

# The Final Wind-up:

## LEGISLATIVE



## WATCH

### PREFATORY

Throughout the legislative session, West Virginia Public Defender Services (“PDS”) has attempted to keep you apprised of the developments in criminal law or other areas related to the practice of law. The agency was substantially aided in this process by Ronni M. Sheets. Ms. Sheets is a Managing Deputy for the Public Defender Corporation for the 13<sup>th</sup> Judicial Circuit, West Virginia. Ms. Sheets is also the Chair of the Subcommittee on Legislative Oversight which is within the State Bar’s Criminal Law Committee. The agency is truly appreciative of Ms. Sheets’ consultation and contributions to the previous issues of the *Legislative Watch*.

For this final *Windup* edition of the *Legislative Watch*, PDS is, again, indebted to Ms. Sheets for her agreement to author the summation of the legislation which was passed during the regular and special sessions.

The agency’s hope is that, in some manner, the *Legislative Watch*, generally, and Ms. Sheets’ efforts, specifically, have assisted you, whether it be personally, professionally, or both.

### THE FINAL WINDUP

By **Ronni M. Sheets**

The 2014 regular and first special sessions of the West Virginia Legislature wrapped up March 14, 2014. Several newly created criminal offenses are covered in detail below. However, I would like to first highlight legislation that constituted significant reform benefitting those whom we, as public defenders, represent.

In keeping with the U.S. Supreme Court decision in *Miller v. Alabama*, 132 S.Ct. 2455 (2012)<sup>1</sup>, the legislature eliminated the sentence of life without the possibility of parole for juveniles. Going a step further, a maximum parole eligibility date of 15 years was established for any offense, or combination of offenses, committed by a juvenile.

Also, the Divisions of Corrections (DOC) will now be required to provide the classes necessary for parole eligibility to DOC inmates housed in regional jails. The availability of the classes, coupled with the clarification that upon reaching parole eligibility one is entitled to a prompt parole hearing regardless of where he is housed, may aid in decreasing jail overcrowding.

All bills listed are effective 90 days from passage, unless otherwise noted.

<sup>1</sup> *Agency’s Note*: Justice Kagan wrote in her majority opinion in which four other justices joined, “We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’” *Id.* at 2460. Notably, this was not a “categorical” preclusion, but, instead, the Court found the “mandatory” imposition of such a sentence unconstitutional. *See, also, Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (invalidating the death penalty for all juvenile offenders under the age of 18) and *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011 (2010) (life without parole for juvenile non-homicide offenders violates Eighth Amendment).

## The Final Wind-up:

# LEGISLATIVE



# WATCH

### NEW OR MODIFIED CRIMES<sup>2</sup>

**Modification of child abuse and neglect criminal offenses** - SB 4005, amending W. Va. Code §§61-8D-1, 3, 4, and 9, makes substantial modifications to existing law and creates new criminal offenses.

The offense of child abuse creating a substantial risk of death or serious bodily injury in the existing W. Va. Code §61-8D-3(c) has been narrowed to apply only to a parent, guardian, or custodian, as opposed to any person. This modification was also made to the offense of gross neglect of a child creating a substantial risk of death or serious bodily injury set forth in the existing provisions of W. Va. Code §61-8D-4(e).

Gross neglect is now defined. It is gross neglect to exhibit reckless or intentional conduct, behavior or inaction that evidences a clear disregard for a minor child's health, safety or welfare.

Further, new misdemeanor and felony offenses were created for child abuse by a parent, guardian or custodian, creating a substantial risk of bodily injury and child neglect creating a substantial risk of bodily injury. The convictions for these newly created misdemeanors are expressly excluded from the child abuse registry and do not trigger an automatic restriction of parental rights. There is, however, no exclusion of the newly created felonies from extended supervision requirements of W. Va. Code §61-12-26. Finally, the definition of neglect is modified to identify acts which do not constitute child neglect. It is not neglectful to permit a child to play sports, to exercise discretion in choosing a lawful method of education, or to make decisions regarding the nutrition and medical care provided to a minor child based upon religious conviction or personal belief. *Passed March 8, 2014.*

**Modification of possession of child pornography criminal offenses** - HB 4006, amending W. Va. Code §61-8C-3, adds electronically accessing material portraying a minor engaged in sexually explicit conduct with the intent to view as prohibited conduct. It creates new penalties depending on the volume and type of material possessed. If the violation consists of 50 or fewer images, the possible penalty is a determinate term of not more than two years. If the violation consists of more than 50 but fewer than 600 images, the penalty increases to an indeterminate term of not less than two nor more than ten years. If the violation consists of 600 images or more or depicts violence against a child or a child engaged in bestiality, the penalty increases to an indeterminate term of not less than five nor more than fifteen years. A video clip, or other recording, five minutes or less is treated as 75 images; and a video longer than five minutes is treated as constituting 75 images for every two minutes exceeding five minutes. *Passed March 8, 2014.*

<sup>2</sup> *Agency's note:* While not warranting extended discussion, it is noteworthy that, on April 1, 2014, the Honorable Earl Ray Tomblin, Governor of the State of West Virginia, approved H.B. 4208, passed on March 8, 2014, which adds synthetic hallucinogens to the state's lists of controlled substances.

## The Final Wind-up:

# LEGISLATIVE



# WATCH

**Modifying the elements of battery, assault, domestic battery, and domestic assault** - HB 4445 (original enrolled version vetoed by the Governor<sup>3</sup>) amending W. Va. Code §61-2-9 and W. Va. Code §61-2-28, redefines battery and assault. Battery is redefined as unlawfully and intentionally “mak(ing) physical contact with force capable of causing physical pain or injury” or “causing physical pain or injury” as opposed to “mak(ing) physical contact of an insulting or provoking nature,” or “causing physical harm.” Assault is redefined as attempting to “use physical force capable of causing physical pain or injury” or “committing an act that places another in reasonable apprehension of immediately suffering physical pain or injury” as opposed to “attempting to commit a violent injury” or placing another in “reasonable apprehension of immediately receiving a violent injury.” These definitions also apply to domestic battery and domestic assault.<sup>4</sup> *Passed March 14, 2014.*

**Expanding definition of financial exploitation of the elderly** - SB 397, amending W. Va. Code §61-2-29(b), expands the scope of the offense to include any person who financially exploits an elderly person, as opposed to caregivers only. Financial institutions and family members are authorized to report suspected exploitation to designated authorities. Public officers and their employees are required to disclose suspected exploitation. Civil immunity is established for those that make such disclosures. *Passed March 8, 2014.*

**Conditional discharge of first offenses related to underage drinking** - HB 4402, creating a new statutory provision, W. Va. Code §60-2-26, allows for the deferral of entry of judgment against one who is found guilty of a first offense for: 1) underage possession or distribution of alcohol; 2) providing false identification in order to purchase alcohol; or 3) distribution of alcohol to a minor, habitual drunkard, intoxicated or mentally ill person, as prohibited by W. Va. Code §§60-3A-24(a)(1), 11-16-19(a)(1), 60-3A-24(b), 11-16-19(b), 60-3-22(a), 60-7-12A(a)(b), and 60-8-20A(a)(b). A period of probation is to be instituted and, upon successful completion, the pending matter will be dismissed. *Passed March 4, 2014.*

**Interfering or preventing call for assistance of emergency personnel** - Senate Bill 90, amending W. Va. Code §61-5-17, creates the misdemeanor offense of interfering with or preventing a person from making an emergency communication or calling for the assistance of emergency service personnel. Interfering is defined as “seizing, concealing, obstructing access to or disabling or disconnecting a telephone, telephone line or equipment or other communication device.” Emergency communication is defined as “communication to transmit warnings or other information pertaining to a crime, fire, accident, power outage, disaster or risk of injury or damage to a person or property”. Escalating penalties for subsequent offenses, all of which are misdemeanors, are established. *Passed March 5, 2014.*

<sup>3</sup> *Agency’s note:* The bill was vetoed due to a defect in the title to the bill. The bill amended the definition of “assault” but the title made no reference to the revised definition. The title to the bill was amended and the bill was passed again.

<sup>4</sup> *Agency’s note:* The intent of the bill is to preclude the result that was reached in *U.S. v. White*, 606 F.3d 144 (4<sup>th</sup> Cir. 2010) in which it was determined that Virginia’s definition of assault or battery in instances of domestic violence did not render the convicted person a prohibited person under federal law with respect to the possession of firearms. Federal law requires “physical force” to be a stated element of the disqualifying offense.

## The Final Wind-up:

# LEGISLATIVE



# WATCH

### JUVENILE MATTERS

**Juvenile sentencing reform** - HB 4210, creating two new sections, W. Va. Code §62-12-13(b) and W. Va. Code §61-11-23, prohibits the imposition of a sentence of life without the possibility of parole in cases where the defendant was less than eighteen years old at the time the offense was committed. It further sets a maximum parole eligibility date of 15 years for any offense, or combination of offenses, committed by a defendant who was less than 18 years old at the time of the commission of the offense(s). Finally, many mitigating factors to be considered at sentencing and parole hearings are identified. They include factors such as age, family and community environment, ability to appreciate the risks and consequences of conduct, intellectual capacity, and peer pressure. *Passed March 8, 2014.*

**Allowing certain expelled students to return to school through juvenile drug court** - SB 252, amending W. Va. Code §18A-5-1a, and creating section W. Va. Code §18A-5-1d, pertains to students suspended for assault or battery of a school employee, possession of a deadly weapon, or selling narcotics at school functions, on school premises, or on a school bus, in violation of W. Va. Code §§61-2-15 and 61-7-11A(b) and defined in W. Va. Code §60A-1-101. The school board, superintendent, principal, parent, guardian or custodian may refer the student to a Juvenile Drug Court operating under W. Va. Code §49-5-2(b). Continued progress and/or successful completion of the program can be grounds for a shortened period of suspension. *Passed March 4, 2014.*

**Permitting the Division of Juvenile Services to maintain trustee accounts and resident benefit funds** - HB 4437, creating W. Va. Code §49-5E-6(a)(b), permits the Division of Juvenile Services to maintain trustee bank accounts, earnings and property for its residents in the same manner as accounts are handled by the Division of Corrections. It also provides for the creation of a resident benefit fund for the benefit and welfare of the residents domiciled in any state juvenile facility and for the benefit of the victims. Funding of the benefit fund will come from such sources as on-site vending machines, telephone commissions, donations, and recovered contraband. The legislation also designates for what the fund can be used, such as open house functions, holiday functions, special activities or rewards for residents. *Passed March 4, 2014.*

**Permitting limited sharing of juvenile records** - HB 4504, creating subsection W. Va. Code §49-7-1(h), authorizes the Division of Juvenile Services (DJS) to provide access to, and the confidential use of, specified juvenile records to an agency in another state which: 1) performs the same functions as the DJS; 2) has a reciprocal agreement with the state; and 3) has legal custody of the juvenile. *Passed February 27, 2014.*

### PAROLE

**Modification of parole eligibility** - SB 408, amending W. Va. Code §62-12-13, eliminates the requirement that an inmate have no disciplinary actions in the three months preceding eligibility for parole. Further, it clarifies that an inmate who has reached parole eligibility is entitled to a timely hearing “without regard to the location in which he or she is housed.” *Passed March 5, 2014, effective from the date of passage.*

## The Final Wind-up:



# LEGISLATIVE

# WATCH

**Requiring programs for Division of Corrections (DOC) inmates housed in regional jails** - SB 457, amending W. Va. Code §31-20-5h, requires the DOC to make all classes and programming required for parole available to inmates who are in the custody of the DOC but detained in regional jails. The Regional Jail and Correction Facility Authority is required to provide the facilities and equipment necessary for the programs and classes or to designate other facilities. Additionally, the bill authorized the development of a cognitive behavioral program for DOC inmates housed in regional jails. *Passed March 6, 2014.*

### ANCILLARY MATTERS

**Eliminating revocation period for certain DUI offenders** - SB 434, amending W. Va. Code §17C-5A-3a, eliminates the revocation period for a person convicted of driving under the influence of alcohol who: 1) applies to and is accepted into the Motor Vehicle Alcohol Test and Lock Program prior to the effective date of the revocation; 2) successfully completes all terms of the program for a period equal to the minimum period for the use of the interlock device plus the applicable minimum revocation period; and 3) waives the right to an administrative hearing. *Passed March 8, 2014.*

**Authorizing pretrial release programs** - SB 307, creating article and sections W. Va. Code §§62-11F-1, *et seq.*, authorizes the creation by a county, circuit, or combination thereof, of a pretrial release program supervised by community corrections. The stated goal of the program is to identify persons who are 1) incarcerated pre-trial, 2) financially unable to post bond, and 3) may be suitable for release with monitoring. The governmental agency implementing such a program is to create a committee of delineated stakeholders. The pre-trial release program is to collect and present necessary information to the court regarding persons identified for possible release, including risk assessments. The program is to identify the potential risks of the defendant failing to appear in court and the potential danger to the community and to make release recommendations to the court when appropriate. The program must develop appropriate supervision of, and must monitor compliance by, the defendant and inform the court of any violations of supervision.

The Supreme Court of Appeals has complete oversight and authority over pretrial release programs and shall create recommended guidelines for these programs. *Passed March 14, 2014.*

**Creating a sexual assault nurse examination network** - HB 4236 (not enrolled due to technical deficiency, reintroduced as HB 108 in the first special session), creating new article W. Va. Code §§15-13-1, *et seq.*, creates within the Governor's Committee on Crime, Delinquency and Correction a Sexual Assault Forensic Commission. Members of the commission are to include representatives of various agencies: law enforcement, including the prosecutors' association; forensic organizations, including the State Police Laboratory and forensic programs at WVU and Marshall University; victims' advocacy groups; and medical associations. The committee is tasked with recruiting and retaining health care professionals qualified to conduct forensic exams, adopt minimum training and basic standards of care for victims of sexual assault, and provide support for providers and victims. *Passed March 14, 2014.*

## The Final Wind-up:

# LEGISLATIVE



# WATCH

**Restricting parental rights of child custody and visitation** - HB 4139, creating W. Va. Code §48-9-209a, relates to the determination of custody of a child born as the result of acts for which the biological parent was convicted of sexual assault or sexual abuse by a parent, guardian or custodian. The court is prohibited from allocating custodial responsibility, or parenting time, to the offending parent without a written finding by the court that it is in the best interest of the child and is with the consent of the other parent.

This section is not applicable to parents who are husband and wife, or unmarried co-habitants, who after the date of conviction continue to cohabitate. *Passed March 8, 2014.*

**Requiring presiding judge's permission to release juror qualification forms after trial's conclusion** - SB 405 amends W. Va. Code §§52-1-5a and 52-1-9. If the court denies the request to release the juror qualification forms, the denial must be explained in writing. *Passed March 5, 2014, effective from date of passage.*

**Providing that grand jury questionnaires are confidential** - SB 470, amending W. Va. Code §52-2-15, imposes the requirement of written permission of the circuit court for the release of grand juror questionnaires. *Passed March 4, 2014.*

### NOTABLE "QUOTE"

All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression.

-Thomas Jefferson

First Inaugural Address; March 4, 1801