YouTube pages by searching for **wvtreasury**.

"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)

Honorable Earl Ray Tomblin - Governor

Ross Taylor - Secretary of Administration

Dana F. Eddy - Executive Director

Public Defender Services

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“Quotes” to Note

“The defendant is required to register as a sex offender for the rest of his life because he touched the breast of a girl he later married. In addition, our law provides that ...[the defendant] can never be removed from the sex offender registry even if he is later rehabilitated.

This makes no sense. Violent criminals serving long prison terms are eligible for parole if they rehabilitate while in prison. Drug addicts are sent to rehabilitation.

This man received worse than a scarlet letter. He will be limited in obtaining employment and it will be published on the internet registry until he dies. The majority opines that the Sex Offender Registration Act is not punitive. It is worse than punitive if you have rehabilitated and are required to tell your prospective employers that you are a sex offender.”

Dissent by the Honorable Menis E. Ketchum, Justice, with whom the Honorable Robin Jean Davis, Justice, joined, *In re: Jimmy M.W.*, 2014 WL 2404298.

“Quotes” to Note

“[A] skeletal “argument,” really nothing more than an assertion, does not preserve a claim.... Judges are not like pigs, hunting for truffles buried in briefs.” *State of West Virginia, Department of Health and Human Resources, Child Advocate Office, on Behalf of Robert Michael B., Minor Child of Trudy Mae B. v. Robert Morris N.*, 195 W.Va. 759, 765, 466 S.E.2d 827, 833 (1995) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991)).

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.

“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)