

PUBLIC DEFENDER SERVICES



SUPREME COURT OF APPEALS OF WEST VIRGINIA 2014 OPINION SUMMARIES

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State v. Fred S. Jr., __ S.E.2d __ (W. Va. 2013), 2013 WL 6605199

In the case of *State v. Fred S. Jr.*, __ S.E.2d __ (W. Va. 2013), 2013 WL 6605199, a memorandum decision was issued. The case is included for discussion because it can be used to demonstrate the effect that certain proposed revisions to the West Virginia Rules of Evidence will have. The defendant was charged with fifteen counts of sexual offenses involving a fourteen year old stepdaughter. At issue was Rule 404(b) evidence that had been admitted of a similar charge and another uncharged incident in North Carolina involving a different stepdaughter.

The trial court gave the cautionary instruction regarding the North Carolina charge and incident which provided that “other crimes, wrongs or acts, evidence of crimes ... is not admissible to prove the character of a person in order to show that he acted in conformity therein” but it could be used to show “motive, opportunity and intent, and your consideration is only limited to those things only and nothing else as far as that evidence is concerned.” The Supreme Court found that “a reasonable juror would have clearly understood this instruction” and “would not have been influenced, or misled by petitioner’s prior conduct in North Carolina.” While this view of the world can be debated, the Supreme Court went on to find that, even if it was an error, the “error was ultimately harmless” because “the jury would have come to the same conclusion.”

The analysis of such issues will change if the proposed revisions are adopted because, under the provisions of the new Rule 414, “in a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation” and the “evidence may be considered on any matter to which it is relevant.” Rule 413 provides for the same “permitted use” in a sexual assault case.

Simply, no issue under Rule 404(b) would have existed for appeal in this matter under these new rules of evidence.

EDITOR’S NOTE: The Revised Rules of Evidence as adopted did not include the Proposed Rule 413 and 414, but instead, retained the existing Rule 404(b).

* * *

EXCLUSIONARY RULE: COURT’S INHERENT POWER TO EXCLUDE.

EXCLUSIONARY RULE: GENERAL.

State v. Clark, __ S.E.2d __, (W. Va. 2013), 2013 WL 6224345

In the case of *State v. Clark*, __ S.E.2d __ (W. Va. 2013), 2013 WL 6224345, the Supreme

Court of Appeals of West Virginia scrutinized the use of the federal “investigative subpoena” that the United States Attorney General is empowered to issue under the provisions of 21 U.S.C. §876(a) in order to further the government’s investigation with respect to “controlled substances.” Numerous federal officials are authorized to issue “DEA” subpoenas and the resulting information is permitted to be released to “State and local officials engaged in the enforcement of laws related to controlled substances.” 28 C.F.R. §0.103.

The cinema was robbed by a lone individual on several occasions. The conclusion was reached by the investigating officer that the robber was aided and abetted by a cinema employee. Cell phone records obtained through a DEA subpoena established the link between an employee, who was the defendant, and another individual, who later confessed. The issue on appeal arose over the manner in which the cellular phone records were obtained and then distributed to the officer investigating only the robbery.

A motion was made to suppress all information obtained through the DEA subpoena. And the argument was simple: No drug-related activity was being investigated and, therefore, the subpoena was improperly obtained and the information from the cellular phone records was improperly released to the local police officers.

The State’s principal witness in the suppression hearing was a local officer who was a part-time security officer at the cinema. Because the defendant, a fellow employee, had a new helmet, jacket, and motorcycle but lived in subsidized housing, the officer suspected illicit income was the source. He asked an assistant manager who informed the officer that the defendant sold marijuana.

The part-time security officer happened to be a deputized federal agent as part of a federal-state task force. So, the State’s testimony was that the part-time security officer, who worked at the cinema that was robbed, was actually involved in a drug investigation and was not involved in the robbery investigation, which was handled by another local police officer. The officer then became a conduit for information from the federal agency on the drug investigation to the local police force on the robbery investigation.

A majority of the Supreme Court saw through the ruse. The subpoena was issued to assist in the robbery investigation and any drug nexus was attenuated. Essentially, the State failed to provide a “believable” explanation for the issuance of the subpoena.

So, did the exclusionary rule preclude the use of the cellular phone records? “No,” says the Supreme Court because the defendant “had no reasonable expectation of privacy in the phone records under the Fourth Amendment to the United States Constitution ... and under the West Virginia Constitution” Even the dissenting opinion agreed with this conclusion.

But the Supreme Court further reasoned that the critical issue in the case was that a local officer “purposefully misused the federal administrative subpoena to shortcut the procedural requirements for appropriately obtaining a search warrant for the phone records from a state

judicial officer.” The Supreme Court concluded, therefore, that the “prosecution of this case has been tainted by the Huntington police department’s egregious conduct.”

But, again, the Supreme Court highlighted that it was not the defendant that had suffered from the “wrongdoing,” but, instead, it was the “DEA” and the “integrity of the court system.”

The Court then found, therefore, that its inherent power to protect and preserve the integrity of the judicial system would enable it to exclude the evidence even though the defendant’s constitutional rights had not been violated.

But, guess what? After determining that it could exclude the evidence *even though no constitutional rights were violated*, the Court then determined that it would not suppress the evidence because the “integrity” of the judicial process was preserved, principally because, in somewhat circular reasoning, *no constitutional rights were violated*. The Court also found that a proper warrant could have been obtained and, even though the discussion was about the “integrity” of the court system, the failure to do so was not fatal. Essentially, the entire discussion about the Court’s exclusionary power was purely academic and, indeed, the dissent described it as “academic puffery.” The end result was that the defendant’s conviction was affirmed.

* * *

INSTRUCTIONS: CAUTION REGARDING CO-DEFENDANT’S GUILTY PLEA.

***State v. Flack*, __ S.E.2d __ (W. Va. 2013), 2013 WL 6224332**

In the case of *State v. Flack*, __ S.E.2d __ (W. Va. 2013), 2013 WL 6224332, the defendant and three men conspired to commit a burglary of the home of the defendant’s uncle. In the course of the burglary, the defendant’s second cousin was shot and mortally wounded by one of the defendant’s accomplices.

The accomplice who shot and killed the defendant’s cousin testified at the defendant’s trial. He specifically testified about his own guilty plea. The defendant’s counsel did not request a limiting or cautionary instruction regarding what weight should be given to the fact that the witness had pled guilty to the murder on which the defendant was being tried as an accomplice.

The issue was whether the trial court had to, *sua sponte*, give a limiting instruction that the issue of the guilty plea went only to the credibility of the witness and was not for the purpose of proving the guilt of the defendant. In a previous opinion, reported in *State v. Caudill*, Syl. Pt. 3, 289 S.E.2d 748 (W. Va. 1982), the Supreme Court had stated that “a failure by a trial judge to give a jury instruction so limiting such testimony is ... reversible error.”

The Court limited its previous syllabus point to only the situation in which the defendant has requested such an instruction. The reasoning was that, as a matter of defense strategy, a counsel might not want the limiting instruction because “such an instruction could emphasize the damaging testimony.” Intriguingly, the Court cited to a legal scholar’s opinion that “research shows that the

typical limiting instruction has little chance of being understood by a jury” and “research shows that the jurors are more prone to listen to the inadmissible evidence after they have been told to disregard it.” Admittedly, the Supreme Court was citing to the scholarly work to demonstrate why a “defense counsel” might not want the limiting instruction and was not adopting the research or the conclusions. But it is nonetheless ironic that, in many other opinions in which objections were made, the Supreme Court found the “error” of allowing inadmissible evidence “harmless,” especially when a cautionary instruction had been given.

The Court affirmed the conviction.

* * *

SENTENCE: NO CREDIT FOR HOME CONFINEMENT DURING DRUG COURT PROGRAM.

***State v. Davis*, __ S.E.2d __ (W. Va. 2013), 2013 WL 6184033**

In the case of *State v. Davis*, __ S.E.2d __ (W. Va. 2013), 2013 WL 6184033, the Court determined in a memorandum decision that the defendant was not entitled to credit against his sentence for the time he served in home confinement during his participation in the drug court program. The Court reasoned that the confinement for the drug court’s purposes did not meet the requirements of the Home Incarceration Act, W. Va. Code §§62-11B-1, *et seq.* The provisions of the Act require the defendant to be subject to oversight by a probation officer (rather than a drug court treatment team), to pay the home incarceration fee (rather than having the drug court program pay the costs), and to not be eligible for days off for good behavior and performing community service (rather than being rewarded by the treatment team). Accordingly, the defendant was not entitled to the credit against his later sentence for the time he served in home confinement under the auspices of the drug court.

* * *

DUE PROCESS: VIOLATION BY IMPOSING HARSHER SENTENCES ON APPEAL.

SENTENCE: PROBATION IS NOT A SENTENCE.

***State v. Workman*, __ S.E.2d __ (W. Va. 2013), 2013 WL 6183989**

In the case of *State v. Workman*, __ S.E.2d __ (W. Va. 2013), 2013 WL 6183989, the defendant “allege[d] that the circuit court violated his due process rights by imposing a harsher sentence on appeal from magistrate court.” The magistrate court had found the defendant guilty of domestic battery and suspended the resulting one year jail term in lieu of one year of *unsupervised probation*. On appeal, the circuit court affirmed the conviction and imposed the one year jail term, but suspended the term in lieu of one year of *supervised probation*. The governing syllabus point dictates that due process is denied when the sentencing judge in the trial *de novo* “imposes a heavier penalty than the original sentence.” The Court found, however, that probation

was not a penalty. Specifically, “probation is not a sentence for a crime but instead is an act of grace upon the part of the State to a person who has been convicted of a crime.” Accordingly, the harsher terms of probation did not constitute a harsher penalty.

* * *

JURY: DISQUALIFICATION OF JURORS.

WITNESSES: VIOLATING SEQUESTRATION ORDER.

***State v. Smith*, __ S.E.2d __ (W. Va. 2013), 2013 WL 6152397**

In the case of *State v. Smith*, __ S.E.2d __ (W. Va. 2013), 2013 WL 6152397, the defendant had been charged with the sexual abuse of his three nieces. The defense counsel challenged the failure to remove several jury members from the panel who “divulged during voir dire that either they were victims of sexual abuse/molestation, or they had a close family member who was sexually abused.” Indeed, the jury foreperson had stated that she was molested as a child and that her father had been prosecuted for the crime. The Supreme Court found that no “statutory or common law per se disqualification based on victimhood” existed. Instead, the defendant had to show “bias or prejudice to justify a strike for cause.” The Supreme Court then found that voir dire had been conducted in a manner “which safeguarded petitioner’s right to be tried by a jury free of bias and prejudice.”

The case also discussed the exclusion of all the defendant’s witnesses for violation of the sequestration order. A brother-in-law had been taking notes during the trial and then discussed the testimony with the defendant’s brother and sister, who were to be witnesses. The defendant’s motion for mistrial was denied, and the State’s motion to exclude the witnesses was granted. The Supreme Court upheld the trial court’s exclusion of the witnesses because the violation was “very deliberate and planned” and “was so egregious it rendered any potential testimony from these witnesses not credible.”

Notably, the general rule is that merely violating the sequestration order does not result in exclusion. The purpose of the sequestration order is to “gain assurance of credibility, and its violation is a legitimate subject of comment in this respect.” For the witness to be disqualified from testifying, therefore, “the violation has [to have] so discredited the witness to render his or her testimony incredible as a matter of law.” And, in this matter, the trial court did not even speak to the witnesses, so it is difficult to discern why the ultimate sanction was imposed, especially when no evidence was adduced that the defendant had encouraged this violation, except for the sterile fact that the defendant was related. Perhaps attention should be paid to the footnote in which the Court stated, “we note that petitioner made no proffer as to what the testimony of the witnesses would have been had they testified.” Simply, it is not clear from this memorandum decision what line was crossed that required exclusion, rather than an instruction from the judge to the jury that the jury could consider the witnesses’ credibility as compromised. If

you are in this situation, you must make a proffer of the evidence that is being excluded so that the prejudice can be ascertained.

* * *

INSTRUCTIONS: DISREGARDING FAILURE TO CALL AN EXPERT WITNESS.

IMPROPER REMARKS BY PROSECUTION: COUNTERING DEFENSE COUNSEL'S ARGUMENT.

***State v. Adkins* __ S.E.2d __ (W. Va. 2013), 2013 WL 6183991**

In the case of *State v. Adkins* __ S.E.2d __ (W. Va. 2013), 2013 WL 6183991, the prosecutor, in the rebuttal portion of his closing statement about the defendant's guilt on drug charges, made reference to the defendant's failure to call an alibi witness that had been mentioned in the defendant's testimony. No instruction to the jury was given to disregard the failure to call an alibi witness. The Court found that the prosecutor's remarks did not amount to the "unlawful shifting of the burden of proof" because the remarks were merely a "reasonable inference based upon testimony introduced by the defense and intended to question the veracity of testimony by the defense and intended to question the veracity of testimony from petitioner and her husband." In other words, the prosecutor could not argue that the defendant failed to provide an alibi, but once she did provide an alibi, the prosecutor could comment on the lack of evidence about the alibi.

The Court further found the prosecutor's comments to be isolated and overwhelmed by the remaining testimony from a confidential informant regarding her sale of drugs. The Court finally found that the prosecutor did not intend to divert the jury's attention to extraneous matters, even though the remarks were reserved for rebuttal. Instead, the remarks related directly to an issue raised in the defendant's closing argument.

* * *

SENTENCE: CONSTITUTIONALITY OF SUPERVISED RELEASE.

SENTENCE: PROPORTIONALITY OF SUPERVISED RELEASE PERIODS OF INCARCERATION.

***State v. Hargus and State v. Lester*, __ S.E.2d __ (W. Va. 2013), 2013 WL 6050695**

In the consolidated appeal of *State v. Hargus and State v. Lester*, __ S.E.2d __ (W. Va. 2013), 2013 WL 6050695, constitutional challenges were made to the "extended supervision statute for certain sex offenders" set forth in W. Va. Code §62-12-26(g)(3). Defendant Hargus "pled guilty to one count of possession of materials depicting a minor engaged in sexually explicit conduct" and was sentenced to "two years of incarceration, a period of thirty years extended supervision, and lifetime registration as a sex offender." Defendant Hargus was held in violation

of his supervised release by failing to provide an alias to the state police, failing to provide his social security number, and providing a false date of birth. Defendant Hargus was then sentenced to serve five years of his supervised release period of thirty years in the penitentiary and, upon release, was to serve a supervised release period of twenty-five years.

Mr. Lester was found to have violated a sex offender condition and was sentenced to serve two years of his supervised release period by incarceration.

Again, the primary issue was “the constitutionality of the portion of W. Va. Code §62-12-26 that permits the revocation of supervised release and additional incarceration when a sex offender violates a condition of supervised release.” The statute providing for a period of supervised release had been held to be constitutional in *State v. James*, 710 S.E.2d 98 (W. Va. 2011). This appeal concerned, however, the “modification, termination, or revocation of the supervised release portions of the defendants’ sentences.”

Simply, by a finding of a violation by “clear and convincing evidence,” revocations of the period of supervised release can result in additional periods of incarceration.

The first notation was that this punishment was attributable to the original crime and not the activities that resulted in the violation. Restated, “treating post revocation sanctions as part of the penalty for the initial offense” avoids many constitutional issues, such as the lack of a requirement of guilt beyond a reasonable doubt.

Moreover, the Court found that equal protection was not denied simply because the statute only applied to sex offenses. The legislature had the authority “to criminalize certain conduct and to determine punishment for that conduct.” The defendant could not complain “that those who violate different criminal statutes are punished differently than he is.” Only if someone committing the same crime was treated differently would equal protection be a consideration.

Finally, the Court refused to find that the sanctions for violating conditions of supervised release were disproportionate to the crime and constituted, therefore, cruel and unusual punishment. The Court stated that child pornography was a “heinous” offense and the violations constituted a pattern of dishonesty. Accordingly, the sanction was not disproportionate to the crime and did not “shock the conscience or offend fundamental notions of human dignity.” The other defendant was similarly denied relief.

An additional issue raised was the complete ban on the use of the computer, which one defendant argued was a first amendment violation. Indeed, federal cases found that a lifetime ban on the use of social media was too restrictive and constituted a “greater deprivation of liberty than was reasonably necessary.” The Court found that because the defendant “has shown a propensity for downloading sexually explicit material involving minors onto his computer,” a restriction of use of the internet, “while in his residence,” was not unreasonable, especially because the provision did not indicate it was in effect for the remainder of his life. The opinion does raise the possibility, therefore, that conditions might be imposed that would be

unconstitutionally restrictive, such as the banning of “all” computer usage or the “lifetime” restriction against such use.

* * *

ETHICS: GUARDIAN AD LITEMS ARE COVERED BY RULES OF PROFESSIONAL CONDUCT.

***State ex rel. Ash v. Swope*, __ S.E.2d __ (W. Va. 2013), 2013 WL 5976106**

In the case of *State ex rel. Ash v. Swope*, __ S.E.2d __ (W. Va. 2013), 2013 WL 5976106, the issue of the guardian ad litem’s ethical duties to his or her ward was decided. In this case, the guardian ad litem was appointed for the incarcerated defendant for proceedings in family court, which involved a domestic violence petition against the defendant. The guardian ad litem met with the incarcerated defendant and was instructed to deliver a message to the family court that if the petitioner did not leave him alone, he would go to her place of employment and kill her. When the message was delivered at the proceeding, the incarcerated defendant was then charged with intimidation of, and retaliation against, a witness. The prosecutor subpoenaed the guardian ad litem, who moved to have the subpoena quashed because the “statement was a confidential communication protected by the attorney-client privilege.” The circuit court quashed the subpoena.

The Supreme Court affirmed that, similar to its holding with respect to guardians ad litem for children in abuse and neglect proceedings, “because many aspects of a guardian ad litem’s representation of an incarcerated person in a family court proceeding comprise duties that are performed by a lawyer on behalf of a client, the rules of professional conduct generally apply to that representation.” However, the rule of confidentiality of information is one which is “under the exclusive control of the client rather than the attorney.” Moreover, the information “must be intended to be confidential.” Accordingly, the incarcerated defendant’s statement to the guardian ad litem was not confidential because the defendant directed the attorney to “disseminate his statement to everyone at the family court hearing.” The Supreme Court found, therefore, that the circuit court should not have quashed the subpoena and granted the writ of prohibition.

* * *

DOUBLE JEOPARDY: MULTIPLE PUNISHMENTS FOR SAME OFFENSE.

***Tony T. Gerlach v. David Ballard, Warden*, __ S.E.2d __, 2013 WL 5814115**

In the case of *Tony T. Gerlach v. David Ballard, Warden*, __ S.E.2d __, 2013 WL 5814115, an issue of Double Jeopardy was raised. The issue arose because the petitioner in this habeas proceeding had been convicted of two offenses arising out of one incident. The convictions were for the offense of second degree murder and the offense of the death of a child by a parent, guardian or custodian. For each conviction, the petitioner received a 40 year sentence, which was

to be served consecutively.

Justice Loughery explained that the Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and Article III, Section 5 of the West Virginia Constitution afforded protection against multiple punishments for the same offense. See Syl. Pt. 1, *State v. Gill*, 416 S.E.2d 253 (W. Va. 1992) and Syl. Pt. 1, *Conner v. Griffith*, 238 S.E.2d 529 (W. Va. 1977).

The resolution of the issue required the determination of legislative intent. Because the legislature has the substantive power to define crimes and prescribe punishments, the sentencing court cannot exceed the legislative limits on an offense by imposing multiple punishments for the same offense. So, was this one offense or two separate and distinct offenses, warranting multiple punishments?

The petitioner's main point was that the legislature had expressly declared "sexual abuse" and "sexual abuse by a parent, guardian or custodian" to be "separate and distinct offenses," but had not done so for the offense of the death of a child and the offense of second degree murder. Moreover, the identical penalty for both offenses further indicated in the petitioner's opinion that the legislature intended the offenses to be alternative offenses.

The interesting facet of this argument is that the legislature had expressly provided that, if the malicious and intentional actions of a parent, guardian or custodian in depriving a child of food, clothing, shelter or medical care resulted in death, then these acts constituted murder in the first degree. W. Va. Code §61-8D-2. But if the actions involved infliction of pain, illness, or impairment upon the child which resulted in death, the governing statute provided that it resulted in a "felony" with a specified penalty of ten to forty years of imprisonment. W. Va. Code §61-8D-2a. Justice Loughery found that by defining the offense as a felony, rather than specifically designating it as an offense of murder as it did in the other statute, the legislature clearly intended it to be a separate offense from second degree murder.

In reviewing the statutes, the explanation might be that a life sentence for the death of a child in certain instances, without an accompanying intent to kill, should be imposed, while, in others, a lesser penalty should be imposed. The intent of the legislature might have been to simply attribute differing degrees of penalty for the death of a child, such as first and second degrees for murder, but accomplishing the same purpose in all the statutes: the elimination of the required element of "intent to kill."

The unanimous opinion of the court, however, was that this difference in language meant that this was to be a separate offense from second degree murder, which would require "intent to kill," and the penalty could be imposed in addition to the penalty for second degree murder, if the additional element of "intent to kill" was, in fact, proved.

* * *

SENTENCE: CONSTITUTIONALITY OF SUPERVISED RELEASE PERIODS OF INCARCERATION.

State v. Coates, 2014 WL 620507

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

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

The argument was that the sentence imposed for the second revocation violated the petitioner's right to due process and right to freedom from cruel and inhuman punishment. The petitioner presented the following scenario as supporting the constitutional arguments: “A person could serve nine years and three hundred and sixty-four days of supervised release and then violate the terms of his release and then be sentenced to the full ten years in prison.” The petitioner believed this to be undeniably unjust.

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

* * *

APPEAL: FAILURE TO RAISE ARGUMENT IN TRIAL COURT.

State v. Tyler, 2014 WL 620486

The memorandum decision in *State v. Tyler, 2014 WL 620486*, is included for discussion because it demonstrates the frustration that can exist for trial counsel. The petitioner was accused of maliciously assaulting a person at a McDonald's restaurant. The petitioner claimed that he was

defending himself. The case should have been readily resolved because surveillance footage of the incident was obtained by the investigating officers and stored on a DVD.

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

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

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

* * *

INSTRUCTIONS: HARMLESS ERROR IN NOT INSTRUCTING ON ELEMENTS OF OFFENSE.

INSTRUCTIONS: PROSECUTOR'S ARGUMENT ASSUAGED ERROR IN INSTRUCTIONS ON ELEMENTS OF OFFENSE.

***State v. Roger P.*, 2014 WL 620483**

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

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

Admittedly the Court also relied upon the testimony that tended to prove the "acts" that occurred. Nonetheless, the Court essentially found that the prosecutor's statements regarding the element of sexual gratification assured that the jurors found the element of sexual gratification as they deliberated the matter.

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

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

* * *

MISTRIAL: INADVERTANT DISCLOSURE OF DEFENDANT'S ASSERTION OF RIGHT TO COUNSEL NOT GROUNDS FOR MISTRIAL.

SUPPRESSION: SUPPRESSED STATEMENT CAN BE USED TO CROSS EXAMINE EXPERT.

EVIDENCE: STATE'S EXPERT'S FAILURE TO RECORD DEFENDANT'S INTERVIEW NOT FATAL.

EVIDENCE: STATE CAN PRESENT EVIDENCE EVEN IF DEFENDANT STANDS SILENT ON THE ISSUE OF MERCY.

State v. Cook, 2014 WL 620478

In *State v. Cook, 2014 WL 620478*, the memorandum decision contained several noteworthy points. The first is that a suppressed statement by the defendant may not be used by the State in its case-in-chief, but if an expert is called by the defendant, the expert can be cross-examined by use of the suppressed statement. In this matter, the defendant never took the stand, but statements that had been made only after a right to counsel had been asserted were used in the cross-examination of the defendant's expert on the issue of his diminished capacity. The Court relied on its previously issued Syllabus Point that "when a defendant offers the testimony of an expert in the course of presenting a defense such as the insanity defense or the diminished

capacity defense, which calls into question the defendant's mental condition at the time the crime occurred, and the expert's opinion is based, to any appreciable extent, on the defendant's statements to the expert, the State may offer in evidence a statement the defendant voluntarily gave to police, which otherwise is found to be inadmissible in the State's case-in-chief, solely for impeachment purposes either during the cross-examination of the expert or in rebuttal, even though the defendant never takes the witness stand to testify." Syl. pt. 3, *State v. DeGraw*, 470 S.E.2d 215 (W. Va. 1996).

The second point is that the State's expert's failure to record the entirety of the interview with the witness was not fatal. The Court requires such a recording to protect the defendant's constitutional privilege against self-incrimination and right to assistance of counsel at court-ordered psychiatric examinations. See *State v. Jackson*, Syl. Pt. 2, 298 S.E.2d 866 (W. Va. 1982). The Court found that only five to six minutes of the interview were missing and the failure to record this portion was unintentional. But notably, the Court stated that "no evidence was presented to indicate that any topic of substance was discussed during the gaps in the recording." The question that arises is, without the recording, how could you know with certainty what was discussed? Nonetheless, the Court found that the defendant's rights had not been compromised.

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

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

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

* * *

JURY: IMPROPER REMARKS BY PROSPECTIVE JUROR NOT GROUNDS FOR MISTRIAL.

OBJECTIONS: FAILURE TO OBJECT TO COURT'S QUESTIONING OF JUROR PANEL.

EVIDENCE: VICTIM'S "SEX OFFENDER" STATUS NOT ADMISSIBLE.

DISCOVERY: STATE NOT OBLIGATED TO OBTAIN STATEMENTS OF WITNESS GIVEN TO PERSONAL ATTORNEY.

***State v. Anderson*, __ S.E.2d __ (W. Va. 2014), 2014 WL 642504**

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

The Supreme Court noted that the petitioner's counsel did not object to this questioning, but the petitioner's counsel did move for a mistrial when the *voir dire* was concluded. On appeal, the petitioner asserted that the circuit court's questioning "chilled" the jurors from admitting overhearing the remark. The Supreme Court found that the circuit court had properly followed the procedure in *State v. Finley*, 355 S.E.2d 47 (W. Va. 1987) in that it "innocuously inquired as to whether the remainder of the panel even heard the unidentified remark..." The Court found no error. The Court noted that the petitioner's counsel had even left one juror on the panel who had admitted to hearing the remark, so how could there be any prejudice?

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

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

HEARSAY: STATEMENTS MADE BY CHILD TO MOTHER, SOCIAL WORKER, AND STATE TROOPER ADMISSIBLE.

***State v. Lambert*, 750 S.E.2d 657 (W. Va. 2013)**

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

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

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

The final conclusion was that this deprivation of the defendant's constitutional rights was "harmless beyond a reasonable doubt" because this was a "fleeting reference in a trial otherwise free of error." Admittedly, the defendant did not dispute the fact of masturbation. Nonetheless,

as an editorial comment, the statement did defeat the defense that the child could not see the act.

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

* * *

WITNESSES: ALIBI WITNESS EXCLUDED FOR DEFENDANT’S FAILURE TO DISCLOSE.

***State v. Schlatman*, 2014 WL _____**

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

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

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

The Court ended its analysis by emphasizing that the defendant could have taken the stand and testified regarding the subject of the excluded witness’ testimony. Rule 12.1 of the Rules of

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

* * *

RECIDIVISM: STRICT CONSTRUCTION OF RECIDIVIST PROVISIONS.

RECIDIVISM: FAILURE TO FOLLOW PROPER PROCEDURE.

***Holcomb v. Ballard*, 752 S.E.2d 284 (W. Va. 2013)**

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

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

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

The Court held true to the statutory language and held that the second recidivist proceeding was faulty in that the defendant had not been arraigned before the end of the term of court in which he had been convicted on the retrial. The circuit court was incorrect to hold that this error was harmless. Notably, the Court reiterated its holding that the compliance with the provisions of the recidivist statute is “jurisdictional and mandatory.” Accordingly, the failure to follow the provisions is “not subject to harmless error analysis.”

But, again, the State argued that the first procedurally correct recidivist sentence should be merged with the second conviction on the same offense. The Court noted, however, that the habitual criminal provisions are to be strictly construed against the prosecution because the provisions are “highly penal, [and] in derogation of the common law.” The Court held, therefore,

that “a recidivist sentence under W. Va. Code §61-11-19 ... is automatically vacated whenever the underlying conviction is vacated.”

* * *

IMPROPER REMARKS BY PROSECUTORS: PROSECUTORS NOT TO REMARK UPON DEFENDANT’S EXPECTED EVIDENCE.

IMPROPER REMARKS BY PROSECUTORS: WAIVER IF NO CONTEMPORANEOUS OBJECTION MADE AND CURATIVE INSTRUCTION REQUESTED.

***State v. Robert Scott R.*, __ S.E.2d __ (W. Va. 2014), 2014 WL 350915**

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

* * *

SENTENCE: PROBATION IMPROPER WHEN STATUTORY SENTENCE IMPOSED AND NOT SUSPENDED.

SENTENCE: COMMUNITY SERVICE IS AN IMPROPER ALTERNATIVE WHEN STATUTORY SENTENCE IS IMPOSED AND NOT SUSPENDED.

***State v. Bennett*, __ S.E.2d __ (2014), 2014 WL 1758026**

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

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

The Court noted that, “before a court may impose a period of probation, the court must first suspend the imposition or execution of at least some portion of the sentence prescribed for the conviction.” Under the truancy statutes, the first conviction of the offense results in an alternative

sentence of (i) a fine of \$50.00 to \$100.00, or (ii) the parent's attendance at school with the child for a period of time. Because the court imposed a fine of \$50.00 and did not suspend the sentence, "the court had no basis to place the petitioner on probation as there was no other sentence to be imposed in the event of a probation violation on the part of the petitioner." Reversible error was committed.

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

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

* * *

SENTENCE: KENNEDY PLEA DOES NOT PRECLUDE LACK OF REMORSE AS A SENTENCING FACTOR.

State v. Keith R., 2014 WL 1686932

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

* * *

EVIDENCE: EXPERT TESTIMONY ON RELIABILITY OF EYEWITNESS TESTIMONY EXCLUDED.

State v. Utter, 2014 WL 1673025

In the memorandum decision of *State v. Utter, 2014 WL 1673025*, the Court was asked to find error in the lower court's exclusion of an expert witness' testimony on the reliability of eyewitness testimony. Notwithstanding that the recent literature discredits, and recent lectures around the circuits all decry, the reliability of such testimony, the circuit court found that, in accordance with the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)* and *Wilt v. Buracker, 443 S.E.2d 196 (W. Va. 1993), cert. denied, 511 U.S. 1129 (1994)*, the

“evidence propounded was not of such scientific, technical, or specialized area to assist the trier of fact.”

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

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

* * *

SPEEDY TRIAL: THREE TERM RULE MET.

SPEEDY TRIAL: STATUTORY THREE TERM RULE AND SIXTH AMENDMENT BALANCING TEST APPLY.

APPEAL: DO NOT INCORPORATE ARGUMENTS BY REFERENCE IN APPELLATE BRIEFS.

***State v. Jordan*, 2014 WL 1672951**

In the memorandum decision of *State v. Jordan*, 2014 WL 1672951, the court reiterated the standard that “it is the three-term rule, W. Va. Code, 62-3-21 [1959], which constitutes the legislative pronouncement of our speedy trial standard under Article III, Section 14 of the West Virginia Constitution.” The three-term rule is that “an individual indicted for a crime must be tried within three terms of the indictment.” However, the provisions of the Sixth Amendment to the United States Constitution impose a balancing test as its speedy trial analysis, measuring four factors: (1) the length of the delay; (2) the reasons for delay; (3) the defendant’s assertion of his rights; and (4) prejudice to the defendant. The case is analyzed on the basis that if one or the other test is failed, then the motion to dismiss the indictment must be granted.

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

The decision is primarily reported because of the following footnote which serves as guidance to counsel in appellate work: “For his argument on this point, petitioner indicates in his brief that ‘he has completely set forth that argument in his previous pleadings [filed in the circuit court], wherefore **he incorporates by reference specifically**’, his motion to modify the circuit court’s order. [emphasis added]. We pause to caution counsel that a brief filed with this Court must set forth an argument that ‘contains[s] appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal.’ W. Va. R. App. P.10(c)(7). Petitioner’s incorporation by reference does not comport with the spirit of this rule inasmuch as he has cast a broad net and failed to tailor his argument for this Court’s consideration.”

* * *

PLEA AGREEMENTS: AMBIGUITY TO BE CONSTRUED AGAINST STATE.

***State ex rel. Thompson v. Pomponio*, __ S.E.2d __, 2014 WL 1659327 (W. Va. 2014)**

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

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

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

It should be noted, however, that defense counsel must strive to make plea agreements clear and unambiguous. In this matter, the defendant’s construction of the plea agreement was

fortunately supported by both statements of the former prosecutor and the Court during sentencing. Without these supporting statements, it is not so certain that, “upon review of the appendix record,” the court would have found the “subject plea agreement to be ambiguous and deficient in its construction.”

* * *

RULE 403: PREJUDICE MUST BE “UNFAIR.”

APPEAL: ISSUES MUST BE SUPPORTED BY AUTHORITY.

SPEEDY TRIAL: CONTINUANCE OF TRIAL PROPER DUE TO PROSECUTORS SURGERY EVEN THOUGH HE WENT TO HEARINGS AND HAD AN ASSISTANT.

MISTRIAL: MOTION MUST BE MADE BEFORE VERDICT IS RENDERED.

***State v. Corey*, __ S.E.2d __, 2014 WL 1659282 (W. Va. 2014)**

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

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

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

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

Another issue was whether the lower court had properly delayed the defendant’s trial due to the surgery of the prosecutor. The defendant pointed out that, after the surgery, the prosecutor

attended several hearings, so how debilitating could the surgery have been? Moreover, the prosecutor had an assistant.

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

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

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

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

* * *

INSTRUCTIONS: JURY NEED NOT BE INSTRUCTED ON LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER WHEN NOT SUPPORTED BY EVIDENCE.

***State v. Skeens*, __ S.E.2d __, 2014 WL 1408468 (W. Va. 2014)**

In *State v. Skeens*, __ S.E.2d __, 2014 WL 1408468 (W. Va. 2014), a *per curiam* opinion, the defendant was convicted of first degree murder without a recommendation for mercy and was sentenced to life in prison without the possibility of parole. The victim was the defendant’s former high school football coach, now 73 years of age, against whom the defendant had no known animus. It had been almost 30 years since the defendant had been coached by the victim. The defendant stabbed his former coach 43 times. Apparently, after the stabbings, the defendant “sat down in the ... [victim’s] living room and ate ice cream.”

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

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

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

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

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

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

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

* * *

APPEAL: NO JURISDICTION IN LOWER COURT TO RULE ON MOTION TO REDUCE SENTENCE WHEN MATTER IS ON APPEAL.

SENTENCE: NO NEED EXISTS TO FILE MORE THAN ONE MOTION TO REDUCE SENTENCE.

State v. Robey, 2014 WL 901746

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

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

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

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

* * *

IMPROPER REMARKS BY PROSECUTOR: INJECTION OF RELIGION INTO ARGUMENT REQUIRES STRICT SCRUTINY AND USUALLY RESULT IN REVERSAL.

IMPROPER REMARKS BY PROSECUTOR: REFERENCE TO JESUS CHRIST AS A HISTORICAL FIGURE DID NOT IMPROPERLY INJECT RELIGION INTO DELIBERATIONS.

State v. Waddell, 2014 WL 1243168

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

The defendant argued that his constitutional rights were violated by the injection of religion into the closing argument and by telling the jury that they were the conscience of the community. The Court, in a 4-1 decision, held that the reference to “Jesus Christ” or to “being the conscience of the community” was merely in support of the point that “the jury should pay attention to what petitioner said during the attack to determine if malice existed.” The Court acknowledged that it had previously recognized that it gives “strict scrutiny to cases involving the alleged wrongful injection of race, gender, or religion in criminal cases,” and “where these issues are wrongfully injected, reversal is usually the result.” *Syl. Pt. 9, State v. Guthrie*, 461 S.E.2d 163 (W. Va. 1995). The distinction was then made that, in this case, the prosecutor was referring to “Jesus Christ as a historical figure and not an appeal to sympathy or emotion.” The Court is seemingly suggesting that the religious segue was not intended to replace the elements required by law, but was merely a means of focusing the jury on the effort of applying these elements.

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

* * *

IMPROPER REMARKS BY PROSECUTOR: REVERSIBLE ERROR NOT FOUND DUE TO REMARKS ABOUT DEENDANT’S FAILURE TO TESTIFY BECAUSE IT WAS REFERENCE TO DEFENSE COUNSEL’S OPENING STATEMENT.

IMPROPER REMARKS BY PROSECUTOR: STATEMENT THAT EVIDENCE IS UNCONTRADICTED IS NOT IMPROPER AS COMMENTING UPON DEFENDANT’S FAILURE TO TESTIFY.

***State v. Hillberry*, 754 S.E.2d 603 (W. Va. 2014)**

In the reported decision of *State v. Hillberry*, 754 S.E.2d 603 (W. Va. 2014), the defendant was convicted of robbery in the first degree and was sentenced to life in prison as a recidivist. The charges arose out of a robbery of a lounge in Farimont which was captured on video. The defendant’s former female roommate identified the defendant in the video by his shirt, shoes and the scar on his lip. The roommate produced a t-shirt identical to that worn in the video and testified that the t-shirt belonged to the defendant. A co-worker testified to a conversation in which the defendant admitted to the robbery and that “he was caught on camera.”

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

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

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

The prosecutor apparently attributed the motive of “financial problems” to the defendant. In his opening the defense counsel asked the jury to take note of the good money made by the defendant in the coal mines and a new car driven by the defendant, all of which indicated that the defendant had no financial issues. Counsel further indicated that the defendant was somewhere else when the crime was committed. The prosecutor claimed that his closing statements addressed these remarks in the defense counsel’s opening statement. No evidence was apparently elicited from any witness regarding any of these assertions.

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

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

The practice point is that defense counsel should consider what statements will be made in the opening statement regarding the evidence, keeping in mind that the prosecutor can make comments regarding the failure to prove the facts made in the statement.

Another error that was alleged was the police officer’s comment that when he questioned the defendant about the shoes displayed in the video, the defendant wanted to stop answering

questions and wanted to have a lawyer present. This violated the general rule “prohibiting the use of the defendant’s silence against him” for which the basis is that “it runs counter to the presumption of innocence that follows the defendant throughout the trial.” *State v. Boyd*, 233 S.E.2d 710, 716 (W. Va. 1977). The error was disregarded because it was “an isolated comment and the prejudicial effect was minimal.”

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

* * *

SEARCH AND SEIZURE: WARRANT NOT REQUIRED TO ENTER HOME DUE TO EMERGENCY EXCEPTION AND AS A PROTECTIVE SWEEP.

EVIDENCE: UNDER TOTALITY OF CIRCUMSTANCES, “OVERLY SUGGESTIVE LINE UP” DID NOT REQUIRE SUPPRESSION OF IDENTIFICATION.

***State v. Kimble*, __ S.E.2d __, 2014 WL 902490 (W. Va. 2014)**

In the reported case of *State v. Kimble*, __ S.E.2d __, 2014 WL 902490 (W. Va. 2014), a search and seizure was held to be reasonable under the 4th Amendment to the US Constitution, although the vote was 4-1 with a strongly worded dissent by Chief Justice Davis. A motorist called to say that he had been fired upon at a specific location by “a shirtless male wearing jeans and a black hat.” The responding officers went to the defendant’s home because it was located near the site of the shooting and one of the officers had “previously responded to reports of the petitioner shooting guns near the residence.”

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

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

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

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

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

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

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

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

* * *

RECIDIVISM: ENHANCED FELONIES CAN BE PREDICATE FELONIES FOR PURPOSES OF APPLYING RECIDIVIST STATUTE.

State v. Powell, 2014 WL 2404304

In *State v. Powell, 2014 WL 2404304*, the defendant was sentenced to life in prison as a recidivist. The facts are somewhat murky in the memorandum decision, but, apparently, the defendant was facing sentencing on two convictions in one proceeding; one conviction was for battery of one victim and one conviction was for domestic battery, third or subsequent offense, of another victim. The compelling issue was whether “enhanced felonies” could constitute the predicate felonies for the recidivism finding. Specifically, one predicate felony was a prior conviction for third offense domestic battery, which was enhanced from a misdemeanor using the same convictions that resulted in an enhancement of his current charge to felonies. The court of appeals held, without lengthy discussion, that the legislature intended that a felony conviction

resulting from an enhanced misdemeanor could be used to apply the recidivist statute. The court relied upon an eighteen year old decision that had upheld using a third offense DUI conviction to apply the recidivist statute. The court did not directly address the argument that this offended the double jeopardy preclusion because the same convictions supported the enhancement of a prior conviction to a felony and the enhancement of the current charges to felonies. The court did note that “it is the repeat nature of the criminal’s history that justifies the enhancement of the punishment.”

* * *

RULE 608(b): WITNESS CAN BE CROSS-EXAMINED ON SPECIFIC INSTANCES OF CONDUCT, BUT DOCUMENTARY EVIDENCE OF SUCH CONDUCT IS NOT ADMISSIBLE.

RULE 404(b): EVIDENCE OF DOMESTIC VIOLENCE PROTECTIVE ORDER WAS ADMISSIBLE AS INTRINSIC TO CHARGES OF BATTERY.

State v. Ruben C., 2014 WL 2404301

In *State v. Ruben C., 2014 WL 2404301*, the petitioner was convicted of first degree sexual assault, domestic battery, and violation of a domestic violence protective order. The underlying facts arose out of the defendant’s and his wife of seventeen years’ ride in a car during which the spouse informed the defendant that she wanted a divorce. The defendant reacted violently resulting in the eventual entry of an emergency protective order. The defendant subsequently returned to the home and allegedly assaulted the spouse, threatening her with a knife. While arguments were made regarding the insufficiency of the evidence, the issue warranting discussion was the defendant’s insistence that extrinsic evidence should have been permitted regarding the wife’s welfare fraud. In the defendant’s opinion, the evidence furthered his argument that the allegations against him were fabricated because “by sending petitioner to prison, the victim would be able to further hide her acts of fraud.”

The trial court permitted cross-examination on the issue pursuant to rule 608(b) of the West Virginia Rules of Evidence (now amended). The rule permits an inquiry on cross-examination of “specific instances of conduct” of a witness if the conduct goes to credibility. The rule does not permit the introduction of documentary evidence to prove the conduct. Notably, however, the witness is permitted to assert a right against self-incrimination with respect to such questions.

And, in this case, the wife, as a witness, did just that. So, the trial counsel could ask questions about the purported welfare fraud. The witness could refuse to answer the questions. But the defendant could not then prove the fraud by using extrinsic evidence such as welfare checks issued to her in her name and payroll checks issued to her using an alias.

The Court applied the literal provisions of the Rule and did not permit the admission of extrinsic evidence. The question that must be asked is whether attacking credibility and insinuating a lie is the same as establishing a motive for the defendant to lie that goes to the gravamen of the charges? The first would be governed by Rule 608(b), but the second would seemingly be an

intrinsic part of the defense. The Court did not address this issue, stating that petitioner did not “offer support from any other legal authority” regarding this distinction.

Further handcuffing the defendant in this matter, the Court refused to sanction the use of an “adverse inference” instruction regarding the assertion of the Fifth Amendment by the wife on the questions of the welfare fraud, stating that, while available in a civil matter, there is “no precedent for such an instruction in the criminal context.”

Finally, the introduction into evidence of the acts that gave rise to the domestic violence protective order was permitted despite the challenge that Rule 404(b) had not been followed. Specifically, no *in camera* pretrial hearing had been held on the evidence. The Court sanctioned the use of the testimony as “intrinsic” to a crime that was charged, *i.e.*, the violation of the domestic violence protective order. The acts were the story behind the issuance of the order. The Court then reiterated that, “as this Court has held in past cases, evidence that is intrinsic to the indicted charge is not governed by Rule 404(b).”

* * *

HABEAS CORPUS: HABEAS COUNSEL CAN BE FOUND TO HAVE INEFFECTIVELY ASSISTED DEFENDANT.

***Ballard v. Hurt*, 2014 WL 2404302**

In *Ballard v. Hurt*, 2014 WL 2404302, the Court affirmed the lower court’s grant of a habeas corpus petition to the defendant. Notably, the petitioner in this appeal was the warden who sought the reversal of the trial court’s actions. The matter had actually been previously remanded by the Court due to the failure of the trial court to make specific findings of fact and conclusions of law relating to its ultimate finding that trial counsel had been ineffective. A thirty-two page order was then entered by the trial court.

The underlying case was a first-degree murder case arising out of the robbery of a gas station/convenience store. The trial counsel was found ineffective due to failing to investigate an alibi, failing to secure the attendance of witnesses, failing to object to “non-disclosed” State witnesses, seeking a change of venue when the first trial resulted in a hung jury but failing to challenge the new venue, conducting a “haphazard” *voir dire*, and failing to object to the prosecutor’s remarks in closing in which the defendant was characterized as a drug dealer.

The case is notable for several reasons. First, it emphasizes that it is most important to convince the trial court that habeas is warranted. Affirmance of a trial court’s decision is more likely than reversal because, in the end, the standard is whether the lower court abused its discretion. Secondly, it emphasizes the need for habeas counsel to assist the habeas court by submitting proposed findings of fact and conclusions of law, because the appeal court will not summarily affirm a decision to grant habeas relief. Thirdly, the first habeas petition was denied, but another habeas was permitted to be filed due to the ineffective assistance of the habeas counsel. So, habeas counsel can be subject to the same scrutiny as trial counsel in the representation. And,

finally, it pays to be lucky in that the co-defendant in the case had recanted his trial testimony implicating the defendant and, in the first trial in the county in which the crime occurred, the defendant hung the jury, indicating that the evidence was not necessarily overwhelming.

* * *

SENTENCE: REGISTRATION OF INTERNET ACCOUNTS UNDER SEX OFFENDER REGISTRATION ACT IS NOT UNCONSTITUTIONALLY VAGUE.

State v. Nolte, 2014 WL 2404323

In *State v. Nolte, 2014 WL 2404323*, the defendant, Jeffrey Allen Nolte, had opened a Facebook account under the name of “Jeffrey Allen,” a MySpace account under the name “Jeffrey Nolte,” and an Amy Grant fan club account. The problem for the sociable defendant was that he was a convicted sex offender and was required to register for life as a sex offender. One of the requirements of the West Virginia Sex Offender Registration Act is that certain information is required to be provided to police, including “any Internet accounts the registrant has and the screen names, user names or aliases the registrant uses on the Internet.”

The defendant had not informed the state police about the Facebook account, the MySpace Account and the Amy Grant fan club account. Notably, “there were no allegations made that petitioner was using these sites or aliases in an inappropriate manner.” At a bench trial, the defendant was found guilty of counts relating to the Facebook account and MySpace account. The sentences were one to five years to run concurrently.

An argument was made that the provision governing the registration of Internet accounts was unconstitutionally vague. The term “Internet accounts” was not defined and, therefore, the petitioner had no knowledge that this conduct violated the statute. The Court rejected the argument, deferring to the intent of the Legislature to encompass, essentially, all “online activity.”

The second argument was that the evidence did not establish that the defendant had knowingly failed to register. However, the Court noted that the defendant had registered his email accounts and should have known, therefore, that the other accounts had to be registered.

* * *

SENTENCE: SEX OFFENDER REGISTRATION ACT IS REGULATORY AND NOT PUNITIVE FOR PURPOSES OF CONVICTION.

SENTENCE: OVERTURNING CONVICTION IS ONLY STATUTORY BASIS FOR REMOVAL FROM SEX OFFENDER REGISTRY.

In re: Jimmy M.W., 2014 WL 2404298

In *In re: Jimmy M.W., 2014 WL 2404298*, the petitioner was seeking to have his name removed from the Sex Offender Registry. When he was forty-four, the petitioner touched the breast of a

girl who was fifteen years of age. The petitioner pled no contest to a charge of sexual abuse in the third degree. Because the victim was a minor, the petitioner had to register as a sex offender for life. Notably, the petitioner was now married to the victim and had fathered her children. The Court notes that the Sex Offender Registration Act contains no provision for the removal of a registrant from the registry except and unless the conviction is overturned. The Court rejected, again, any constitutional challenges to the Act noting that its provisions are regulatory and not punitive in nature.

The decision is most notable by reason of the dissent by Justice Ketchum, in which Justice Davis joined. The primary criticism was that oral argument should have been afforded and the due process issues should have been studied. The most poignant statement was “this man received worse than a scarlet letter. ... It is worse than punitive if you have rehabilitated and are required to tell your prospective employers that you are a sex offender.”

* * *

JURY: PERPETRATOR’S STATUS WITH RESPECT TO A VICTIM SUCH AS PARENTAL OR CUSTODIAL IS A QUESTION FOR THE JURY AND NOT A MATTER OF LAW.

***State ex rel. Harris v. Hatcher*, __ S.E.2d __, 2014 WL 2439902**

In *State ex rel. Harris v. Hatcher*, __ S.E.2d __, 2014 WL 2439902, the Court granted a writ of prohibition requested by the prosecution. The prosecution sought the writ because the circuit court had granted, as a matter of law, a motion to dismiss six counts of an indictment returned against the defendant that charged the defendant with abuse by a parent, guardian, custodian or person in a position of trust. The prosecutor argued in the petition for the writ of prohibition that the status of defendant as a parent, guardian, custodian or person in a position of trust was a question of fact, requiring the jury’s determination.

The charges arose out of the defendant’s conduct with a minor. The defendant was a school bus driver, but the alleged conduct occurred at the victim’s home while the parents were sleeping and at the defendant’s farmhouse, not on the bus or at the school. The trial court ruled that the conduct at his house was related to his position as a custodian or a person in a petition of trust. However, the six counts relating to the conduct at the victim’s house when the parents were sleeping did not allege the requisite custodial or trust relationship.

The Court cited to a long list of cases in which it held that the perpetrator’s status with respect to the victim was a question for the jury. The Court ruled, therefore, that the Court had exceeded its authority in dismissing the six counts of the indictment and the Court vacated the order.

* * *

SENTENCE: EXPUNGEMENT NOT PROPER IF A GRIEVANCE PROCEEDING IS PENDING.

Humphreys v. West Virginia Div. of Corrections, 2014 WL 2219108

In *Humphreys v. West Virginia Div. of Corrections, 2014 WL 2219108*, the petitioner had certain misdemeanor charges expunged from the court's records. Specifically, the petitioner was a correctional officer who had been arrested by police on four counts of misdemeanor battery. Allegedly, the petitioner and a cohort had been approaching individuals in a blue Ford Escape and then pepper spraying the individuals. One victim identified the petitioner. Petitioner was terminated and, at the time of this appeal, his grievance with the West Virginia Public Employees Grievance Board was pending.

The petitioner had been placed in a pretrial diversion program for three months. However, he had secured another job and the magistrate dismissed the charges entirely. Approximately two months later, the petitioner filed a petition to expunge the criminal records, citing that he had "no current charges or proceedings pending." The order was entered.

The petitioner then presented the expungement order to his previous employer, the Division of Corrections. The obvious intent was to preclude the Division from using the charges as evidence supporting the petitioner's termination. The Division then filed a motion with the circuit court to intervene in the expungement proceeding and to have the order set aside. After a hearing, the circuit court determined that the grievance proceeding was, in fact, a "current ... proceeding" that precluded the expungement of the order.

The petitioner's appeal of this order was denied because the Court was not inclined to "rewrite the statute to read 'criminal proceedings.'" The Court reasoned that: "Just as courts are not to eliminate through judicial interpretation words that were purposefully included, we are obliged not to add to statutes something the Legislature purposely omitted." The Court further ruled that the Division was entitled to intervene because the expungement order could "impair or impede" the Division's defense in the grievance proceeding.

* * *

TERRORISM: ISOLATED THREAT AGAINST A SINGLE POLICE OFFICER IS NOT A TERRORIST ACT.

State v. Yocum, __ S.E.2d __, 2014 WL 2017843

In *State v. Yocum, __ S.E.2d __, 2014 WL 2017843*, an appeal was taken from the petitioner's conviction for committing a terrorist act. The governing statute was adopted in the aftermath of 9/11. However, this was recognized to be the "first case that has reached us under our anti-terrorism statute."

The petitioner had been arrested, had been handcuffed, and had been placed in the patrol car for transport when he threatened to sexually assault the transporting police officer's child. In the final analysis, the court settled on the issue as being whether, in these circumstances, the threats

were intended to “affect the conduct of a branch or level of government.” The prosecution’s argument was that the threat was intended to intimidate the officer so that the officer would disregard his duty “of ensuring that the Petitioner was incarcerated at the Northern Regional Jail.”

The court looked to the State of New York’s application of its anti-terrorist statute and noted that the New York court had refused to apply its statute to gang-on-gang street violence. The State of New York Court held that “acts of terrorism typically involve politically-motivated and mass-targeted harm caused by incendiary or other means capable of causing significant mortal injuries.” The Supreme Court of Appeals of West Virginia then concluded that terrorism has a unique meaning and that “violence and a political purpose or motivations are universal components.” And, accordingly, the court found that the anti-terrorist act was not concerned with threats leveled at an individual, but, due to the reference to a “level” or “branch,” the act was concerned with threats directed to an institution. To hold otherwise, opines the Court, would be to “run the risk of trivializing the offense at issue.”

Consistent with messages that have been communicated in other decisions, the Court stated, “rather than sanctioning overzealous prosecution, we take this opportunity to encourage both law enforcement and the prosecutors of this state to charge individuals with offenses that properly encompass the alleged wrongdoing at issue.” In this matter, the Court noted that the petitioner could have been charged with the intimidation or retaliation against a public officer by threats of physical force or harassment in an attempt to impede or obstruct that individual from performing his or her official duties. The Court commented that, instead, “the State sought to overreach and punish Mr. Yocum for the type of impulsive empty threat that any seasoned police officer such as Sergeant A. regularly encounters in the course of his duties – a threat that falls well outside the definitional parameters of terrorist activity.”

Notably, Justice Benjamin dissented. The dissent reasoned that the police officer was the very personification of the exercise of executive power. Accordingly, the threat to the police officer was deeply personal and obviously calculated to “maximize the terror felt by Sergeant A. and thereby maximize his intimidation of him in the execution of his official duties.” The dissent concludes as follows: “The petitioner is left to laugh. He pulled off a good one and got away with it. Sergeant A. is left to worry and perhaps hug his family a bit tighter.”

* * *

TERRORISM: INTENT OR LACK OF INTENT TO COMMIT THE THREATENED TERRORIST ACT IS IRRELEVANT.

***State v. Knotts*, __ S.E.2d __ (June, 2014)**

In *State v. Knotts*, __ S.E.2d __ (June, 2014), the anti-terrorist act was again reviewed. The question was whether sufficient evidence existed that the defendant made a threat that would,

indeed, be covered by the act. In this case, the defendant was deemed to be incompetent to stand trial and was committed to the psychiatric facility in Weston, West Virginia. The defendant's counsel employed the statutory procedure, however, that permitted defenses to the charges to be proffered so that the defendant could be released. A bench trial was held and the defendant was deemed to be able to be convicted of the offenses if he stood trial.

Notably, the defendant's odd behavior over a period of time was known and was attributed to a brain injury. The behavior included his confrontation of customers and employees at a federal credit union. The conversations typically centered around discussions of circumcision with pregnant customers and employees. The record is not clear about what his views were on the subject. The defendant's account with the federal credit union was closed after several such encounters.

In a phone conversation with a bank employee about his closed account, the defendant stated he was going to place bombs on the employees' cars and was going to stream, live, the resulting devastation so the whole world could see how he had been wronged by the credit union.

In the bench trial, the defendant denied that he had threatened to place explosive devices on the cars and claimed that all he intended to do was place copies of emails and DVD's on the vehicles in the credit union parking lot to "expose the credit union's violation of his First Amendment right to freely speak about circumcision."

The appeal was made on the grounds that the evidence was not sufficient to find that the defendant had made a threat intending to "intimidate or coerce" a "civilian population." The defendant's counsel characterized the defendant's statements as "the rantings of a mentally disabled person who was angry and who is incapable of articulating his displeasure in a socially acceptable manner."

In resolving the issue, the Court did not define the term, "civil population." However, because the defendant had stated that he wanted "to let the world know how he felt about the credit union," his actions were viewed as extending beyond "just the employees of the credit union." Moreover, the Court noted that "detonation of bombs in a metropolitan area" was an express act viewed as terrorism in the federal statutes. Notably, it is merely the knowing and willful making of the threat that is the violation. The intent or lack of intent to commit the threatened act is irrelevant. Accordingly, the Court affirmed the lower court's application of the act to the defendant's actions.

* * *

GRAND LARCENY: IF SEVERAL THEFTS OCCUR WITHIN A BRIEF PERIOD OF TIME AS PART OF A SINGLE SCHEME, THE VALUE OF THE ITEMS CAN BE AGGREGATED FOR THE JURISDICTIONAL AMOUNT PURSUANT TO THE "COMMON LAW SINGLE LARCENY DOCTRINE."

***State v. Jerome*, __ S.E.2d __, 2014 WL 1876158**

In *State v. Jerome*, ___ S.E.2d ___, 2014 WL 1876158, the Court dealt with the issue of whether property taken from four victims could be combined for the purpose of determining whether it was “grand larceny.” After a law firm’s Christmas party, several coworkers went to a nightclub. Throughout the night, various patrons of the nightclub determined that their purses had been stolen. The items in the purses included, among other things, cell phones and a medical inhaler.

The trial focused on whether the defendant was guilty of grand larceny or petit larceny. The victims testified that the total value of the items was in excess of one thousand dollars. The sole defense witness was a purported expert on the value of used cell phones, which reduced the defendant’s total haul to less than one thousand dollars.

The principal issue on appeal was whether all the property could be aggregated to determine the total value of the stolen property. The court reviewed, therefore, the “common law single larceny doctrine.” The doctrine provides that the “taking of several articles at the same time from the same place is pursuant to a single intent and design.” Apart from its application in this case, the doctrine has application to determine whether counts in an indictment are duplicitous when it involves theft from several persons at the same time and whether double jeopardy bars prosecution for more than one offense when it involves theft from several persons at one time. In this context, the doctrine is applicable to determine whether the value threshold is met by aggregating the value of the various items of stolen property from the different victims.

The doctrine does not require that the items be stolen simultaneously. Instead, the doctrine covers several thefts within a brief period of time. Moreover, the doctrine does not literally require the “same place,” but can cover different rooms on the same floor of a building. The overriding factor, in the Court’s opinion, is “whether the separate takings were part of a single scheme or continuing course of conduct.” Obviously, therefore, no bright line exists and the application of the doctrine must occur on a case-by-case basis.

The final issue raised concerned the manner in which the property was to be evaluated. The Court, again, does not draw a bright line, but, holds that, the owner of the property is competent to testify to the “fair market value” of the property, but other valuation methods may be used such as “purchase price [or] replacement cost.” As the Court noted, the jury will decide the weight to be given to the owners’ testimony as to the value of the property. Notwithstanding the defendant’s expert testimony, the Court found that the jury had sufficient evidence, notably the owners’ testimony, to find that the value of the stolen property exceeded one thousand dollars.

Justice Loughry and Justice Workmen concurred, but consistent with his and Justice Workmen’s opinions in other cases, emphasized that the true analysis in the case must come down to whether, in the circumstances, the actor had separately formed an intent to steal the various items of property. This is the analysis that should be used in determining whether one assault or multiple assaults occurred or whether one brandishing or multiple instances of brandishing occurred or whether one larceny or several larcenies occurred. The admonishment to the State was that the charging document needed to comport the evidence with the allegation of the single intent. In this

case, the defendant was circling the bar such that the jury could have found the single intent to steal the multiple items.

* * *

SEARCH AND SEIZURE: INVITED GUEST HAD NO OBJECTIVELY REASONABLE EXPECTATION OF PRIVACY BECAUSE CONTINUATION OF STAY WAS OBTAINED BY THREATS AND EXPLOITATION OF OWNER'S ADDICTION.

SEARCH AND SEIZURE: ENTRY INTO HOME PURSUANT TO KNOCK AND TALK JUSTIFIED WARRANTLESS SEARCH OF PREMISES DUE TO THE CIRCUMSTANCES.

***State v. Dorsey*, __ S.E.2d __ (June, 2014)**

In *State v. Dorsey*, __ S.E.2d __ (June, 2014), a search and seizure was the focus of the appeal. The defendant was staying at the trailer of a female, from which he operated a drug trade. The owner of the trailer was paid \$20.00 in crack cocaine for every \$100.00 of crack cocaine that was sold by the defendant. The defendant also supplied the owner with marijuana and partially paid at least one utility bill.

Tips were received that the trailer was a staging site for drugs. Notably, a state trooper determined that the tips were not sufficient to obtain a warrant. The state trooper determined, however, that he would talk to the owner of the trailer to see if she would cooperate. The trooper claimed, however, that the defendant was known to have a previous firearm charge. Accordingly, four officers were brought along in order to have this "talk" with the owner. Upon arrival, three of the officers surrounded the trailer in the purported effort to just "knock and talk."

When the knocking commenced, the owner testified that the defendant threatened her by making a throat-cutting motion and threatening to kill her if she opened the door. Eventually, she opened the door. In the meantime, one trooper had heard someone in the house running and then had heard a toilet flushing. The troopers came into the residence and, before the "talking" started, secured everyone in the residence, including the petitioner who was in the bathroom. In the toilet, the trooper observed water running and marijuana floating in the water. The troopers then asked permission of the owner to search the premises, which she gave. The search turned up cash, a digital scale, a razor blade with cocaine residue, and a 9mm handgun.

The defendant was indicted on, and convicted of, drug-related charges. While several issues were raised on appeal, the most compelling issue was the search and seizure of the evidence from the trailer in which the defendant was staying.

The Court reviewed the question of whether the defendant had any standing to contest the search of the owner's trailer. The issue is framed as whether, subjectively, the defendant had an expectation of privacy, and whether, objectively, the expectation was reasonable.

The Court had to acknowledge that the case law supported an expectation of privacy by invited guests. However, in this matter, the Court went to great lengths to find that the defendant had exceeded the boundaries of his original invitation. Essentially, the petitioner had an expectation of privacy, subjectively, but the expectation was not reasonable, objectively. The defendant's continued residence in the trailer was obtained by threats of violence against the owner and the exploitation of the owner's addiction. Simply, the Court found that the defendant was no longer a welcomed guest. While this characterization was not used, the Court essentially treated the owner as the defendant's hostage.

Only after this analysis did the Court then review the other circumstances of the search and seizure. The Court rested on the fact that the owner had opened the door, invited the troopers into the residence, and then consented to the search of the premises. Moreover, the evidence that other persons were present in the home, that the defendant was known to have a firearm, and that destruction of evidence was heard supported the entry into the home without permission or a warrant. The Court went to great lengths to determine that it was not the troopers who had created the exigent circumstances in that the troopers did not threaten actions that would violate the owner's fourth amendment rights.

Justice Davis dissented, noting that the facts did not support the idea that the owner was less than willing to have the defendant share her home. While it was not so characterized, the payments to the owner seemingly made the defendant, effectively, a tenant. The Justice also believed that the troopers had created the exigent circumstances by their behavior. The Justice highlighted the trooper's testimony that his intent, from the beginning, was to go to the trailer to "secure" the involved persons. In the Justice's opinion, the majority opinion "ensured that no police officer in West Virginia will ever need a warrant to enter and search any person's home."

* * *

SUPPRESSION: CONFESSION WAS ADMISSIBLE BECAUSE INTERROGATION ABOUT ROBBERY WAS PERMITTED DESPITE DEMAND FOR COUNSEL WITH RESPECT TO ARREST ON WHOLLY UNRELATED OFFENSE.

***State v. Blackburn*, __ S.E.2d __, 2014 WL 1876152**

In *State v. Blackburn*, __ S.E.2d __, 2014 WL 1876152, the defendant confessed to robbing a Wendy's wearing a bandana and brandishing a machete. The confession came after the defendant subsequently called 911 threatening to shoot someone if he did not get a cigarette. In the course of the arrest for his 911 threat, the defendant demanded a lawyer. The defendant was nonetheless questioned nine times without a lawyer present.

Two issues arose on appeal after the defendant's conviction on the robbery charge. The first was the admissibility of the confession and the second was the admissibility of an eyewitness identification.

With respect to the confession, the Court held that it was proper for the police to interrogate the defendant with respect to the robbery charge even though he had requested counsel for the 911 threats. The only caveat was that the interrogating officers had to *Mirandize* the defendant regarding his right against self-incrimination and his right to the appointment of counsel. The Court stresses that the interrogation “must involve a wholly unrelated offense.”

As for the voluntariness of the confession, the Court was not convinced that coercion, in the form of dropping the 911 charges if he confessed to the robbery and the statement that the defendant had not done well on his polygraph, was present. Moreover, the defendant was not believed to be incapacitated by either his emotional or physical distress. Under the totality of the circumstances, the confession was deemed to be voluntary.

As for the eyewitness’ identification, the eyewitness stated that his certainty level, considering the face of the robber was covered by a bandana, was “9 out of 10.” Does this constitute a reasonable doubt? This question was not asked and, therefore, not answered. The most interesting aspect of the identification was that the prosecutor, in the *in camera* hearing on the motion to suppress, questioned the witness by asking him if he was identifying the defendant, who he referred to as a person seated in the courtroom. The Court found, however, that in the circumstances of the questioning, which included a general question regarding a “bunch of gentlemen seated over there,” the prosecutor had not “communicated the identity of the assailant” to the witness. Moreover, the trial counsel was noted to have never raised an objection.

So, the witness’ certainty of only 9 on a scale of 10, his admission that he was identifying the defendant based on his eyes and skin color and his acknowledgment that he had viewed a website that revealed the defendant had confessed were merely factors for the jury to consider and not a reason to suppress the identification. The question to be asked is, what if the confession had been suppressed, would the eyewitness identification have been determined differently?

* * *

RULE 404(b): COURT HAS TO FIND BY PREPONDERANCE OF THE EVIDENCE THAT DEFENDANT COMMITTED THE UNCHARGED OFFENSES BEFORE ADMITTING EVIDENCE.

RULE 404(b): ERRONEOUS ADMISSION OF RULE 404(b) EVIDENCE MOST LIKELY RESULTS IN PREJUDICIAL ERROR.

***State v. Angle*, __ S.E.2d __ (June, 2014)**

In *State v. Angle*, __ S.E.2d __ (June, 2014), the Court remanded and reversed the defendant’s conviction and sentence of life imprisonment as a recidivist. The reversal was based on issues relating to Rule 404(b) of the West Virginia Rules of Evidence.

The defendant had been charged with the assault of a female victim. The trial on this charge included the admission of evidence that, after the date of the alleged assault, the defendant had

been a person of interest with respect to the assault of two female victims living in the same neighborhood as the victim in the instant matter.

Notably, the only witnesses at the trial were the purported victim and the police officer who relayed the Rule 404(b) evidence.

Based on the record, or lack of record, and the testimony of the police officer, the Court determined that the lower court had failed in its responsibility to determine in the Rule 404(b) hearing that it was the defendant who had committed the other acts, especially when another individual was also a “person of interest.” This is significant in that the standard in such a hearing is merely a “preponderance of the evidence,” and not “guilt beyond a reasonable doubt.”

The fact that it was a “subsequent” uncharged offense that was proffered was of no consequence. The Court acknowledged a 2013 decision in which it had permitted a subsequent bank robbery to be admitted as evidence of guilt on a charge of an earlier bank robbery because it showed a “common plan, scheme and identity” and because “there was substantial forensic evidence linking the defendant to both crimes.” In this matter, however, the Court found insufficient evidence to support a conclusion that the defendant was involved, especially considering the different circumstances of each alleged crime.

The Court also found that a stated purpose for the use of the evidence was improper. The State intended to show a lustful disposition toward the victim. The Court emphasized that its decision in *Edward Charles L.* was only for lustful disposition toward children. The general rule that such evidence is impermissible still extends to cases involving adult victims.

Finally, the trial court was found to have improperly conducted the Rule 404(b) process. First, the evidence must be admissible. But once deemed to be admissible, the evidence must be found to be relevant. But once found to be relevant and admissible, the evidence must be evaluated under the balancing test of Rule 403. The Court emphasized that “the balancing necessary under Rule 403 must affirmatively appear on the record.” As the Court noted, “it is clear that no balancing test was ever conducted.”

Significantly, the Court refused to engage in a “harmless error” analysis. The Court noted “that Rule 404(b) determinations are among the most frequently appealed of all evidentiary rulings and the erroneous admission of evidence of other acts is one of the largest causes of reversal of criminal convictions.” Accordingly, “where a trial court erroneously admits Rule 404(b) evidence, prejudicial error is likely to result.” The conviction and the recidivist conviction were reversed.

* * *

EVIDENCE: DEFENDANT’S CRIME NOVEL COULD NOT BE USED IN STATE’S CASE IN CHIEF, BUT COULD BE USED TO CROSS-EXAMINE DEFENDANT AS TO ISSUES OF CREDIBILITY.

IMPROPER REMARKS BY PROSECUTOR: PROSECUTOR COULD REFER TO DEFENDANT'S PRE-ARREST SILENCE, BUT NOT POST-ARREST SILENCE.

***State v. Prophet*, __ S.E.2d __ (June, 2014)**

In *State v. Prophet*, __ S.E.2d __ (June, 2014), the defendant had authored a book entitled, *Enter the Fire: Seven Days in the Life*. The novel contained themes of violence within the drug culture, referred to a house fire, featured drug dealers as the main characters, killed the wife of one of the main characters, injured the child of one of the characters in a home invasion, and detailed the slitting of a character's throat. What were the charges against the defendant in this criminal proceeding? The charges were the murder of a mother with whom he was spending the night and one of her two sons. The details were that a fire had been set in the apartment. The bodies were found in the apartment, but, while no cause of death could be determined for the son due to the damage done by the fire, the mother had her throat slit before the fire.

The defendant claimed that the real perpetrator was a drug dealer whom he had crossed and who was seeking retribution. The defendant's story was that, on the evening of the fire, the apartment had been invaded by two thugs. He managed to escape. When he saw the fire, he came back to the apartment and managed to save one child. He then panicked and fled, leaving the surviving son on the patio of the grandparent's adjacent residence.

Notably, the defendant had never told anyone this version of events. However, in support of the defendant's story was a 911 call made by the defendant to report threats by the drug dealer.

The Court ruled that the State could not use the novel and its similarity to the crime scene in its case-in-chief, but could use it in rebuttal. The defendant testified and the prosecutor began cross-examining the defendant about the novel, which, over objection, the Court permitted. The prosecutor then argued in closing the theme that the defendant was a writer of crime fiction and was quite capable, therefore, of fabricating a story to fit the evidence in the two years between the charge and the trial. The defendant was convicted.

With respect to the cross-examination on the novel, the Court held that the defendant, by testifying, "placed his credibility at issue." The use of the novel in cross-examination was "relevant to the petitioner's credibility." The novel was not used, in the Court's opinion, to suggest that the defendant was more likely to have killed the victims because he wrote about such things.

The other noteworthy issue was the prosecutor's questions regarding the defendant's failure to have told this story to any person in law enforcement. Objections to the line of questioning had been interposed. The ruling was that the prosecutor could refer to "pre-arrest silence," but "not post-arrest silence." The prosecutor then asked a question that arguably could have elicited "post-arrest information," but subsequent questions specifically referred to a "pre-arrest conversation." The Court found, in the circumstances, that the prosecutor did not improperly inquire into post-arrest matters.

* * *

FELON IN POSSESSION: THE “ATTEMPT” TO MANUFACTURE METHAMPHETAMINE IS STILL A CONTROLLED SUBSTANCE OFFENSE MAKING DEFENDANT’S POSSESSION OF A FIREARM BY A PROHIBITED PERSON A FELONY.

State v. Shamblin, 2014 WL 2922804

In the case of *State v. Shamblin, 2014 WL 2922804*, the defendant was found guilty of the crime of possession of a firearm by a prohibited person. The charge was deemed to be a felony because the prior felony convictions were determined to be controlled substance offenses. See *W. Va. Code §61-7-7(b)(2)*.

On appeal, the defendant argued that his charges should have been treated as a misdemeanor under section (a) of the governing statutory provision.

The prior convictions were for the “attempt” to commit a felony. The defendant acknowledged that the attempt related to the manufacturing of methamphetamine, but, since he did not actually manufacture methamphetamine, the offense should not be considered to “involve” a controlled substance. Accordingly, his current conviction was a misdemeanor offense, not a felony.

Without much discussion, the Supreme Court of Appeals of West Virginia rejected the argument, stating that the attempt was related to a controlled substance and, therefore, would invoke the felony elements of the felon-in-possession statutes. The Court noted that the attempt charge was considered to be a lesser included offense of the controlled substance felony charge.

* * *

SPEEDY TRIAL: GOOD CAUSE EXISTS FOR CONTINUANCE OF TRIAL TO NEXT TERM WHEN ONLY ONE COURT DAY REMAINS IN THE TERM.

SPEEDY TRIAL: ACTUAL INDICTMENT AND CONVICTION MOOTS ANY VIOLATION OF THE TWO-TERM RULE REQUIRING TIMELY INDICTMENT OF AN INCARCERATED DEFENDANT.

SPEEDY TRIAL: VIOLATION OF TWO-TERM RULE REQUIRING TIMELY INDICTMENT OF AN INCARCERATED DEFENDANT DOES NOT PROHIBIT FURTHER PROSECUTION OR INCARCERATION UPON A SUBSEQUENT INDICTMENT.

State v. White, 2014 WL 4347130

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.

* * *

SENTENCE: DEFENDANT HAS NO CONSTITUTIONAL RIGHT TO BE SENTENCED AS AN ADULT RATHER THAN AS A YOUTHFUL OFFENDER.

State v. Hamon, 2014 WL 4347136

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.”

* * *

JURY: INCONSISTENT VERDICTS ARE NOT GROUNDS FOR A NEW TRIAL BECAUSE IT MAY BENEFIT DEFENDANT.

***State v. Jackson*, 2014 WL 2681081**

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.

* * *

SENTENCE: CHARGES OF SEXUAL ABUSE BY CUSTODIAN OR THIRD DEGREE SEXUAL ASSAULT ARE VIOLENT OFFENSES EVEN THOUGH PHYSICAL VIOLENCE IS NOT AN ELEMENT AND THUS CHARGES AGAINST AN INCOMPETENT DEFENDANT WOULD NOT BE DISMISSED.

State v. George K., 760 S.E.2d 512 (W. Va. 2014)

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.”

* * *

HEARSAY: RESIDUAL HEARSAY EXCEPTION COVERED ADMISSION OF WITNESS’ TESTIMONY THAT DECEDENT IDENTIFIED BRUISES IN A PHOTOGRAPH AS INFLICTED BY DEFENDANT.

RULE 404(b): BECAUSE DEFENDANT ARGUED WIFE’S DEATH WAS ACCIDENTAL, PRIOR INCIDENTS OF DOMESTIC VIOLENCE WERE ADMISSIBLE TO SHOW ABSENCE OF MISTAKE.

IMPROPER REMARKS BY PROSECUTOR: PROSECUTOR’S REMARK THAT HE WOULD INDICT WITNESS WAS NOT IMPROPER AS BOLSTERING CREDIBILITY OF WITNESS, BUT WAS PROPER REBUTTAL TO DEFENSE COUNSEL’S ARGUMENT AND, IF ERROR, WAS INVITED.

EVIDENCE: SURPRISE REQUIRES DEFENSE COUNSEL TO MOVE FOR A RECESS IN ORDER TO CURE PREJUDICE, OTHERWISE IT IS WAIVED.

***State v. Rollins*, 760 S.E.2d 529 (W. Va. 2014)**

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 the 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.

* * *

SENTENCE: THE COURT IS NOT OBLIGATED TO INSTRUCT A DEFENDANT WHO REJECTS A PLEA AND PROCLAIMS HIS INNOCENCE ABOUT THE POSSIBILITY OF A KENNEDY/ALFORD PLEA.

JURY: STATE COULD USE A PEREMPTORY CHALLENGE TO REMOVE THE LAST PERSON OF COLOR FROM THE PANEL WHEN THE JUROR LIED ABOUT HAVING BEEN ARRESTED.

State v. Johnson, 2014 WL 2681500

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.

* * *

SEARCH AND SEIZURE: WARRENTLESS SEARCH OF AN AUTOMOBILE PERMITTED AFTER A TRAFFIC STOP WAS PROPER IN CIRCUMSTANCES.

SEARCH AND SEIZURE: STATE LAW ON SEARCHES OF AUTOMOBILE IS COMMENSURATE WITH FEDERAL LAW.

State v. Rogers, 2014 WL 2683047

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 then 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.

* * *

WITNESSES: ELICITING INFORMATION FROM AN OFFICER THAT OTHER OFFICERS PERSONALLY KNEW THE DEFENDANT DID NOT VIOLATE IN LIMINE ORDER ABOUT DEFENDANT’S PRIOR CRIMINAL HISTORY BECAUSE THE INFORMATION RESOLVED ISSUES OF IDENTIFICATION RAISED BY DEFENSE COUNSEL.

State v. Johnson, 2014 WL 2681579

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.

* * *

EVIDENCE: TAPED CONVERSATION BETWEEN A CONFIDENTIAL INFORMANT AND AN ATTORNEY IN THE ATTORNEY’S OFFICE WAS NOT EXCLUDED BY EXEMPTIONS IN THE WIRETAPPING AND ELECTRONIC SURVEILLANCE ACT BECAUSE THE CONVERSATIONS WERE NOT PRIVILEGED.

***State ex rel. State v. Burnside*, 757 S.E.2d 803 (W. Va. April, 2014)**

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 two clauses which referred 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."

PLEA AGREEMENTS: DISCUSSION OF THE REQUIREMENTS UPON THE SENTENCING COURT IN DETERMINING WHETHER TO ACCEPT A TYPE “B” AGREEMENT (W. Va. R. Crim. P. 11(e)(1)(C)).

***State v. Allman*, _____ S.E.2d _____ (W. Va. 2014), 2014 WL 5800685**

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.

WITNESSES: ERROR WAS COMMITTED WHEN TRIAL COURT DID NOT REQUIRE A NON-PARTY WITNESS TO APPEAR IN FRONT OF A JURY TO ASSERT THE FIFTH AMENDMENT PRIVILEGE, ALTHOUGH IN THIS MATTER THE ERROR WAS HARMLESS.

PRIOR CONVICTIONS: THE RULES REGARDING THE BIFURCATION OF THE ISSUES OF A PRIOR CONVICTION ARE DISCUSSED, WITH DISTINCTION DRAWN BETWEEN INSTANCES IN WHICH THE PRIOR CONVICTION IS AN ELEMENT OF THE CRIME AND IN WHICH THE PRIOR CONVICTION MERELY ENHANCES THE PENALTY.

***State v. Herbert*, _____ S.E.2d _____ (W. Va. 2014), 2014 WL 6734007**

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.

PROCEDURE: THE TRIAL COURT DID NOT ERR WHEN IT PERMITTED THE PROSECUTOR TO REOPEN THE CASE TO ADMIT SEARCH WARRANTS THAT HAD BEEN OMITTED.

SEARCH AND SEIZURE: PROBABLE CAUSE TO SEARCH A HOME WAS FOUND WHEN ANONYMOUS POSTS THREATENING HARM WERE TRACED BY OTHER WARRANTS TO THE DEFENDANT.

State v. Keffer, 2014 WL 6724747

In the case of *State v. Keffer, 2014 WL 6724747*, the defendant had 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).

JURY: AFFIRMS THE PRECEDENT OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA THAT APPELLATE REVIEW OF A CLAIM OF INCONSISTENT VERDICTS IS GENERALLY NOT AVAILABLE.

***State v. Johnson*, 2014 WL 6634483**

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.

RULE 404(b): THE NOTICE REQUIRED UNDER THE RULE FOR THE USE OF PRIOR ACTS NEED ONLY TO STATE THE GENERAL GROUNDS SET FORTH IN THE RULE FOR THE USE OF THE EVIDENCE AND DOES NOT NEED TO STATE THE SPECIFIC AND PRECISE PURPOSE.

RULE 403: THE RULE IS NOT APPLICABLE IF THE EVIDENCE OF OTHER ACTS IS INTRINSIC TO THE CRIMES CHARGED.

***State v. Nathan S.*, 2014 WL 6676550**

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 his evidence would "lead to the conviction of innocent people who may have bad character."

HABEAS CORPUS: THE COUNSEL'S GUARANTEE OF SUCCESS AT TRIAL CANNOT BE INEFFECTIVE ASSISTANCE OF COUNSEL WITHOUT PROOF OF A PLEA THAT WAS MADE AND WOULD HAVE BEEN ACCEPTED BUT FOR THE GUARANTEE.

HABEAS CORPUS: GROUNDS RANDOMLY SELECTED FROM THE *LOSH* LIST AND RAISED FOR THE FIRST TIME IN A HABEAS CORPUS PROCEEDING ARE PROPERLY DENIED.

SENTENCE: CONSTITUTIONAL PROPORTIONALITY STANDARDS ARE MOST APPLICABLE TO SENTENCES WITH NO FIXED MAXIMUM PERIOD OR SENTENCES OF LIFE DUE TO A RECIDIVIST ACTION.

Edward M. v. Ballard, 2014 WL 6607582

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."

SENTENCE: THE OPPORTUNITY TO OPPOSE AND CONTEST A FINDING THAT A CRIME WAS SEXUALLY MOTIVATED IN ORDER TO APPLY THE PROVISIONS OF THE SEX OFFENDER REGISTRATION ACT CAN BE WAIVED BY TRIAL COUNSEL AND THE COURT CAN RELY UPON PREVIOUS TESTIMONY OF THE DEFENDANT AND VICTIM IN A PREVIOUS TRIAL.

***State v. Chucci*, 2014 WL 6607461**

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 pled 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?

SEARCH AND SEIZURE: CONSENT TO SEARCH RESIDENCE WAS VOLUNTARY WHEN POLICE OFFICER DID NOT TELL DEFENDANT HE WAS UNDER ARREST AND HAD NOT STATED THAT HE WOULD SEARCH HOUSE EVEN IF CONSENT WAS NOT GIVEN.

CONSPIRACY: HARMLESS ERROR IF WRONG CO-CONSPIRATOR IS NAMED BECAUSE DEFENDANT IS STILL INVOLVED IN A CONSPIRACY.

EVIDENCE: STATE WAS NOT REQUIRED TO TAKE A STATEMENT OF A POTENTIAL EXCULPATORY WITNESS WHEN DEFENDANT COULD HAVE OBTAINED STATEMENT.

RECIDIVISM: ONLY ONE ENHANCEMENT IS PERMITTED OF ANY CONVICTIONS RETURNED AT THE SAME TIME.

State v. Lusk, 2014 WL 6607447

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.

RULE 404(b): ALLOWING EVIDENCE OF ARREST FOR POSSESSION AFTER CURRENT CHARGES BUT BEFORE TRIAL HELD TO BE HARMLESS AS IT WAS WHOLLY UNNECESSARY TO JURY'S FINDING OF GUILT.

JUDGE: THE JUDGE DID NOT LACK NEUTRALITY WHEN REMINDING PROSECUTOR THAT HE HAD NOT PROVED OWNERSHIP BY DEFENDANT OF RELEVANT EVIDENCE BECAUSE JUDGE IS REQUIRED TO FIND THE TRUTH.

State v. Greer, 2014 WL 6607465

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.

EVIDENCE: CONVICTION FOR SEXUAL OFFENSE MAY BE OBTAINED ON THE UNCORROBORATED TESTIMONY OF THE VICTIM UNLESS SUCH TESTIMONY IS INHERENTLY INCREDIBLE.

EVIDENCE: PROSECUTOR DID NOT ACT IMPROPERLY BY NOT GIVING THE PARTICULARS REGARDING THE TIME OF ASSAULTS BECAUSE PROSECUTOR ALSO DID NOT KNOW PARTICULARS UNTIL FIRST DAY OF TRIAL.

HEARSAY: COURT FINDS HARMLESS TESTIMONY THAT WAS DESCRIBED AS HEARSAY BY IMPLICATION, I.E., “SO IF THERE WAS INFORMATION.....”

State v. Richard P., 2014 WL 6607496

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 – 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.

SEARCH AND SEIZURE: A WARRANT NEED ONLY TO PROVIDE A SUFFICIENT BASIS FOR IDENTIFICATION OF THE REAL PROPERTY SO THAT IT IS RECOGNIZABLE FROM OTHER ADJOINING AND NEIGHBORING PROPERTIES.

SEARCH AND SEIZURE: A DETACHED GARAGE IS COVERED BY THE TERM “OUTBUILDING.”

State v. Harper, 2014 WL 6607659

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.

SUPPRESSION: A CONFESSION IS INVOLUNTARY ONLY IF THE DEGREE OF INTOXICATION MAKES IT OBVIOUS THAT THE DEFENDANT LACKED THE CAPACITY TO VOLUNTARILY AND INTELLIGENTLY WAIVE HIS RIGHTS AND, IN THIS MATTER, THE DEFENDANT’S ABILITY TO ANSWER AND LIE DID NOT MAKE IT SO OBVIOUS.

SUPPRESSION: AN OFFICER’S STATEMENTS DURING QUESTIONING THAT THE DEFENDANT’S “LIFE AS HE KNEW IT WOULD COME TO AN END,” THAT “HE COULD GO AWAY,” AND “IT WAS YOUR OWN ASS RIGHT NOW,” WERE NOT DEEMED TO BE COERCIVE POLICE ACTIVITY.

SUPPRESSION: THE STATEMENT, “I SHOULD HAVE A LAWYER, SHOULDN’T I” WAS NOT AN ASSERTION OF RIGHT TO COUNSEL BECAUSE IT WAS AMBIGUOUS.

DOUBLE JEOPARDY: A FELONY CONVICTION MERGES INTO THE FELONY MURDER CHARGE CONVICTION, BUT, IF MORE THAN ONE FELONY IS CHARGED AND THE VICTIM OF ONE FELONY IS SEPARATE AND DISTINCT FROM THE MURDER VICTIM, THE FELONY CONVICTION WITH RESPECT TO THIS SEPARATE AND DISTINCT VICTIM WILL NOT MERGE WITH THE FELONY MURDER CONVICTION FOR DOUBLE JEOPARDY PURPOSES.

***State v. Wisotzkey*, 2014 WL 6607462**

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.”

SENTENCE: DISPARATE SENTENCES FOR CODEFENDANTS, I.E., ONE GETTING CONCURRENT SENTENCES AND THE OTHER GETTING CONSECUTIVE SENTENCES, ARE NOT PER SE UNCONSTITUTIONAL.

State v. Stitley, 2014 WL 5546524

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.

RECIDIVISM: THE SENTENCING COURT HAD NO DUTY TO INFORM PETITIONER ABOUT A POSSIBLE RECIDIVIST ACTION BECAUSE SUCH AN ACTION WAS NOT A DIRECT CONSEQUENCE OF PETITIONER’S GUILTY PLEA.

Gardner v. Ballard, 2014 WL 5546202

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 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 of minor children. 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.

IMPROPER REMARKS BY PROSECUTOR: PROSECUTOR'S CONTINUED STATEMENT OF "OKAY" AFTER EACH ANSWER BY YOUNG VICTIM WAS NOT FOUND TO BE IMPROPER ENCOURAGEMENT OF WITNESS CONSIDERING THE VICTIM'S CONTINUED FAILURE TO SPEAK UP AND OVERALL RETICENCE TO TESTIFY.

State v. Cottingham, 2014 WL 5545930

In the case of *State v. Cottingham, 2014 WL 5545930*, an interesting 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 did not provide any authority that required such findings.

SUPPRESSION: APPELLATE COURT WILL DEFER TO THE LOWER COURT’S FINDING OF VOLUNTARINESS OF A STATEMENT WHEN THE DEFENDANT ALLEGES HE WAS UNDER THE INFLUENCE OF PAIN MEDICATION.

SUPPRESSION: THE ORDER OF PROOF IN A SUPPRESSION HEARING CAN BE VARIED UNDER RULE 611 OF RULES OF EVIDENCE WHEN DEFENDANT CONCEDES HE WAS NOT IN CUSTODY, HE HAD WAIVED HIS RIGHTS UNDER *MIRANDA*, AND HE WAS NOT COERCED AND THE ONLY QUESTION REMAINING IS THE EFFECT OF MEDICATION UPON THE DEFENDANT.

***State v. Marcum*, 765 S.E.2d 304 (W. Va. 2014)**

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 defense counsel 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 did not allege that the statement was the result of coercion. At the jury instruction conference, the Court admitted its error in requiring the defendant to 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.

PLEA AGREEMENTS: THE APPARENT LEGAL IMPROPRIETY OF A DEAL WAS NOT DECIDED ON APPEAL BECAUSE THE PARTIES HAD NOT RAISED THE ARGUMENT.

PLEA AGREEMENTS: THE SLOPPINESS OF THE PLEA AGREEMENT WAS THE STATE'S ISSUE AND THE DEFENDANT WAS ENTITLED TO HIS SIDE OF THE BARGAIN.

State v. Shrader, 765 S.E.2d 270 (W. Va. 2014)

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

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 because 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).

RECIDIVISM: A RECIDIVIST INFORMATION CANNOT BE WITHDRAWN ONCE FILED, REQUIRING THE SENTENCING COURT TO IMPOSE THE STATUTORY ENHANCEMENT.

DOUBLE JEOPARDY: IT IS NOT DOUBLE JEOPARDY IF, UPON RESENTENCING AFTER AN ILLEGAL SENTENCE, THE NEW SENTENCE IS HARsher.

State v. Jenkins, 2014 WL 5328684

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.

INDICTMENT: WITHOUT EVIDENCE OF SELECTIVE OR DISCRIMINATORY PROSECUTION, THE COURT WILL NOT DISTURB THE PROSECUTOR'S CHOICE OF WHAT CHARGES TO BRING.

INSTRUCTIONS: JURY DID NOT HAVE TO BE INSTRUCTED THAT THE MISDEMEANOR OFFENSE UNDER W. VA. CODE §49-7-7 IS A LESSER INCLUDED OFFENSE OF GROSS CHILD NEGLECT CREATING SUBSTANTIAL RISK OF SERIOUS BODILY INJURY OR DEATH BECAUSE THE MISDEMEANOR OFFENSE DEALS WITH CONTRIBUTING TO THE DELINQUENCY OF A MINOR AND NOT NEGLECT.

State v. Clemens, 2014 WL 5312301

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.

INSTRUCTIONS: JURY WAS PROPERLY INSTRUCTED THAT LYING TO AN INVESTIGATING OFFICER WAS EVIDENCE OF A GUILTY CONSCIENCE IF NO OTHER REASON FOR THE LIE COULD BE DISCERNED AND WAS ONE FACTOR THAT COULD BE CONSIDERED IN WEIGHING THE EVIDENCE ON THE DEFENDANT’S GUILT OR INNOCENCE.

PROMPT PRESENTMENT: THE EVILS TO BE THWARTED BY PROMPT PRESENTMENT, SUCH AS PROLONGED INTERROGATION AND A DELAY TO INDUCE A CONFESSION, WERE NOT PRESENT WHEN THE NINE AND ONE-HALF HOUR DELAY BETWEEN HANDCUFFING AND ARRAIGNMENT COULD BE ATTRIBUTED TO ADMINISTRATIVE MATTERS, TRAVEL, AND THE DEFENDANT’S OWN DEMANDS.

State v. Lytle, 2014 WL 5311366

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, recordation 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, i.e., “prolonged interrogation” or “delay which precedes, and can therefore be used to induce, the confession.” The appeal was denied.

INSTRUCTIONS: A DURESS INSTRUCTION WAS NOT REQUIRED WHEN A BATTERED WOMAN’S SYNDROME INSTRUCTION AND A DIMINISHED CAPACITY INSTRUCTION WAS GIVEN, THUS PERMITTING THE DEFENDANT TO ARGUE THAT SHE LACKED CRIMINAL INTENT.

SENTENCE: WHEN NO MAXIMUM SENTENCE IS SET BY STATUTE, THE ISSUE OF WHETHER THE IMPOSED SENTENCE IS CONSTITUTIONALLY DISPROPORTIONATE REQUIRES A TWO PART TEST, ONE PART OF WHICH IS THE SUBJECTIVE ANALYSIS OF WHETHER THE SENTENCE SHOCKS THE CONSCIENCE, WHICH, IN THIS MATTER, THE COURT FOUND THAT THE SENTENCE DID NOT.

***State v. Roberts*, 2014 WL 5311317**

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 a 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.”

WITNESSES: WITNESSES CAN TESTIFY BY VIDEOCONFERENCE WHEN CIRCUMSTANCES DICTATE, SUCH AS SAFETY CONCERNS RAISED BY SIX INMATES TESTIFYING IN THE CASE.

State v. Cox, 2014 WL 4930264

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 ruling precedent placed the burden on defense counsel to move the court to have an incarcerated witness testify in civilian clothes.

WITNESSES: PATROLMEN COULD GIVE LAY OPINION TESTIMONY AS TO WHETHER DEFENDANT'S DRIVING DEMONSTRATED A RECKLESS INDIFFERENCE TO THE SAFETY OF OTHER PEOPLE.

State v. Burks, 2014 WL 6634384

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 sentenced 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 office 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 defendant’s 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 knowledge.

