

PUBLIC DEFENDER SERVICES



SUPREME COURT OF APPEALS OF WEST VIRGINIA 2015 OPINION SUMMARIES

Prepared By: The Criminal Law Research Center
A Division Of: Public Defender Services
Dana F. Eddy, Executive Director
Donald L. Stennett, Deputy Director
Pamela R. Clark, Coordinator

APPEAL

Failure to raise argument in trial court (2014) 10

Do not incorporate arguments by reference in appellate briefs (2014) 20

Issues must be supported by authority (2014)..... 22

No jurisdiction in lower court to rule on motion to reduce sentence when matter is on appeal (2014)..... 25

Appellate review of inconsistent verdicts is not generally available (2015) 39

Claims of inconsistency in jury verdicts are not reviewable on appeal (2015) 47

A direct appeal from a criminal conviction based on a guilty plea will lie where an issue is raised as to the voluntariness of the guilty plea or the legality of the sentence (2015) 86

Defense counsel’s bold statement, without citation to the controlling precedent, that evidence should have been preserved was insufficient to establish grounds for relief on appeal (2015) 105

Error will not be presumed, so the failure to record police officer’s testimony at a preliminary hearing was not a ground for appeal without any statement by the appellant counsel as to the nature of the officer’s testimony that made the testimony so important and exculpatory (2015)..... 114

An appeal ordinarily does not lie in a criminal case from a judgment of conviction rendered upon a plea of guilty (2015)..... 128

Appeal on issues would be denied when brief did not point to any portion of the record and did not cite any authority (2015) 147

Absent a proffer of the questions that counsel would have asked, court will not consider an argument that trial court precluded effective cross-examination (2015) 149

The improper admission of polygraph related evidence is subject to harmless error analysis (2015) 167

Failure to get a ruling on an objection will not preserve an error for an appeal based solely upon the objection (2015)..... 170

Credibility determinations are not a legitimate function of an appellate court (2015)..... 170

Appropriate remedy for denial of a timely appeal was not unconditional release, but such remedial steps as will permit the effective prosecution of the appeal (2015)..... 184

Jurisdictional error could be ignored in order to protect principles underlying notions of judicial economy and integrity by allocating appropriate responsibility to the defendant for inducing the error (2015).....	184
There must be no evidence to support a conviction before a jury verdict will be set aside or, restated, verdict will be upheld if “some” evidence exists (2015)	191
Counsel had memorialized in correspondence his advice that defendant not take an appeal and, therefore, court disregarded defendant’s assertion that he had been coerced into not taking an appeal (2015).....	196
Prosecutor’s office is not disqualified by an assistant’s previous representation of a defendant if the assistant prosecutor has effectively and completely been screened from involvement, active or indirect, in the case (2015)	209
By pleading guilty, the defendant limited the appeal to whether the plea was voluntary, whether the sentence was correct, and whether jurisdiction is proper (2015)	210
A judgment will not be reversed for any error in the record introduced by or invited by the party seeking reversal (2015).....	212
BURGLARY	
A named lessee can be convicted of burglary by entering the leased premises if the co-lessee has been granted sole occupancy by the protective order (2015)	68
CONSPIRACY	
Harmless error if wrong co-conspirator is named because defendant is still involved in a conspiracy (2014).....	63
In a conspiracy charge, failure to complete the crime is irrelevant as the prohibited conduct is the criminal agreement and the inherent danger represented by such an agreement (2015)	47
Conspiracy and delivery of controlled substances were properly found by jury from the circumstantial evidence (2015)	204
CRUEL AND UNUSUAL PUNISHMENT	
In a capital case, using an IQ number to preclude evidence of an intellectual disability to avoid execution is improper (2015)	32
DIMINISHED CAPACITY	
Expert testimony is required to establish a diminished capacity defense (2015)	37

DISCOVERY

State not obligated to obtain statements of witness given to personal attorney (2014) 14

DOUBLE JEOPARDY

Multiple punishments for same offense (2014) 8

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 (2014) 68

It is not double jeopardy if, upon resentencing after an illegal sentence, the new sentence is harsher (2014) 74

Consecutive sentences for two counts arising out of same incident is not double jeopardy because “abuse” and “neglect” have different elements, so the same incident could support conviction on two different counts (2015) 35

No double jeopardy issues in conviction of both domestic battery and malicious assault as elements for both offenses differed (2015) 42

Entry of a plea is a waiver of double jeopardy grounds, overturning state v. Rogers, 547 S.E.2d 910 (W.Va. 2001) (2015) 45

Court would not rule on issue of double jeopardy for charges of abduction with intent to defile and abduction because the issue was not raised in the trial court and defense counsel requested the instructions on the offense of abduction (2015) 68

The question is what the legislature intended to be a unit of prosecution and it is clear from the statute that each improper use of a state credit card was a separate offense (2015) 77

Multiple punishments for the same offense does not occur where the alleged crimes do not arise, temporally, from the same act or transaction or when each crime has elements that the other does not (2015) 77

Pleading guilty to two counts of possession of controlled substance from same transaction may have constituted a double jeopardy violation, but this was waived upon entry of the plea agreement (2015) 139

Defendant can be convicted of first degree sexual abuse and sexual assault by a parent, guardian or custodian for the same act because legislature clearly made them separate and distinct crimes (2015) 147

Proof of physical helplessness and mental incapacity are different requirements even if the single administration of a drug caused both and therefore, defendant could be convicted of both second and third degree assault (2015) 149

DUE PROCESS

Violation by imposing harsher sentences on appeal (2014) 4

Prosecution was required to give notice pretrial that it would seek a finding that the battery was sexually motivated and the failure to do so was plain error warranting a new trial (2015) 55

A criminal defendant has the right, absent some necessity relating to courtroom security or order, to be tried free of physical restraints (2015) 82

The better practice is to remove restraints before a prisoner is brought before the jury and reasonable efforts should be made to prevent prisoners under such restraints from being seen by jurors (2015) 82

State may seek a conviction for felony murder and premeditated murder without electing one or the other so long as the court instructs the jury on the distinction between the two theories (2015) 123

An inquiry into a defendant’s financial ability to comply with terms of supervised release may be appropriate (2015) 135

State can impose licensing requirements upon driving a vehicle in order to protect citizens generally when driving on the state’s highways (2015) 146

The denial of the right of appeal constitutes a violation of due process which renders the sentence imposed by reason of the conviction void and unenforceable (2015) 184

Proceedings for violation of conditions of supervised release is a continuation of the prosecution of the original offense and, therefore, is not a separate criminal trial requiring all the incidents of a criminal trial (2015) 214

ETHICS

Guardian ad litem are covered by rules of professional conduct (2014) 8

EVIDENCE

State’s expert’s failure to record defendant’s interview not fatal (2014)..... 12

State can present evidence even if defendant stands silent on the issue of mercy (2014)..... 12

Victim’s “sex offender” status not admissible (2014) 14

Expert testimony on reliability of eyewitness testimony excluded (2014) 19

Under totality of circumstances, “overly suggestive line up” did not require suppression of identification (2014)	28
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 (2014).....	41
Surprise requires defense counsel to move for a recess in order to cure prejudice, otherwise it is waived (2014)	48
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 (2014)	54
State was not required to take a statement of a potential exculpatory witness when defendant could have obtained statement (2014).....	63
Conviction for sexual offense may be obtained on the uncorroborated testimony of the victim unless such testimony is inherently incredible (2014)	66
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 (2014).....	66
Loss of videotaped statements by investigators is not a Brady violation because defendant cannot show the statements impeach the officer’s testimony and loss was not willful (2015)	34
Defense counsel’s use of police report to elicit favorable testimony supported prosecutor’s motion for admission of entire police report into record (2015)	42
Malice and intent may be inferred by the jury from the defendant’s use of a deadly weapon (2015)	45
The “curative admissibility rule” allows a party to present otherwise inadmissible evidence on an evidentiary point where an opponent has “opened the door” by introducing similarly inadmissible evidence on the same point (2015)	62
Statements made by the purported partner in crime to a witness while smoking pot were not testimonial in nature and, therefore, confrontation clause was not invoked (2015)	71
Any interval of time between the forming of the intent to kill and the execution of that intent is sufficient to support a conviction for first degree murder (2015)	75
Malice may be inferred from the intentional use of a deadly weapon (2015)	75
Rape shield precluded evidence of a victim’s consensual activity with a boyfriend and another victim’s abuse by another person because these incidents did not bear on question of defendant’s guilt of	

charges (2015)	88
From the testimony, the jury could infer that the defendant was not married to the six and nine year old victims (2015)	91
Proof of lustful disposition satisfied proof of sexual gratification element of crimes (2015)	91
Element of “fear of bodily injury” required for conviction of second degree robbery was satisfied by proof of threats made when victims tried to regain possession of property (2015)	94
A study of reported shaken baby incidents was deemed to not be scientific in nature requiring, as defense counsel demanded, a <i>Daubert</i> analysis, but because defense counsel did not object to its relevance, its admission was not an abuse of discretion and would be harmless error in any event (2015)	103
Denial of motion for acquittal on basis that motive need only to be proved by a preponderance of evidence was merely inartful articulation of the standard that the court does not have to believe that proof beyond a reasonable doubt exists but that the jury need only to have sufficient evidence to justify believing so (2015)	104
Direct proof of premeditation is seldom possible and is generally proved by only circumstantial evidence (2015)	105
Defense counsel must prove evidence would be favorable before failure to turn it over is a <i>Brady</i> violation (2015)	105
The crime of concealing a body extends to concealing the body of a person who overdosed on self-administered drugs, even though the body was not a victim of the defendant’s criminal activity of ingesting drugs (2015)	108
The value of the damage done to a car in order to constitute a felony was sufficiently established by the owner’s testimony, the nature of the damage, and the opinion of an expert with years of experience even though the expert saw only photographs (2015)	112
In light of the overwhelming evidence of defendant’s intoxication, the trial court’s refusal to compel production of voluminous materials on the intoximeter was not a <i>Brady</i> violation because its exculpatory value was speculative at best (2015)	114
A corpus delicti of a crime cannot be established solely by the accused’s extrajudicial confession or admission but, instead, must be corroborated by independent evidence such that, when taken in connection with the confession or admission, establishes the crime beyond a reasonable doubt (2015)	116
Examination of an expert about facts upon which he or she relied should not be conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his or	

her testimony (2015)	123
A new trial will not be granted on grounds of “newly discovered evidence” consisting of a witness’ testimony about defendant’s beard when defendant knew he had this encounter but did not disclose it until after the trial, thereby establishing his lack of diligence in securing evidence (2015)	131
A conviction can be sustained on solely circumstantial evidence (2015)	135
Several witnesses referred to material as a meth lab without being qualified as experts, but the co-defendant and an expert had so identified the material and therefore the witnesses were stating facts, not opinions (2015)	137
Cohabitation is not required for a person to be a “custodian” (2015)	138
Pictures of other minor victims in sexual situations were permitted to be introduced to show lustful disposition and absence of mistake (2015)	142
Argument on appeal that the prosecutor failed to put forth evidence that the 45 year old defendant was over 18 years of age was not an <i>Apprendi</i> issue requiring a jury finding and the defendant’s age was not contested by either party and was readily established from the circumstances (2015)	144
Issue of reliability of the victim’s in-court identification of defendant due to the passage of time was for the jury to determine (2015)	146
A liberal thrust exists for the admission of expert testimony with issues of credentials, methodology, or lack of authority going to weight and admissibility of testimony (2015)	149
Evidence admissible in the mercy phase of a murder trial is much broader than the guilt phase and necessarily encompasses the defendant’s past, present and future as well as evidence surrounding the nature of the crime committed (2015)	152
An expert opinion regarding the defendant’s characteristics that did not fit the profile of a sex offender would not be permitted in absence of scientific acknowledgment that a profile existed for a sex offender (2015)	162
The rule that a court has no authority to permit use of confidential juvenile law enforcement records as evidence in the state’s case does not prohibit the use of juvenile records as a shield to rebut or impeach evidence that is presented by a criminal defendant (2015)	167

Any reference to a criminal defendant’s offer or refusal to take a polygraph examination, and the results of a polygraph examination, are inadmissible and evidence that a defendant in a criminal case took a polygraph examination is also inadmissible (2015)	167
The type of evidence that is admissible in the mercy phase of a bifurcated first degree murder trial is much broader than the evidence admissible for purposes of determining a defendant’s guilt or innocence (2015)	170
Autopsy or crime scene photographs may be particularly relevant to depicting the nature of the crime committed by the defendant who has been found guilty of first degree murder and even if deemed gruesome, the probative value of these photographs is greater at the mercy phase of a bifurcated trial than at the guilt phase of such trial (2015)	170
No misconduct on part of prosecutor who only asked a general question that resulted in the expert’s improper statement that victim was afraid of the defendant (2015)	173
Twelve year old evidence of sexually related violence could be admitted to show a lustful disposition to young female relatives and to show proof of opportunity (2015)	174
Remoteness in time of prior bad sexual acts goes to weight to be accorded evidence and not admissibility (2015)	174
If a client waives the right to remain silent, then whatever is not said in the resulting statement is properly commented on (2015)	179
State is required to produce evidence to support the crime but is not generally obligated to produce evidence that only the defendant may deem to be relevant (2015)	181
Non-testimonial statements by an unavailable declarant are not precluded from use by the confrontation clause (2015)	183
Victims statement to nurse that defendant caused the injuries was not testimonial, but was hearsay, although harmless (2015)	183
Another incident almost identical to the facts in this matter was allowed as evidence to demonstrate a specific plan or course of action on behalf of defendant and also to show that there was no mistake on his part and that there was no instance of a heat-of-passion incident (2015)	189
It is fundamental that where the subject matter of a question has been introduced by a defendant on cross-examination, it may properly be covered on redirect (2015)	206
No <i>Brady</i> violation in not disclosing that defendant had refused to sell to undercover law enforcement because it is neither exculpatory nor inculpatory (2015)	207

Before a physical object connected with a crime may properly be admitted into evidence, it must be shown that the object is in substantially the same condition as when the crime was committed (2015) 208

The difference in genders of child victims did not preclude introduction of the other acts in the trial because it could show a lustful disposition toward children generally (2015) 209

The defendant’s knowledge that checks were forged was sufficiently established by a chronology of events from which he had to know (2015) 213

EXCLUSIONARY RULE

Court’s inherent power to exclude (2014)..... 1

General (2014) 1

EXTRADITION

Presence in other state in commission of a crime charged by that state is not needed when an act in this state is committed and intentionally results in a crime in another state (2015) 40

Defenses to crime, including unconstitutionality, are to be decided by the demanding state (2015) .. 41

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 (2014)..... 43

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” (2014)..... 36

HABEAS CORPUS

Habeas counsel can be found to have ineffectively assisted defendant (2014) 31

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 (2014) 61

Grounds randomly selected from the *Losh* list and raised for the first time in a habeas corpus proceeding are properly denied (2014)..... 61

Even if plea offer was not communicated by trial counsel, relief should not be granted because defendant maintained his innocence throughout trial and a *Kennedy* plea was unlikely due to nature of crime (2015) 40

Error in findings of fact about review of a transcript of a guilty plea when defendant was actually convicted by a jury was only a clerical error that court could correct at any time on its own initiative and, therefore, no appellate relief was warranted (2015)	87
Court found no merit to petitioner’s assertion that his court-appointed counsel was incompetent because of his low rate of compensation (2015)	98
Ordinary trial error not involving constitutional violations will not be reviewed in a habeas corpus proceeding (2015)	107
Counsel’s leaving the courtroom to use the restroom while jury was watching a video recording was ineffective assistance of counsel, but defendant suffered no prejudice because no adversarial moment occurred during counsel’s absence (2015)	111
Petition is properly denied as moot when defendant has fully discharged his sentence and is released from incarceration (2015)	119
Parolees in the state penal system may not file habeas petitions (2015)	148
The primary purpose of an omnibus hearing is to provide the court with evidence from the most significant witness, the trial attorney (2015)	163
Given the heinous nature of the offenses, it was not ineffective for defense counsel to forgo an argument for probation at the sentencing hearing and instead to hope for concurrent sentences (2015)	193
When a knowing and intelligent waiver of constitutional rights is conclusively demonstrated on the record at a plea hearing, the matter is res judicata in subsequent actions in habeas corpus (2015) ..	193
Habeas counsel found contradictory an argument that the speedy trial statute was violated and that trial counsel’s motion to continue the trial should have been granted and, therefore, was not ineffective in not raising the speedy trial claim (2015)	199
Petition was properly denied for failing to state a claim because the prisoner’s claims against warden did not rise to the level of constitutional violations (2015)	199
We only ask whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case (2015)	202
As a result of the rules and presumptions established, the cases in which a defendant may prevail on the ground of ineffective assistance of counsel are few and far between one another (2015)	202
The contention was rejected that defendant would have accepted the initial plea offer if communicated to him when the defendant rejected a subsequent plea offer that was more favorable (2015)	202

While the trial may not have been perfect, given the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and the constitution does not guarantee such a trial (2015)	202
Counsel’s failure to appeal a conviction, in and of itself, does not necessarily constitute ineffective assistance (2015)	211
A court may deny a petition for a writ of habeas corpus without a hearing and without appointing counsel for the petitioner if the petition, exhibits, affidavits, or other documentary evidence show to the court’s satisfaction that the petitioner is not entitled to relief (2015)	211

HEARSAY

Statements made by child to mother, social worker, and state trooper admissible (2014).....	15
Residual hearsay exception covered admission of witness’ testimony that decedent identified bruises in a photograph as inflicted by defendant (2014)	48
Court finds harmless testimony that was described as hearsay by implication, i.e., “so if there was information.....” (2014)	66
A self-inculpatory statement made by a purported cohort who was unavailable by pleading the Fifth Amendment privilege falls within the hearsay exception (2015)	70
Victim’s statement about defendant hitting her made to a police officer was not hearsay when officer is testifying about why he took certain steps (2015)	183

IMPROPER REMARKS BY PROSECUTOR

Countering defense counsel’s argument (2014)	6
Prosecutors not to remark upon defendant’s expected evidence (2014)	18
Waiver if no contemporaneous objection made and curative instruction requested (2014)	18
Injection of religion into argument requires strict scrutiny and usually results in reversal (2014)	25
Reference to Jesus Christ as a historical figure did not improperly inject religion into deliberations (2014).....	25
Reversible error not found due to remarks about defendant’s failure to testify because it was reference to defense counsel’s opening statement (2014)	26
Statement that evidence is uncontradicted is not improper as commenting upon defendant’s failure to testify (2014).....	26

Prosecutor could refer to defendant’s pre-arrest silence, but not post-arrest silence (2014)	42
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 (2014)	48
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 (2014)	71
Prosecutor’s argument to jury that dismissed charges were nonetheless true did not warrant relief when defense counsel used dismissed charges in his closing to show failure to conduct an improper investigation (2015)	88
Discussing the defendant’s potential motive for murder as greed or a “macho thing” was not an improper reminder to the jury that the defendant had not testified, despite precedent that by directing attention to what was in the appellant’s mind is stealthily emphasizing that defendant had not testified (2015)	102
Defense counsel must object to preserve error when prosecutor says “the only evidence that you have and there’s not another good explanation” which potentially is a reference to the defendant’s failure to testify (2015)	197

INDICTMENT

Without evidence of selective or discriminatory prosecution, the Court will not disturb the prosecutor’s choice of what charges to bring (2014).....	75
An indictment will be reviewed only for constitutional error and prosecutorial misconduct (2015)	62
Supreme Court would only inquire into the evidence considered by the grand jury if willful intentional fraud could be found (2015)	62
“Operating” or “attempting to operate” a clandestine drug laboratory are not separate offenses, but two ways to violate the statute; thus, indictment was not defective (2015)	73
The mistaken reference to the same count in an indictment on a jury verdict form for two identical charges involving different victims was not error supporting relief on a habeas corpus petition (2015)	86
It is not necessary in an indictment for murder to set forth the manner in which, or means by which, the death of the deceased was caused (2015)	123
Court cannot consider the evidence presented to the grand jury unless an allegation of willful, intentional fraud is made (2015)	172

INSTRUCTIONS

Caution regarding co-defendant’s guilty plea (2014).....	3
Disregarding failure to call an expert witness (2014).....	6
Harmless error in not instructing on elements of offense (2014).....	11
Prosecutor’s argument assuaged error in instructions on elements of offense (2014).....	11
Jury need not be instructed on lesser included offense of involuntary manslaughter when not supported by evidence (2014)	23
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 (2014).....	75
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 (2014).....	76
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 (2014)	77
“Sufficient evidence” must exist to support an instruction, not just some evidence (2015)	37
Supreme Court does not recognize or adopt the doctrine of imperfect self- defense (2015)	45
Accomplice’s plea of guilty cannot be considered as proving the guilt of the defendant and may only be considered for proper evidentiary purposes such as to impeach trial testimony or to reflect on a witness’ credibility (2015)	53
Defendants are on notice that an aiding and abetting instruction may be requested, even in the absence of an indictment thereon (2015)	57
The use of the term co-conspirator rather than “accomplices” in the jury instructions was not improper because defendant was actually charged with conspiracy (2015)	92
An instruction that in order to constitute a premeditated murder an intent to kill need exist for only a moment was properly given (2015)	105
Defendant admitted elements of more serious charge and, therefore, evidence did not support instruction on lesser included offense (2015)	118

The court improperly instructed the jury on “lying in wait” as not requiring concealment, but error was harmless because sufficient evidence existed to support other theories of murder (2015)	123
Defendant’s expert on diminished capacity did not testify that defendant lacked capacity to form malice and, therefore, an instruction on involuntary manslaughter was properly denied (2015)	123
Defendant’s self-serving letter to victim of his abuse was not competent evidence to support giving an instruction on self-defense (2015)	139
The court normally presumes a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury will be unable to follow the court’s instructions and a strong likelihood that the effect of the evidence would be devastating to the defendant (2015)	167

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 (2014)	65
Judge does not need to affirmatively disclose a relationship with the victim, only relationships with the litigants (2015)	107
A family relationship between a magistrate and a law enforcement official does not automatically disqualify the magistrate (2015)	177

JURY

Disqualification of jurors (2014)	5
Improper remarks by prospective juror not grounds for mistrial (2014).....	14
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 (2014).....	33
Inconsistent verdicts are not grounds for a new trial because it may benefit defendant (2014).....	45
State could use a peremptory challenge to remove the last person of color from the panel when the juror lied about having been arrested (2014)	51
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 (2014).....	60
No automatic requirement for the reversal of a conviction exists whenever a witness for the state comes into contact with the jury (2015)	45

Mere presence of a biased prospective juror on a jury panel, although undesirable, does not threaten a defendant’s constitutional right to an impartial jury if the biased panel member does not actually serve on the jury (2015) 48

Improper influence of juror requires clear and convincing evidence; the mere opportunity to influence a juror is not enough (2015) 59

Communication between bailiff and juror at beginning of jury’s deliberation was not a critical stage of proceedings requiring defendant’s presence (2015) 59

When a juror makes an inconclusive or vague statement that only indicates the possibility of bias or prejudice, the prospective juror must be questioned further by the trial court and/or counsel to determine if actual bias exists (2015) 67

The use of a preemptory challenge to remove a juror who was a spouse of an employee in the prosecutor’s office did not prejudice defendant who still got what he is promised – an unbiased jury (2015) 103

More than the juror’s race is required for a *Batson* challenge as defendant must show that other white jurors were not struck who offered similar responses in *voir dire* (2015) 113

Defense counsel should have discovered a juror’s connection to the clerk and an investigating officer during *voir dire* and not after the trial (2015) 142

Defendant must show that the jury was biased before prejudice can be shown for failure to strike a juror for cause (2015) 145

Without evidence of bias, individual *voir dire* is not justified (2015) 147

While no clear and convincing evidence existed that jurors improperly spoke with a third party, the circuit court should have heard from all jurors purportedly involved and case was remanded for this purpose (2015) 153

Defendant is entitled to a presumption of prejudice when a person interferes with a juror if the person is an interested party, that is, a plaintiff, defendant, or an attorney representing one of them (2015) 170

Defendant must prove prejudice when the party interfering with a juror is not an interested party (2015) 170

MISTRIAL

Inadvertent disclosure of defendant’s assertion of right to counsel not grounds for mistrial (2014)....	12
Motion must be made before verdict is rendered (2014).....	22
Intentional reference in opening statement about already deemed inadmissible evidence was grounds for “manifest necessity” to declare a mistrial as opening statement is the most impressionable time for a jury (2015)	44
Questions by the court to a witness are within the trial court’s right to control the orderly process of a trial (2015)	45
Judge’s questions of a witness were non-substantive and merely confirmed already elicited testimony (2015)	57
A victim’s remark about defendant’s possible drug use was only slightly prejudicial which could have been readily cured by counsel’s request for a curative instruction that was not made (2015)	113
Improper Rule 404(b) evidence about witness owing money to defendant charged with dealing drugs did not warrant a new trial due to curative instruction and due to absence of any statement about why money was owed (2015)	132
A curative instruction given immediately sufficiently cured witness’ blurting out prejudicial information (2015)	144
A purported ground for a mistrial will be ignored on appeal if it was not stated as a ground to the trial court (2015)	197

OBJECTIONS

Failure to object to court’s questioning of juror panel (2014)	14
--	----

PLEA AGREEMENTS

Ambiguity to be construed against state (2014)	21
Discussion of the requirements upon the sentencing court in determining whether to accept a Type “B” agreement (2014).....	56
The apparent legal impropriety of a deal was not decided on appeal because the parties had not raised the argument (2014).....	73
The sloppiness of the plea agreement was the State’s issue and the defendant was entitled to his side of the bargain (2014)	73

The enhancement of a sentence is not a direct consequence, as it is only a collateral consequence, of sentencing and thus defendant entering a plea is not required to be informed about a habitual offender enhancement by either the court or the prosecutor (2015) 50

A defendant has no constitutional right to have a case disposed of by way of a plea bargain (2015) .. 62

Claiming bipolar disorder is not sufficient ground for withdrawing plea as the proceedings must in some manner reflect that the disorder impacted the defendant’s ability to comprehend the proceedings (2015) 64

Defendant was properly denied the right to withdraw his *Kennedy* plea before sentencing because he could not show a “*fair and just reason*” for doing so that did not contradict his responses to the court’s questions during his plea hearing (2015) 85

Fact that defendant was humiliated by prospect of use of a previous conviction during a trial did not make his guilty plea involuntary (2015) 86

Statements made during plea colloquy precluded defendant’s argument that his now disbarred attorney promised he would get probation and that he did not understand the proceedings which defendant thought should have been obvious to the court upon defendant’s disclosure that he was on social security disability (2015) 110

A hearing on the motion to withdraw a plea of “no contest” was not required to be held because defendant’s answers at the plea hearing undermined the grounds for the motion to withdraw the plea (2015) 126

A plea hearing is not to be a formal adjudication of guilt beyond a reasonable doubt, but is to ascertain that the plea is voluntarily and intelligently made (2015) 141

W. Va. R. Cr. P. 11 gives a trial court discretion to refuse a plea bargain and no constitutional right exists to a plea bargain (2015) 175

Having received all the benefits from his negotiated agreement, the defendant ought not now be heard to complain of his bargain, even if his period of supervised release was not legally mandated (2015) 194

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 (2014) 57

PROCEDURE

The trial court did not err when it permitted the prosecutor to reopen the case to admit search warrants that had been omitted (2014).....	59
Petitioner for expungement was not entitled to a hearing as process is intended to be a summary procedure based upon a verified petition (2015)	90
It is not an abuse of discretion for a circuit court to decide the merits of a motion to reduce a sentence without an evidentiary hearing, especially if the court hearing the motion did the sentencing (2015)	94
A conference among the defense counsel, prosecutor and the court on what portions of a transcript are to be read is not a critical stage of the proceeding that requires defendant to be present because it concerns a technical question of law that is not dependent upon facts within the personal knowledge of the defendant (2015)	102
Lack of evidence sufficient to prove grand larceny did not preclude conviction on lesser offense because submission of the case to the jury was warranted and denial of request for judgment was proper despite favorable jury verdict (2015)	119
The rules of procedure in criminal and civil cases do not apply in post-conviction habeas corpus proceedings (2015)	121
Pretrial defects were waived when defendant knowingly and willingly entered a plea of guilty (2015)	128
Because defense counsel had made no request for trial court to see if jury had been improperly influenced by the purple ribbons worn by the victim’s family, the purported error was waived (2015)	129
The denial of a motion to reconsider a sentence without detailed findings of fact and conclusions of law does not mean that court failed to meaningfully review the motion (2015)	136
Managing the questions on cross-examination of a child witness was proper in order to prevent harassment of witness (2015)	139
Without actual prejudice shown, twelve year pre-indictment delay will not result in a dismissal of the charges (2015)	146
Bold allegations of conspiracies do not satisfy the heightened fact pleading required for inmate lawsuits against prison officials (2015)	148
No attorneys’ fees were to be awarded to reporter for quashing subpoenas issued by prosecutor for reporter’s tax returns in absence of a statutory authorization or vexatious or bad faith conduct by	

prosecutor (2015)	148
A preliminary hearing is not a federal constitutional mandate and there is nothing in the state constitution which would give an independent state constitutional right to a preliminary hearing (2015)	157
If state elects to indict a person without a preliminary hearing or before one can be held, the preliminary hearing is not required because probable cause is determined by the grand jury, eliminating the need for a magistrate to make that determination (2015)	157
A preliminary hearing is not about pretrial discovery, but, rather, is about a court exercising jurisdiction over a person by either incarceration or release on conditions (2015)	157
Dismissal of a case is to be consonant with the public interest in the fair administration of justice (2015)	157
Terms and conditions of supervised release cannot be modified without a hearing and assistance of counsel (2015)	159
A remedial sentence reduction is not a critical stage of the proceedings; so the defendant's presence is not required (2015)	165
Juvenile records are to be obtained by means of a properly noticed motion to the court to unseal the records (2015)	167
State has no obligation to call a witness so defense can elicit testimony from him or her (2015)	179

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 (2014).....	76
Confession was not involuntary due to period of time spent at police station because purpose was investigatory and defendant was not under arrest (2015)	129
When defendant voluntarily testified at trial, he waived any error that he maintained occurred as a result of his allegation that the prompt presentment statute was violated (2015)	195

RECIDIVISM

Strict construction of recidivist provisions (2014).....	17
Failure to follow proper procedure (2014).....	17

Enhanced felonies can be predicate felonies for purposes of applying recidivist statute (2014).....	29
Only one enhancement is permitted of any convictions returned at the same time (2014).....	63
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 (2014)	70
A recidivist information cannot be withdrawn once filed, requiring the sentencing court to impose the statutory enhancement (2014).....	74
Rule of lenity does not require that a recidivism enhancement be applied to the least harsh penalty (2015)	68
Requirement that the information be filed “immediately” after conviction is met if filed before the end of the term of court (2015)	118
The recidivist information does not have to state the date on which the prior offenses occurred if reasonable notice of the nature and character of the previous conviction is otherwise given (2015)	118
Defendant was not prejudiced during his recidivist trial by being in shackles due to his multiple outbursts in prior proceedings and due to the inability to see the shackles because the defense table was covered with a cloth skirt (2015)	118

RULE 403

Prejudice must be “unfair” (2014).....	22
The rule is not applicable if the evidence of other acts is intrinsic to the crimes charged (2014).....	60
Evidence of sexual activity by a victim and evidence of other abuse suffered by a victim was unduly prejudicial and such prejudice clearly outweighed any probative value (2015)	88
Probative value must be substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence (2015)	186

RULE 404(b)

Jury would clearly understand limiting instruction regarding use of similar charges and uncharged incidents involving a different victim (2014)	1
Evidence of domestic violence protective order was admissible as intrinsic to charges of battery (2014).....	30
Court has to find by preponderance of the evidence that defendant committed the uncharged offenses before admitting evidence (2014).....	40

Erroneous admission of Rule 404(b) evidence most likely results in prejudicial error (2014).....	40
Because defendant argued wife’s death was accidental, prior incidents of domestic violence were admissible to show absence of mistake (2014).....	48
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 (2014)	60
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 (2014)	65
Mention of previous charges in opening statement and in a witness’ answer will not be found to be error when trial counsel did not object; the charges, although subsequently dropped, were part of the current indictment; and defense counsel used the fact the charges were dropped in cross examination (2015)	62
Prosecutor’s reference to defendant and an expert’s diagnosis of defendant as a pedophile was an improper attempt to establish a character trait, but was harmless in light of the “overwhelming” evidence of guilt (2015)	80
An adult’s testimony as to her abuse in similar circumstances seven years before the abuse of other victims charged in this case was reasonably close in time to be permitted to show a lustful disposition toward children (2015)	91
A hearing was not required to bring out testimony regarding defendant’s drug dealing during the murder trial as it was part of the <i>res gestae</i> of the crime, as evidenced by defendant’s own use of the fact to show a lack of motive (2015)	92
An identical drug transaction to the one charge was admitted, despite its prejudicial effect, in rebuttal of defendant’s testimony denying involvement in a drug transaction and proclaiming that he does not mess with drugs (2015)	95
Because witness was called by defense counsel who did not object to cross-examination of witness on prior acts, no Rule 404(b) violation occurred (2015)	129
The testimony of a police officer about why defendant was not searched after a controlled buy for the supplied money, which was that another controlled buy was planned and done, was given on redirect examination after defense counsel had criticized the officer for not doing a search and the testimony was, therefore, invited error not warranting a reversal (2015)	133
Defendant’s reference in a letter to his victim about his prior bad acts need not be redacted because it was intrinsic to the subject of the letter containing admissions by the defendant to the charged conduct (2015)	139

Failure to give limiting instruction at time of introduction of evidence was error, but it was harmless error including the fact that defense counsel failed to move for the limiting instruction (2015) 186

Previous attempt to kill the victim as evidence was deemed to be harmless error because defendant’s own statements provided the necessary animus toward the victim to support a first degree murder conviction (2015) 200

RULE 608(b)

Witness can be cross-examined on specific instances of conduct, but documentary evidence of such conduct is not admissible (2014)..... 30

RULE 609

A pretrial diversion agreement did not result in a conviction and therefore impeachment permitted by Rule 609 does not apply (2015) 121

SEARCH AND SEIZURE

Warrant not required to enter home due to emergency exception and as a protective sweep (2014)..... 28

Invited guest had no objectively reasonable expectation of privacy because continuation of stay was obtained by threats and exploitation of owner’s addiction (2014)..... 38

Entry into home pursuant to knock and talk justified warrantless search of premises due to the circumstances (2014)..... 38

Warrantless search of an automobile permitted after a traffic stop was proper in circumstances (2014)..... 52

State law on searches of automobile is commensurate with federal law (2014) 52

Probable cause to search a home was found when anonymous posts threatening harm were traced by other warrants to the defendant (2014) 59

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 (2014) 63

A warrant need only provide a sufficient basis for identification of the real property so that it is recognizable from other adjoining and neighboring properties (2014)..... 67

A detached garage is covered by the term “outbuilding” (2014)..... 67

Warrantless entry into a house is valid when based upon the consent of a third party that the police, at the time of entry, reasonably believe to possess common authority over the premises even if the third party does not possess such common authority (2015) 178

SENTENCE

No credit for home confinement during drug court program (2014) 4

Probation is not a sentence (2014)..... 4

Constitutionality of supervised released (2014)..... 6

Proportionality of supervised release periods of incarceration (2014)..... 6

Constitutionality of supervised release periods of incarceration (2014) 10

Probation improper when statutory sentence imposed and not suspended (2014)..... 18

Community service is an improper alternative when statutory sentence is imposed and not suspended (2014) 18

Kennedy plea does not preclude lack of remorse as a sentencing factor (2014)..... 19

No need exists to file more than one motion to reduce sentence (2014) 25

Registration of internet accounts under sex offender registration act is not unconstitutionally vague (2014) 32

Sex offender registration act is regulatory and not punitive for purposes of conviction (2014) 32

Overturing conviction is only statutory basis for removal from sex offender registry (2014)..... 32

Expungement not proper if a grievance proceeding is pending (2014) 34

Defendant has no constitutional right to be sentenced as an adult rather than as a youthful offender (2014)..... 44

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 (2014) 46

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 (2014)..... 51

Constitutional proportionality standards are most applicable to sentences with no fixed maximum period or sentences of life due to a recidivist action (2014)..... 61

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 testimony of the defendant and victim in a previous trial (2014) 62

Disparate sentences for codefendants, i.e., one getting concurrent sentences and the other getting consecutive sentences, are not per se unconstitutional (2014)..... 70

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 (2014)..... 77

Supervised release could be imposed on physical nonsexual abuse of children even though caption to statute referred only to a sex offender (2015) 36

Documents relating to community and official sentiment would not be given to defendant upon denial of parole because no prejudice was shown due to independent ground for denying parole (2015) 38

Imposing sentence equal to victim’s age of 74 years was not arbitrary because court record contained consideration of other factors, including seriousness of injury (2015) 39

Failure to object to presentence investigation report at sentencing constituted waiver of any irregularities (2015) 42

Probation after a period of incarceration could be revoked for prohibited phone calls while incarcerated even though phone calls presented no real danger at that time (2015) 53

The requirement to pay court costs is compensatory and not part of the punishment or penalty for committing the crime (2015) 60

The Legislature determines what is a felony or misdemeanor and what is a schedule I controlled substance (2015) 60

Defendant’s failure to get an evaluation required for probation would not be grounds for resentencing as probation is a matter of grace and not a right and court’s sentence was within the statutory limits (2015) 66

For purposes of commitment, an act of violence against a person is an act that indicates an incompetent defendant poses a future risk of harm to the public, and, therefore, the mere possession of a gun on educational premises satisfied the finding (2015) 78

Federal court decision vacating conviction on six of eight counts due to improper application of the rape shield statute in violation of the confrontation clause resulted in resentencing, but did not give defendant the right to a new sentencing hearing (2015) 83

A victim’s impact statement can include allegations that relate to dismissed charges if the allegations relate in some manner to charge of conviction, i.e., conspiracy (2015) 84

On Rule 35(b) motions, circuit courts should consider only those events that occur within the 120-day filing period; however, as long as circuit court does not usurp the role of the parole board, it may consider matters beyond the filing period when such consideration serves the ends of justice (2015) 87

Expungement could not be granted to petitioner for misdemeanor charges related to consumption of alcohol at college because of a previous charge and conviction for underage consumption (2015) 90

Supreme Court has upheld the propriety of consecutive sentences when a plea agreement results in a much lesser sentence than the crimes for which defendant was originally indicted (2015) 94

An inmate who is parole eligible will not get credit for time served when sentenced for an assault within the prison because, while he was not released on parole due to the assault, he was serving the sentence on the original charge (2015) 95

Defendant is not given credit for time served on unrelated charges even if State of West Virginia has placed a detainer on defendant (2015) 96

The 2013 version of the statute governing incarceration periods upon revocation of probation does not apply retroactively (2015) 97

Court did not find that undue emphasis was placed on victim impact statement which constituted 72% of the sentencing hearing and included numerous photographs and visual aids, especially when record showed that the sentencing court had reviewed a pre-sentence investigation report and had considered the defendant’s criminal history and drug abuse history and had examined family’s letters of sentiment (2015) 99

Petitioner’s frivolous complaint warranted the loss of 60 days of good-time credit (2015) 101

Court did not abuse its discretion in transferring youthful offender to prison on his twenty-first birthday notwithstanding his achievements during his preceding placements (2015) 120

A detainer for charges for which no bail had been set did not get defendant credit for time served during this period because even if bail had been set, defendant would still not have been released because he remained incarcerated on unrelated charges (2015)..... 127

Good time credit is to be applied against the total years of the minimum terms for consecutive sentences and is not to be credited against each concurrent sentence (2015)..... 131

Advanced age does not have to be considered when imposing a sentence and running terms consecutively (2015)..... 134

Giving defendant probation would have severely depreciated the seriousness of petitioner’s

conviction on domestic violence charges (2015)	136
The finding that the defendant was a sexually violent predator was only required to impose supervised release for life, not for any lesser period (2015)	138
Probation is not a right, as it is, instead, a matter of grace (2015)	141
A special condition of supervised release may restrict fundamental rights when the special condition is narrowly tailored and is directly related to deterring the defendant and protecting the public (2015)	159
Allowing trial courts to order defendants to make restitution directly to insurance companies further assists victims by relieving them from the burden associated with an insurer pursuing its own subrogation claim and the possibility of involvement in litigation to resolve such a claim (2015)	161
A court may order a defendant to make restitution to an insurance company to the extent the insurance company has compensated a victim for loss attributable to the defendant's criminal conduct (2015).....	161
A palpable abuse of discretion must occur before the decision to deny probation will be overturned (2015).....	175
Circuit court judges do not have to use the results of the LS/CMI in their sentencing decisions (2015)	176
Defendant is not entitled to credit for time served when his incarceration is related to revocation of parole for a prior conviction (2015)	181
Motion made, pro se, to correct a sentence was untimely when made two years after the sentence was imposed (2015)	194
A proper factor in sentencing was the use of a firearm even though the plea was taken for the crime of robbery without the use of a firearm (2015).....	204
The governing statute imposing periods of supervised release up to life is not facially unconstitutional as cruel and unusual punishment (2015)	214
Imposition of the legislative mandated additional punishment of a period of supervised release as an inherent part of the sentencing scheme for certain violations is not in contravention of the double jeopardy clause (2015)	214

SPEEDY TRIAL

Three term rule met (2014).....	20
Statutory three term rule and Sixth Amendment balancing test apply (2014).....	20

Continuance of trial is proper due to prosecutor’s surgery even though he went to hearings and had an assistant (2014).....	22
Good cause exists for continuance of trial to next term when only one court day remains in the term (2014).....	43
Actual indictment and conviction moots any violation of the two-term rule requiring timely indictment of an incarcerated defendant (2014).....	43
Violation of two-term rule requiring timely indictment of an incarcerated defendant does not prohibit further prosecution or incarceration upon subsequent indictment (2014).....	43
Generally, a defendant incarcerated in another state is entitled to a trial within three terms which requires state to apply for temporary custody (2015)	96
The three term rule does not apply when failure to try a defendant is due to defendant’s escape from jail or failure to appear (2015)	96
The failure to commence a trial on a misdemeanor charge within 120 days of the execution of a warrant did not require dismissal because the state’s inability to obtain its evidence through no fault on the part of counsel constituted good cause to twice continue the trial (2015)	100
Fact that defendant was in custody for unrelated charges was significant factor in finding no prejudice to defendant in the continuance of his trial to another term (2015)	109
The purported delay was pre-arraignment which does not count toward the running of the three term rule (2015)	198

STATUTE OF LIMITATIONS

The filing of the criminal complaint tolls the statute of limitations so that a subsequent warrant filed more than one year after the commission of the offense is not untimely (2015)	100
A criminal trial in magistrate court must be commenced within one year of the execution of the criminal warrant and lack of good cause for delay beyond one year should be presumed from a silent record (2015)	182

SUPPRESSION

Suppressed statement can be used to cross examine expert (2014).....	12
Confession was admissible because interrogation about robbery was permitted despite demand for counsel with respect to arrest on wholly unrelated offense (2014)	39

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 (2014)..... 68

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 (2014)..... 68

The statement, “I should have a lawyer, shouldn’t I” was not an assertion of right to counsel because it was ambiguous (2014)..... 68

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 (2014)..... 72

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 (2014)..... 72

Failure to hold an in camera hearing on admissibility of confession does not alone constitute reversible error because matter can be remanded for such a hearing and a new trial will be granted if statement is found to be involuntary unless it is harmless beyond a reasonable doubt (2015) 54

Fifth Amendment is invoked in custodial situations only with respect to questioning initiated by law enforcement officers (2015) 70

Right to counsel does not attach during transport when a formal prosecution such as an arraignment or preliminary hearing has not yet commenced (2015) 70

The defendant’s mistaken belief that she would be released on a surety bond in exchange for her statement was not based, impermissibly, on a promise of leniency because the collateral benefit of a bond did not relate in any manner to a benefit to the accused with respect to the charged crime (2015) 92

A warrantless electronic intercept of a controlled buy did not warrant suppression of subsequent searches even though the applications for warrants were based on warrantless intercept (2015) ... 177

The threat to arrest defendant at a traffic stop was not coercive because a misdemeanor crime was being committed in the officer’s presence and, therefore, an arrest could be made (2015) 205

TERRORISM

Isolated threat against a single police officer is not a terrorist act (2014)..... 34

Intent or lack of intent to commit the threatened terrorist act is irrelevant (2014) 35

A terrorist act occurred when defendant threatened to bomb the town of Sutton in a phone call to a judge’s office due to a juvenile case against her granddaughter pending before the judge in that statute does not require specific intent to commit the act or a perception by anyone that the threat was real (2015)	134
--	-----

TRAFFIC STOP

A mistake of law will automatically invalidate a stop, but a reasonable mistake of fact will not (2015)	49
Use of a drug dog is not a search requiring a warrant, but it cannot extend the traffic stop (2015)	73
A warrantless search of a vehicle incident to an arrest is permitted only when the arrestee is unsecured and within reaching distance of the passenger compartment or if the vehicle is reasonably believed to contain evidence of the offense of arrest (2015)	155
Furtive gestures, without more, are not sufficient to establish probable cause for the search of a vehicle (2015)	155
The reasonable suspicion needed for a traffic stop is a less demanding standard than probable cause (2015)	205

WITNESSES

Violating sequestration order (2014)	5
Alibi witness excluded for defendant’s failure to disclose (2014).....	16
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 (2014).....	53
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 (2014)	57
Witnesses can testify by videoconference when circumstances dictate, such as safety concerns raised by six inmates testifying in the case (2014).....	78
Patrolmen could give lay opinion testimony as to whether defendant’s driving demonstrated a reckless indifference to the safety of other people (2014)	79
Conviction for a crime may be had upon the uncorroborated testimony of an accomplice (2015)	52

A four year old was found to be competent to testify, especially considering that the rape shield law states that “neither age nor mental capacity of the victim shall preclude the victim from testifying (2015)	64
Police officer’s lay opinion that certain shoes made foot prints in the snow was permitted to show a completed investigation and aid the jury’s understanding of the case (2015)	71
Without a showing of actual prejudice, a prosecutor is not disqualified because a witness changed details of her story during trial preparation with the prosecutor’s office (2015)	75
In second retrial, co-defendant’s unwillingness to testify made them unavailable and, because the co-defendants had been cross-examined in previous trials, the transcripts of the testimony were properly used in this trial (2015)	102
Police officer’s vouching of victim’s trustworthiness was “appropriate rehabilitative evidence” because in cross-examination of the officer the defense counsel raised the issue of the victim’s credibility (2015)	113
Witness could not be cross-examined about a complaint that he had sexually assaulted a person for which he was seeking leniency by testifying because no charges had been corroborated or filed and would have confused and misled the jury (2015)	116
Witness’ probation on unrelated charges prior to defendant’s charges was not a proper subject for cross-examination in that no connection was found to her voluntary statement to investigating officer (2015)	121
Establishing witness’ credentials as a doctor and addressing the witness as doctor was not improper bolstering of the witness’ credibility as it was background information relevant to jurors in assessing credibility (2015)	123
Investigating officer could offer a lay opinion on what had caused injuries to a child’s back (2015) ..	179
Confrontation clause was violated when defense counsel was not permitted to cross-examine police officers on why the charges were not filed as felonies, first, rather than after misdemeanor charges had been filed and then dismissed (2015)	188
Cross-examination to impeach is not, in general, limited to matters brought out on the direct examination (2015)	188
A defendant does not have a constitutional right for his incarcerated witness to be dressed in other than prison attire, but it is desirable for the witness to be so attired (2015)	191
It is defendant’s burden to move that an incarcerated witness should testify in civilian clothes and, at the time, the judge must set forth on the record the reasons for denying the motion (2015)	191

CRUEL AND UNUSUAL PUNISHMENT: IN A CAPITAL CASE, USING AN IQ NUMBER TO PRECLUDE EVIDENCE OF AN INTELLECTUAL DISABILITY TO AVOID EXECUTION IS IMPROPER.

***Hall v. Florida*, 572 U.S. _____, 134 S.Ct. 1986 (2014).**

In a 5-4 decision, the United States Supreme Court of Appeals held that the State of Florida's statute violated the Eighth and Fourteenth Amendments of the United States Constitution because a person was required by the provisions of the statute to demonstrate an IQ below 70 before presenting further evidence regarding an intellectual disability that would preclude the person's execution for a capital offense.

In this matter, the defendant Hall and an accomplice kidnapped, beat, raped and murdered a pregnant 21 year old newlywed. The defendant and his accomplice then planned to rob a convenience store, but they encountered a deputy's sheriff who tried to apprehend them. The deputy's sheriff was killed. Hall was convicted of the murders and, for one of the murders, received the death penalty.

The defendant's IQ had been measured at 71 and, as a result, the Florida state court refused to vacate his sentence of execution because the governing statute established that the threshold for any showing of intellectual disability was an IQ of 70. Florida's Supreme Court upheld the constitutionality of the statute.

As a quick aside, the opinion recognizes the change in the applicable nomenclature from "mental retardation" to "intellectual disability."

The first stage in Hall's journey to the United States Supreme Court began in 1987 when the United States Supreme Court held "that capital defendants must be permitted to present nonstatutory mitigating evidence in death penalty proceedings." See *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987). Hall was resentenced and the horrific circumstances of his life were recounted to a jury, including the fact that his "mother would strap [Hall] to his bed at night, with a rope thrown over a rafter [and] in the morning, she would awaken Hall by hoisting him up and whipping him with a belt, rope, or cord." This was mostly attributed to the fact that he was "slow" or "made simple mistakes." The expert testimony included the fact that Hall had "levels of understanding 'typically [seen] with toddlers.'"

In the resentencing, the trial court stated, poignantly, it "'suspect[ed] that the defense experts [were] guilty of some professional overkill,' because '[n]othing of which the experts testified could explain how a psychotic, mentally-retarded, brain-damaged, learning-disabled, speech-impaired person could formulate a plan whereby a car was stolen and a convenience store was robbed.'" Not surprisingly, therefore, Hall was again sentenced to death.

The second stage in Hall's journey to the Supreme Court began with the United States Supreme Court's ruling that "the Eighth Amendment prohibited the execution of persons with intellectual disability." *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Five years later, a hearing was held in the state court to determine if Hall had an intellectual disability. IQ tests had been administered which established that Hall had an IQ ranging from 60 to 80. Two tests were eliminated for "evidentiary reasons," resulting in a range of scores from 71 to 80, placing Hall above Florida's threshold of 70. The State's stark assessment was, "under the law, if an I.Q. is above 70, a person is not mentally retarded."

Admittedly, the State of Florida was not endorsing the execution of individuals with intellectual disabilities, but was prescribing a standard that defined who was or was not intellectually disabled. The question on appeal was the constitutionality of this standard.

In resolving the constitutional question, the Supreme Court deemed it to be "proper to consult the medical community's opinions." The Supreme Court noted that "the medical community defines intellectual disability according to three criteria: significantly sub-average intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental period."

The Supreme Court critiqued the Florida standard, thusly: "Florida's rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise." The Supreme Court noted that "the professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range." It was further noted that "because the test itself may be flawed, or administered in a consistently flawed manner, multiple examinations may result in repeated similar scores, so that even a consistent score is not conclusive evidence of intellectual functioning." It was repeated that "IQ tests are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks." Essentially, "intellectual disability is a condition, not a number."

Accordingly, the Supreme Court held, "This Court agrees with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." For this reason, the Florida procedure was unconstitutional because it did not utilize the "range" assessment, but, instead, relied on a precise number that was imprecise.

The State of West Virginia does not have the death penalty, of course. But the central issue in

this case and its precedent was what determines an intellectual disability. As stated by the Supreme Court, “those persons who meet the ‘clinical definition’ of intellectual disability ‘by definition ... have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.’ Thus, they bear ‘diminish[ed] ... personal culpability.’” These findings and these opinions should serve the criminal defense lawyer very well in not only the defense of certain criminal charges, but in the mitigation of sentences.

EVIDENCE: LOSS OF VIDEOTAPED STATEMENTS BY INVESTIGATORS IS NOT A BRADY VIOLATION BECAUSE DEFENDANT CANNOT SHOW THE STATEMENTS IMPEACH THE OFFICER’S TESTIMONY AND LOSS WAS NOT WILLFULL.

State v. Taneyhill, 2015WL570160 (W.Va.)

In the case of *State v. Taneyhill, 2015WL570160 (W. Va.)*, the defendant was prosecuted for the theft of an Xbox gaming system and two games. After the theft was reported to police, the owner was advised to contact several pawn shops in the area. The owner found the Xbox gaming system and games at one of the identified pawn shops. The police discovered that the owner’s cousin had signed the pawn shop receipt. The owner’s cousin said she received the Xbox from the defendant with instructions to pawn the system. When questioned, the defendant made a recorded statement that he bought the system from a friend. When questioned again after further investigation, the defendant elaborated in a recorded statement that he had received the Xbox system in exchange for his delivery of one-half ounce of marijuana.

Subsequently, the defendant was indicted. The defendant was convicted of burglary, petit larceny, conspiracy and obtaining money by false pretenses, for which he received consecutive sentences of one to fifteen years, one to five years, and one year for each of the remaining two charges. He was acquitted of the charge of delivery of a controlled substance.

The defendant appealed because the relatively undisputed facts were that he did not break into, or enter, the apartment from which the system was stolen.

But the defendant had informed his buyer where he could find gaming systems to steal and then trade for drugs. The Court opined that the defendant was an accessory before the fact because “he incited” the buyer to steal the system. Also, the defendant’s conduct and actions were said to support a conspiracy even if no actual agreement existed.

The intriguing aspect of this case is that the defendant was acquitted of the delivery of drugs count, but was convicted of the theft of the gaming system as an accessory or conspirator. But the only reason the theft was tied to the defendant was that it constituted a suggested means of

payment for delivery of the drugs. And the system apparently came into the defendant's possession. Nonetheless, the defendant was deemed to be a thief and not a drug dealer. If the jury did not believe the defendant delivered any controlled substances, then was the defendant guilty of anything other than the receipt of stolen goods?

An additional fact was that the defendant's videotaped statements had been lost. Yet, at trial, the police testified regarding the defendant's statements.

The defendant argued that his due process rights under *Brady* were violated because the videotapes were potentially exculpatory or impeachment evidence. The Court dismissed the claim, in part, because it would not speculate about whether the videotaped statements had exculpatory or impeachment value. The Court cited to a published opinion as support for this proposition, but, in the other opinion, the motion to suppress was denied on other grounds, not on the grounds that the Court could only speculate about the materiality of the evidence.

Seemingly, the Court has engaged in circular logic. Potentially exculpatory or impeachment evidence was lost by the investigating officers. The motion to suppress is made on the grounds that purportedly exculpatory or impeachment evidence is unavailable to the defendant due to the actions of the investigating officers. The motion to suppress is denied because the Court cannot examine the evidence to determine if it is potentially exculpatory or impeachment evidence. Why is the Court unable to view the evidence? It was lost (through no fault of the defendant).

The Court further supported its decision, however, by finding that the loss was not willful, which is a required component of a *Brady* violation.

The convictions were affirmed.

DOUBLE JEOPARDY: CONSECUTIVE SENTENCES FOR TWO COUNTS ARISING OUT OF SAME INCIDENT IS NOT DOUBLE JEOPARDY BECAUSE "ABUSE" AND "NEGLECT" HAVE DIFFERENT ELEMENTS, SO THE SAME INCIDENT COULD SUPPORT CONVICTION ON TWO DIFFERENT COUNTS.

State v. Sykes, 2015WL508188 (W. Va.)

In the case of *State v. Sykes, 2015WL508188 (W. Va.)*, the defendant entered a *Kennedy* plea to a count of "attempt to commit child abuse causing serious bodily injury" and a count of "attempt to commit child neglect causing serious bodily injury." The charges arose out of the defendant's alleged physical abuse of his son that was noted by the mother when the defendant returned the son to the mother's North Carolina residence. At that time, a physical altercation occurred and afterward, both the mother and son had to be treated at a hospital. Presumably, the son's injuries were suffered in West Virginia and the mother's injuries were suffered in the altercation over the son's injuries.

The defendant was charged with the alleged abuse in West Virginia. The conviction of an “attempt” to commit the felonies by reason of the defendant’s plea, rather than a conviction on the actual felonies, reduced the indeterminate sentence to one to three years in a penitentiary. The Court denied the defendant’s application for probation and sentenced the defendant to consecutive terms of one to three years.

The defendant argued that the imposition of “consecutive” sentences violated the double jeopardy clauses of the United States and West Virginia constitutions. The reasoning was that the two counts related to the same “factual scenario” and the same “incident and injuries” and, therefore, he was receiving multiple punishments for the same act.

The Court then recited the applicable test for determining whether double jeopardy exists when the same “act or transaction” violates two “distinct statutory provisions.” The test is “whether each provision requires proof of an additional fact which the other does not.” The Court determined that the defendant had “abused” the child by injuring him physically, thus supporting one charge, and “neglected” him by not getting medical attention for the resulting injuries, thus supporting the second charge.

The Court’s reasoning is inconsistent with its legal analysis, however. The Court seemingly reasoned that two different acts occurred which gave rise to two different violations while the double jeopardy analysis cited by the Court looked at one act supporting two charges. In any event, double jeopardy was not invoked by the circumstances.

The imposition of consecutive sentences was upheld.

SENTENCE: SUPERVISED RELEASE COULD BE IMPOSED ON PHYSICAL NONSEXUAL ABUSE OF CHILDREN EVEN THOUGH CAPTION TO STATUTE REFERRED ONLY TO A SEX OFFENDER.

State v. Ferguson, 2015WL508172 (W. Va.)

In the case of *State v. Ferguson, 2015WL508172 (W. Va.)*, the defendant was convicted of five counts of child abuse resulting in injury under the provisions of W. Va. Code §61-8D-3(a). The defendant was sentenced to one to five years of home incarceration. The defendant was also subjected to ten years of supervised release.

The incidents of child abuse involved each of the defendant’s five children and consisted of the following: Striking the face of a child; striking three of the children with a belt; and grabbing a child. No sexual abuse was alleged.

The defendant emphasized that the title of the statutory provision governing supervised release, *i.e.*, W. Va. Code 62-12-26, is, “Extended supervision for certain sex offenders....” Accordingly, the defendant postulated that the statute was not applicable to the defendant because she was not a “sex offender.”

The Supreme Court of Appeals noted, however, that subsection (a) provides for a period of supervised release for “a felony violation of the provisions of article eight-b, eight-c or eight-d” of Chapter 61 of the West Virginia Code. The defendant’s plea was to a conviction under the provisions of section eight-d. Accordingly, the statute was applicable.

The defendant argued that the inclusion of such an offense in the statute, in light of the title, must have been by “legislative accident or mistake.” The judicial response: “We decline to draw such a conclusion in this case.”

The appeal was denied.

DIMINISHED CAPACITY: EXPERT TESTIMONY IS REQUIRED TO ESTABLISH A DIMINISHED CAPACITY DEFENSE.

INSTRUCTIONS: “SUFFICIENT EVIDENCE” MUST EXIST TO SUPPORT AN INSTRUCTION, NOT JUST SOME EVIDENCE.

State v. Pustovarh, 2015WL148673 (W. Va.)

In the case of *State v. Pustovarh, 2015WL148673 (W. Va.)*, the defendant appealed on the basis that he had been unwarrantably blocked from presenting a defense of either diminished capacity or voluntary intoxication. The defendant was convicted on one count of malicious assault and one count of domestic battery.

The defendant had become upset with his girlfriend because she had taken a phone call from someone and, as a result, the defendant threw the girlfriend’s chairs into a fire pit and then stabbed her pool with a knife. The physical altercation then ensued.

The Supreme Court of Appeals opined that the defendant’s defenses were not supported by the evidence and, therefore, the circuit court was not required to give instructions on either the diminished capacity defense or the voluntary intoxication defense.

The defendant did testify, however, that “he consumed several quarts of a highly alcoholic beverage.”

The Court did not consider this sufficient evidence to put the issue before the jury. First, the Court reaffirmed that diminished capacity is a defense that requires “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 defendant had failed to retain an expert by the court imposed deadline, even after a continuance had been granted for that express purpose.

Second, the Court reviewed “whether the facts are sufficient to justify the delivery of a particular instruction” under an “abuse of discretion standard” and, due to the defendant’s conviction, the evidence was to be “considered in the light most favorable to the prosecution.”

The significance is that the standard is not that some evidence must exist but, instead, that “sufficient” evidence must exist, which determination is made by a court before the issue is ever submitted to the jury. In this case, the defendant had admitted in his testimony that he “was not so drunk that [he] did not know what [he] was doing.” Moreover, the defendant had attributed his actions to being upset with his girlfriend, thus contradicting the claim that the actions were attributable to the intoxication.

The lower court’s rulings were affirmed.

SENTENCE: DOCUMENTS RELATING TO COMMUNITY AND OFFICIAL SENTIMENT WOULD NOT BE GIVEN TO DEFENDANT UPON DENIAL OF PAROLE BECAUSE NO PREJUDICE WAS SHOWN DUE TO INDEPENDENT GROUND FOR DENYING PAROLE.

***Shrout v. Murphy*, 2015WL424901 (W.Va.)**

In the case of *Shrout v. Murphy*, 2015WL424901 (W.Va.), the petitioner was serving a sentence of life in prison, but with the possibility of parole. The petitioner had been denied parole due to “extremely negative” community and official sentiment and due to failing to complete “recommended programming.” The petitioner requested the West Virginia Parole Board to “provide him all documents the Board relied on in determining community and official sentiment.” The Board refused to do so based upon its governing regulation that, generally, compelled disclosure commensurate with the provisions of the West Virginia Freedom of Information Act, W. Va. Code §29B-1-1, *et seq.* A stated example of documents that would not be subject to disclosure, however, included “official, judicial, or community sentiment of any form.”

The petitioner relied upon precedent of the Court that “if no security concern exists to prevent disclosure, [an] inmate is entitled to access to information which will be used to determine whether he is paroled.” See Syl. Pt. 4, *Tasker v. Mohn*, 267 S.E.2d 183 (W. Va. 1980).

So, should the documents have been disclosed under this precedent?

The Court says, no, but bases its ruling on the grounds that the petitioner had failed to “carry his burden of showing that he was prejudiced by the non-disclosure of documents regarding community and official sentiment.” The reason was that parole could have been independently denied due to the petitioner’s failure to complete the “recommended programming.”

Accordingly, the Court did not answer the basic question of whether the documents relating to “official, judicial or community sentiment” should be produced generally, but, instead, determined

that because other grounds existed for denial of parole, “no clear legal right to those documents existed.”

SENTENCE: IMPOSING SENTENCE EQUAL TO VICTIM'S AGE OF 74 YEARS WAS NOT ARBITRARY BECAUSE COURT RECORD CONTAINED CONSIDERATION OF OTHER FACTORS, INCLUDING SERIOUSNESS OF INJURY.

State v. Givens, 2015WL148687 (W. Va.)

In the case of *State v. Givens, 2015WL148687 (W. Va.)*, the defendant appealed the sentence for his conviction, by plea, to first degree robbery. The defendant was sentenced to seventy-four years. The victim of the robbery, who was left in a vegetative state, was seventy-four years of age. The defendant argued, therefore, that the sentence was arbitrary since it was obviously based on the victim's age.

The Court noted that the sentence would be reviewed under the “deferential” abuse of discretion standard. The record was said to have shown that the circuit court had considered other factors, such as the defendant's criminal history, age, and culpability for the victim's serious injuries. The Court especially took note of the seriousness of the injuries suffered by the victim including a fractured back, fractured facial bones, and punctured lungs. No discussion is had, however, regarding how the lower court arrived at the length of seventy-four years, a length equal to the victim's age.

The Court found no error in the defendant's sentence.

APPEAL: APPELLATE REVIEW OF INCONSISTENT VERDICTS IS NOT GENERALLY AVAILABLE.

State v. Cleveland, 2015WL148681 (W. Va.)

In the case of *State v. Cleveland, 2015WL148681 (W. Va.)*, the defendant was acquitted of malicious assault, but convicted of the lesser included offense of misdemeanor battery. The defendant appealed on the ground that the jury verdicts were inconsistent. The defendant's conclusion was based on the fact that the acquittal was due to the jury's belief in his claims of self-defense, so how could they then convict him of battery?

The Court reiterated that “appellate review of a claim of inconsistent verdicts is not generally available.” However, the Court opined that, in this instance, “it is clear from a review of the record that the verdict was not inconsistent.” The Court then explained that the jury could have rejected the claim of self-defense, but determined that the prosecutor had simply not proved a case for malicious assault. The Court does not explain how this conclusion is “clear from the record,” but concludes that “the jury's guilty verdict of battery is not inconsistent with its acquittal

of malicious assault and unlawful assault.”

The appeal was denied.

HABEAS CORPUS: EVEN IF PLEA OFFER WAS NOT COMMUNICATED BY TRIAL COUNSEL, RELIEF SHOULD NOT BE GRANTED BECAUSE DEFENDANT MAINTAINED HIS INNOCENCE THROUGHOUT TRIAL AND A *KENNEDY* PLEA WAS UNLIKELY DUE TO NATURE OF CRIME.

John C. v. Pszczolkowski, 2015WL148690 (W. Va.)

In the case of *John C. v. Pszczolkowski, 2015WL148690 (W. Va.)*, the petitioner appealed the denial of his *habeas corpus* petition on the grounds that he had the ineffective assistance of counsel. Specifically, the petitioner alleged that the trial counsel had failed to present to him an offer that was indisputably made by the State.

The petitioner testified that he had not been told about the plea before trial and he would have accepted the plea if he had known. The petitioner was neither contradicted by, nor supported by, the trial counsel as counsel did not testify. The State confirmed that a verbal plea offer had been made.

The Court determined that the lower court could properly find that the petitioner’s testimony alone, even though not contradicted, was insufficient to prove that the plea offer had not been communicated. The circuit court found the petitioner’s uncontradicted testimony unreliable due to the petitioner’s lack of credibility. The Supreme Court stated it could not be expected to “assess witness credibility through a record.” Accordingly, the circuit court would not be “second guess[ed].”

Moreover, the Supreme Court stated that the second prong of the analysis was not met, which was that the outcome would have been different if trial counsel had been effective. Because the petitioner maintained his innocence throughout the trial and because the State would not have offered a *Kennedy* plea due to the fact that a child was mutilated, the petitioner would obviously “not have accepted the State’s plea offer because he believed he was innocent.” So, the failure to communicate the plea offer was of no consequence.

The circuit court’s denial of the petition was affirmed.

EXTRADITION: PRESENCE IN OTHER STATE IN COMMISSION OF A CRIME CHARGED BY THAT STATE IS NOT NEEDED WHEN AN ACT IN THIS STATE IS COMMITTED AND INTENTIONALLY RESULTS IN A CRIME IN ANOTHER STATE.

EXTRADITION: DEFENSES TO CRIME, INCLUDING UNCONSTITUTIONALITY, ARE TO BE DECIDED BY THE DEMANDING STATE.

Prokop v. Francis, 2015WL508196 (W. Va.)

In *Prokop v. Francis, 2015WL508196 (W. Va.)*, the petitioner, a West Virginia resident, was facing extradition to the State of Missouri for failure to pay child support. The petitioner had not been to Missouri.

First, the petitioner argued that he should not be extradited because he was not present in Missouri when the alleged crime was committed. However, W. Va. Code §5-1-7(g) expressly provides for the governor's surrender of a person "even though the accused was not in that state at the time of the commission of the crime." The only requirement is that the person committed an act in this state "intentionally resulting in a crime in the [other] state." In this matter, the petitioner, while residing in West Virginia, refused to pay child support pursuant to a Missouri court order.

Second, the petitioner argued that he was not sufficiently identified as the person in the Missouri arrest warrant. Specifically, that person was described as 6' 6" while the petitioner was only 6' 2". However, the arrest warrant had the following information correct: name, address, social security number, date of birth, gender, race and weight. Overall, the Supreme Court felt the identification of petitioner was sufficiently proved.

Third, the petitioner argued that he had been unlawfully incarcerated for one hundred and five days which is "beyond the ninety-day limit allowed by law." However, the Supreme Court noted that for a portion of the period, the petitioner had been incarcerated on an additional firearms charge. Accordingly, the period for which he was only held on the fugitive warrant was less than ninety days. Moreover, even if he had been released, he would have been immediately subject to re-arrest. By statute, the petitioner remains a fugitive subject to arrest even after release due to the expiration of the ninety-day period.

Fourth, the petitioner argued that he was being extradited for the collection of a civil debt which is precluded by the provisions of W. Va. Code §5-1-7(b). However, Missouri had charged the petition with a criminal offense based on "knowingly" failing to provide adequate support as a parent.

Fifth, the petitioner argued that Missouri had not exhausted all civil remedies because Missouri had not registered the child support order with the State of West Virginia under the Uniform Interstate Family Support Act. The circuit court simply took on its face the affirmation in the extradition documentation that all civil remedies had been exhausted. The Supreme Court agreed, stating that West Virginia was limited to ensuring the documents were in proper form and that the petitioner was the person named in the extradition papers.

Finally, the petitioner tried to argue that the Missouri criminal statute was unconstitutional because it shifted the burden to the defendant to prove an inability to pay the child support. The

Supreme Court affirmed the circuit court's refusal to consider such a constitutional issue as that remained the province of the demanding state.

In short, the Court affirmed the petitioner's all-expenses paid trip to the State of Missouri.

SENTENCE: FAILURE TO OBJECT TO PRESENTENCE INVESTIGATION REPORT AT SENTENCING CONSTITUTED WAIVER OF ANY IRREGULARITIES.

State v. Rogers, 2015WL869323 (W. Va.)

In the case of *State v. Rogers, 2015WL869323 (W. Va.)*, the defendant appealed the denial of a motion for reconsideration of his sentence on the grounds that he had been sentenced without a "Level of Service/Case Management Inventory ("LS/CMI") risk and needs assessment." The defendant referred to the language of W. Va. Code §62-12-6(a) which provides that "each probation officer shall: ... conduct a standardized risk and needs assessment." (Emphasis added). While the language refers to the duties of the probation officer, the defendant argued that the lower court improperly sentenced him in the absence of the LS/CMI assessment.

The Supreme Court upheld the lower court's ruling that any error or irregularity in the pretrial sentence report was waived when the defendant and his counsel represented at the sentencing hearing that no additions or correction to the report were necessary and the petitioner represented that the report was accurate. Notably, the Supreme Court recited previous language that "silence may operate as a waiver of objections to error and irregularities at the trial which, if seasonably made and presented, might have been regarded as prejudicial."

The opinion does leave open the question of whether the absence of the LS/CMI was, in fact, an error or irregularity that, if not waived, would have supported resentencing. In a concurring opinion, Justice Loughery proffers that the LS/CMI is one tool to be used by the sentencing court, but its absence would not have an impact on the sentencing in this matter due to the nature of the crime. Essentially, the use of the information is, and should be, "entirely left to [the circuit court judges'] discretion."

EVIDENCE: DEFENSE COUNSEL'S USE OF POLICE REPORT TO ELICIT FAVORABLE TESTIMONY SUPPORTED PROSECUTOR'S MOTION FOR ADMISSION OF ENTIRE POLICE REPORT INTO RECORD.

DOUBLE JEOPARDY: NO DOUBLE JEOPARDY ISSUES IN CONVICTION OF BOTH DOMESTIC BATTERY AND MALICIOUS ASSAULT AS ELEMENTS FOR BOTH OFFENSES DIFFERED.

State v. Lobb, 2015WL135036 (W. Va.)

In the case of *State v. Lobb, 2015WL135036 (W. Va.)*, the defendant appealed from his

conviction, after a jury trial, of (i) domestic battery and (ii) battery as a lesser included offense of the charge of malicious assault.

The first ground for appeal arose out of the cross-examination of an investigating officer about whether any other suspects had been identified. The officer replied that he did not recall. The defense counsel presented a copy of the investigative report to the officer that was used to refresh the officer's recollection and, in fact, it did because the officer identified another suspect at the time.

The State then moved for admission of the police report into evidence, to which defense counsel objected because it contained statements from witnesses who did not testify and referenced a prior domestic violence conviction. The trial court admitted the statement in its entirety.

The memorandum decision is somewhat confusing. Based upon these facts, defense counsel never moved the report into evidence and, accordingly, Rule 106 would not be applicable because it involves the admission of an entire writing when fairness requires this to be done upon a motion for admission of a portion of the writing. Defense counsel did not make such a motion, apparently.

However, the memorandum decision does refer to defense counsel's attempt to cross-examine the investigating officer regarding witness statements contained within the police report. It is unclear whether this is more than the mere refreshing of recollection sequence described previously, but it must have been. The Supreme Court held that, because the defense counsel was allowed to refer to favorable testimony, fairness dictated that the State should be able to introduce the entire report notwithstanding the hearsay nature of the statements.

Actually, defense counsel was hoisted on his or her own petard. The cross-examination regarding other witnesses' statements was permitted on the basis of defense counsel's argument that the statements were not hearsay based on a "police report exception." If it was not hearsay in the defense counsel's hand, then it could not be hearsay in the State's hands.

Another issue concerned whether a trial on both a domestic battery charge and a malicious assault charge was proper. The Supreme Court found it to be proper because each charge contained elements requiring proof of facts that the other did not. Due to this, the charges were distinct and did not give rise to double jeopardy issues.

The remaining issue was whether the medical service providers that treated the victim should have been able to testify about the victim's identification to them of who had inflicted the injuries. The State argued that the exception to hearsay for statements made in the course of a medical examination applied. The Supreme Court did not discuss the nature of the statements at all, but stated without discussion that the Court did not abuse its discretion in admitting the evidence. The Supreme Court did state that any error was harmless because the victim testified at trial and identified the defendant as her attacker.

Interestingly, Justice Davis dissented, but no opinion is provided.

MISTRIAL: INTENTIONAL REFERENCE IN OPENING STATEMENT ABOUT ALREADY DEEMED INADMISSIBLE EVIDENCE WAS GROUNDS FOR “MANIFEST NECESSITY” TO DECLARE A MISTRIAL AS OPENING STATEMENT IS THE MOST IMPRESSIONABLE TIME FOR A JURY.

***Libert v. Kuhl*, 2014WL4650921 (W. Va.)**

In the case of *Libert v. Kuhl*, 2014WL4650921 (W. Va.), a magistrate declared a mistrial and ordered a new trial. The petitioner requested a writ of prohibition against the magistrate court to prevent the court from proceeding with a new trial. The trial was over a battery charge (no pun intended) involving the petitioner’s alleged spitting in the eye of a neighbor in the course of an altercation with another neighbor. The petitioner had made a video recording of the incident. The magistrate court ruled that the videotaped recording could not be played for the jury because, somewhat quizzically, the recording did not have a time stamp on it. This is quizzical because, presumably, the very contents of the recording would have provided the timeframe and certainly the witnesses could have authenticated the recording. Apparently, defense counsel experienced a similar frustration and in his opening stated, “[my client] has a video camera in his hand to record the incident That video you will not see due to the court’s ruling.” Upon objection, the jury was instructed “to disregard the mention to [sic] the videotape.” The state’s first victim, i.e., the spittee, volunteers in an answer that the petitioner “had his video camera on his shoulder.” The State moves for a mistrial which is granted.

The Supreme Court recited its precedent that “a trial court is empowered to exercise this discretion [i.e., to declare a mistrial and order a new trial in a criminal case] when there is a ‘manifest necessity’ for discharging the jury before it has rendered its verdict.” Without the existence of “manifest necessity,” “a trial court’s discharge of the jury without rendering a verdict has the effect of an acquittal of the accused and gives rise to a plea of double jeopardy.”

The Supreme Court determined “the inadmissible evidence was referenced intentionally, during opening statements, the most impressionable time for a jury, creating an irreparable prejudicial scenario.” Moreover, a limiting instruction was found to be unavailing as “permitting the reference to inadmissible evidence frustrates the public interest by tainting the jury and prejudicing the State through the obvious implication that evidence was being withheld. [Therefore] the damage was already complete and irreversible.”

Accordingly, the order denying the writ of prohibition was affirmed.

The case is included for the reason that some editorializing is appropriate. For spitting in someone’s eye, a trial is held, a writ of prohibition is prosecuted, an appeal is taken, a decision is issued, and a retrial is granted. Surely, judicial resources could be better allocated.

DOUBLE JEOPARDY: ENTRY OF A PLEA IS A WAIVER OF DOUBLE JEOPARDY GROUNDS, OVERTURNING *STATE V. ROGERS*, 547 S.E.2d 910 (W.VA. 2001).

***State v. Coles*, 763 S.E.2d 843 (W. Va. 2014)**

The reported opinion of *State v. Coles*, 763 S.E.2d 843 (W. Va. 2014), is significant for two reasons. First, the Supreme Court of Appeals of West Virginia affirmed that state law would comport with federal law as follows: “if a guilty plea is shown to have been intelligently and voluntarily entered into, generally it cannot be directly or collaterally attacked on double jeopardy grounds.” In other words, the entry of a plea constitutes a waiver of many potential constitutional deficiencies, including “double jeopardy.”

Second, the Court took the opportunity to overturn its decision in 2001 reported as *State v. Rogers*, 547 S.E.2d 910 (W. Va. 2001). In *Rogers*, the Court found that conviction and sentencing of a defendant for false pretense, which existed in common law, and for a fraudulent scheme, created in 1995, violated the double jeopardy prohibition. Justice Davis wrote a dissenting opinion. In this matter, Justice Davis wrote the majority opinion and the Court held that *Rogers* should be overturned because under the Court’s general analysis, each offense required proof of an act or acts that the other did not require. Accordingly, double jeopardy is not involved even though the offenses relate, generally, to the same transaction or transactions.

MISTRIAL: QUESTIONS BY THE COURT TO A WITNESS ARE WITHIN THE TRIAL COURT’S RIGHT TO CONTROL THE ORDERLY PROCESS OF A TRIAL.

EVIDENCE: MALICE AND INTENT MAY BE INFERRED BY THE JURY FROM THE DEFENDANT’S USE OF A DEADLY WEAPON.

INSTRUCTIONS: SUPREME COURT DOES NOT RECOGNIZE OR ADOPT THE DOCTRINE OF IMPERFECT SELF-DEFENSE.

JURY: NO AUTOMATIC REQUIREMENT FOR THE REVERSAL OF A CONVICTION EXISTS WHENEVER A WITNESS FOR THE STATE COMES INTO CONTACT WITH THE JURY.

***State v. York*, 2015WL1881028 (W.Va.)**

In the memorandum decision reported as *State v. York*, 2015WL1881028, the appeal was from a motion denying the defendant’s new trial following his conviction of two counts of first-degree murder, one count of second degree murder, one count of concealment of a deceased human body, one count of conspiracy to commit concealment of a deceased human body, and one count of illegally possessing a firearm.

While visiting friends, the defendant's spouse quarreled with an acquaintance. After the defendant returned to his home, the acquaintance and others came, unarmed, to the residence to "repossess a washer and dryer." The defendant spotted the group approaching his residence, grabbed his rifle, and eventually shot one person in the chest, another person in the chest and twice in the back, and another person in the side and twice in the back. All three victims died. The defendant and his spouse tried to conceal one body by tying it to the back of an ATV with an extension cord, but the cord broke during the effort and the body was abandoned on the hillside. The defendant then fled and was later arrested while traveling on the interstate.

The sentence on the eventual convictions was two consecutive terms of life without mercy for the two first degree murder charges and consecutive terms for the remaining charges.

The primary issue was whether the jury was properly instructed on self-defense. The defendant's counsel had proposed a jury instruction on "imperfect self-defense," which, in part, would explain to the jury "that when a defendant uses deadly force with an honest but unreasonable belief that it is necessary to defend himself, the element of malice, necessary for a murder conviction is lacking."

The Supreme Court opined that the defendant's proposed jury instruction was "properly rejected by the circuit court because it did not accurately reflect our law on self-defense." The Supreme Court then declared that "this Court has not recognized or adopted the doctrine of 'imperfect self-defense.'" The Court acknowledged that in a footnote in a previous decision the doctrine was recognized as having been applied in other jurisdictions, but the Court made clear that the Court had not adopted this defense by such a reference.

The defendant also argued that the lower court had erred by failing to remove a juror who was seen by the trial judge conversing with a deputy during a recess. The deputy was a witness for the state. The judge observed that the juror had initiated the conversation believing the deputy might have been related to an acquaintance and the judge intervened to stop the conversation. The motion to strike the juror was denied because "there was no communication between the two regarding the case; the communication was initiated by the juror, not the witness; and the conversation took place in a hallway, not in a private area." The Supreme Court reiterated that "there is no automatic requirement that mandates the reversal of a conviction whenever a witness for the State comes into contact with the jury." The question becomes one of prejudice to the defendant, which the Supreme Court found was not demonstrated in these circumstances. The Supreme Court did state that a relevant concern was whether the witness' testimony was crucial or was merely formal in nature. Presumably, the prejudice of any contact would be greater the more crucial the witness' testimony was.

The editor takes note that no discussion was had regarding the juror's interest in the deputy's

relationship to her acquaintance; i.e., whether this bolstered the witness' credibility in her eyes.

Additionally, the defendant challenged the sufficiency of the evidence regarding his malice, especially considering the quarrel that had earlier occurred with one of the victims who then approached the defendant's home. The Supreme Court noted certain facts, including the number of times the victims were shot, especially in the back. Moreover the Supreme Court noted that "in a homicide trial, malice and intent may be inferred by the jury from the defendant's use of a deadly weapon, under circumstances which the jury does not believe afforded the defendant excuse, justification or provocation for his conduct."

Finally, the defendant complained about the trial court assisting the prosecution by basically insisting that the medical examiner confirm that the entrance wounds supported the conclusion that the victim had been shot in the back. Moreover, it was the trial court which confirmed with the witness that the opinions were "within a reasonable degree of medical certainty or pathological certainty." The Supreme Court found that the questions were within the trial court's "right to control the orderly process of a trial." However, the Supreme Court hedged this ruling by emphasizing that the trial counsel had not objected to the court's questioning.

APPEAL: CLAIMS OF INCONSISTENCY IN JURY VERDICTS ARE NOT REVIEWABLE ON APPEAL.

CONSPIRACY: IN A CONSPIRACY CHARGE, FAILURE TO COMPLETE THE CRIME IS IRRELEVANT AS THE PROHIBITED CONDUCT IS THE CRIMINAL AGREEMENT AND THE INHERENT DANGER REPRESENTED BY SUCH AN AGREEMENT.

State v. York, 2015WL1881062 (W.Va.)

In the memorandum decision reported as *State v. York, 2015WL1881062*, the Supreme Court of Appeals of West Virginia considered the appeal of the spouse of the defendant in the above decision. She was tried with her husband. The spouse was convicted of three counts of voluntary manslaughter and one count of conspiracy to conceal a deceased human body. The spouse received consecutive sentences of 15 years for each of the manslaughter convictions and a consecutive sentence of 5 years for the conspiracy count.

Several issues on appeal mirrored her husband's issues and were resolved identically.

The unique issue was whether the evidence was sufficient to convict her of voluntary manslaughter for the three killings for which her spouse had been convicted of first and second degree murder.

The spouse was prosecuted as an accomplice. The Supreme Court noted, therefore, that “the State was not required to prove that petitioner killed the victims; instead, it was only required to prove that she was present and aided and abetted her husband’s acts, or that she advised and encouraged them.” The Supreme Court added that “proof that the defendant was present at the time and place the crime was committed is a factor to be considered by the jury in determining guilt, along with other circumstances, such as defendant’s association with or relation to the perpetrator and ... [her] conduct before and after the commission of the crime.” In this matter, the defendant did not shoot the victims, but was armed with a shotgun and stood behind her spouse as he confronted the victims; the defendant helped the spouse in the attempt to conceal the bodies; and the defendant initially tried to cover for her spouse by claiming responsibility for the shootings. This, the Supreme Court opined, justified finding that she was an accomplice of her husband.

The defendant further emphasized the inconsistency of being liable as a principal for involuntary manslaughter when the person whom she purportedly aided and abetted was convicted of murder. Moreover, the defendant had been acquitted of conspiracy to commit murder. The Supreme Court resolved the issue by refusing to resolve it. Specifically, “this Court has repeatedly held that claims of inconsistency in jury verdicts are not reviewable on appeal.”

Finally, the defendant argued that she could not be convicted of conspiracy to conceal a deceased human body because the statute provided that a “complete defense” existed when the “defendant affirmatively brought to the attention of law enforcement within forty-eight hours of concealing the body and prior to being contacted regarding the death by law enforcement the existence and location of the concealed deceased human body.” W. Va. Code §61-2-5a(b). After her spouse fled, the defendant had immediately called the police to report the killings and, therefore, the bodies were found immediately. The charge was “conspiracy,” however, and the fact that the actual crime was not completed was irrelevant. The focus was on the “inherent danger in a criminal agreement” and, therefore, the “prohibited conduct is the agreement to commit an act made an offense by the laws of this State.”

JURY: MERE PRESENCE OF A BIASED PROSPECTIVE JUROR ON A JURY PANEL, ALTHOUGH UNDESIRABLE, DOES NOT THREATEN A DEFENDANT’S CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY IF THE BIASED PANEL MEMBER DOES NOT ACTUALLY SERVE ON THE JURY.

State v. McKean, 2015WL1881021 (W.Va.)

In the memorandum decision reported as *State v. McKean, 2015WL1881021*, the recited facts arose out of law enforcement’s high speed chase of the defendant on a motorcycle when a traffic stop was attempted due to a missing tail light. The defendant eventually crashed the motorcycle

after hitting a speed bump in a residential area. After an arrest was made, a police officer found a duffel bag near the motorcycle. In the bag was material used to make methamphetamine.

In the subsequent trial proceedings, a deputy sheriff in the jury pool responded to a question on voir dire about any potential acquaintance with the defendant by stating that “he believed he had once arrested” the defendant. Questioning was immediately stopped and the deputy sheriff was removed from the jury pool. The resulting motion for a new jury pool was denied. The trial was held and the defendant was convicted.

Understandably, the defendant appealed the conviction on the ground that the denial of a motion for a new jury pool was error. The Supreme Court acknowledged that “the right of a criminal defendant to an impartial and objective jury is a fundamental right guaranteed by the state and federal constitutions.” However, the Supreme Court “cautioned” that “the mere presence of a biased prospective juror on a jury panel, although undesirable, does not threaten a defendant’s constitutional right to an impartial jury if the biased panel member does not actually serve on the jury that convicts the defendant.”

But what about a “bias statement” made during jury selection? The Supreme Court found that the curative instruction of the trial court “fulfilled its purpose of learning whether any of the prospective jurors were influenced by the deputy sheriff’s remark.” And, again, the Supreme Court hedged its finding with the notation that the defense counsel chose not to ask questions of the prospective jurors regarding the curative instruction. And, finally, the Supreme Court noted that the dashboard camera’s capture of the high speed chase left no room for doubt that it was the sufficiency of the evidence that convicted the defendant rather than any misapprehension or passion or prejudice on the part of the jury.

The editor questions, however, did the deputy sheriff know that his remark would be prejudicial and stated it for this reason rather than asking to speak privately with the court and counsel? Surely, the deputy sheriff’s recognition of the defendant came earlier than the question on voir dire. These facts do lead to a trial tip: if you know a law enforcement person is on the panel, ask for individual voir dire of the person based on the grounds that any response might lead to a conclusion that the defendant had previous encounters with the law.

TRAFFIC STOP: A MISTAKE OF LAW WILL AUTOMATICALLY INVALIDATE A STOP, BUT A REASONABLE MISTAKE OF FACT WILL NOT.

State v. Lilly, 2015WL1741690 (W.Va.)

In the memorandum decision of *State v. Lilly*, 2015WL1741690, the issue centered on the validity of a traffic stop. Around midnight, the defendant was pulled over on a state route because he did not have “a clear legible registration light.” Once stopped, the police officer stated that he observed a “small wooden box” inside the vehicle which he asked to inspect. The defendant purportedly consented and the police officer found “methamphetamines, scales, spoons, and baggies” in the box.

A suppression motion was grounded on the defendant’s assertion that his “registration light was functional at the time of the stop because he checked it before he drove that night and again when he reclaimed his vehicle from the impound yard.” Restated, the defendant asserted that the light was functioning when he retrieved the car after his arrest.

A video recording of the stop had been made and, apparently, the registration plate was illuminated. The lower court found, however, that the illumination came from the police cruiser and surrounding lights rather than from the required license plate light. The motion to suppress was denied.

A conditional plea was entered to the felony offense of possession of a controlled substance with the intent to deliver or manufacture. A sentence of one to five years was imposed.

In its review, the Supreme Court noted that “a mistake of law will automatically invalidate a stop but a mistake of fact will not invalidate a stop if the mistake is reasonable.” So, if a police officer believed, incorrectly, that a broken side mirror violated the law or believed, incorrectly, that the failure to use a turn signal violated the law, the stop would be invalidated. However, a missing tail light is a violation of the law and will support a stop, even if just a misdemeanor. Accordingly, no mistake of law was made in these circumstances.

Based on this discussion, the assumption would be that the Supreme Court would simply state that the issue was over a mistake of fact which would not invalidate the stop, unless unreasonable, and the Supreme Court would then stop its analysis. However, the brakes were not applied to the Supreme Court’s review. Instead, the Supreme Court reviewed the evidence and agreed with the lower court that the evidence demonstrated that the light was not properly illuminated. So, the Supreme Court found “no mistake of fact and articulated reasonable suspicion” and affirmed the denial of the motion to suppress the evidence gathered at the traffic stop.

PLEA AGREEMENTS: THE ENHANCEMENT OF A SENTENCE IS NOT A DIRECT CONSEQUENCE, AS IT IS ONLY A COLLATERAL CONSEQUENCE, OF SENTENCING AND THUS DEFENDANT ENTERING A PLEA IS NOT REQUIRED TO BE INFORMED ABOUT A HABITUAL OFFENDER ENHANCEMENT BY EITHER THE COURT OR THE PROSECUTOR.

State v. Keith D., 235 S.E.2d 421 (W.Va.)

In its reported decision, *State v. Keith D.*, 235 S.E.2d 421, 2015WL1720912, the Supreme Court of Appeals split, 3-2, over the issue of whether the lower court erred when it refused to permit a defendant to withdraw a plea before sentencing once the defendant learned about the possibility of a sentence enhancement.

The defendant was indicted on fourteen counts of sex crimes relating to his five-year old stepdaughter and on an additional count of possession of a firearm by a prohibited person. The count on the possession of a firearm stated that defendant had been previously convicted of voluntary manslaughter.

The plea agreement had the defendant pleading guilty to one count of sexual assault in the third degree and to the possession of a firearm by a prohibited person. The State was to remain silent on the issue of sentencing. The interesting facts then occur.

At the plea hearing, the defendant waived the right to a presentence report and asked to be immediately sentenced. The prosecuting attorney opposed the motion on the stated ground that the victim's mother was not present due to a medical emergency and should be at the sentencing. The lower court set a later date for the sentencing.

Six (6) days after the plea hearing, the prosecutor filed an information setting forth prior convictions of the defendant, involving grand larceny and the voluntary manslaughter charge. Notably, the grand larceny charge had not been included in the indictment on the possession of a firearm by a prohibited person. While the prosecutor had agreed to remain silent on the sentencing issue, the information was filed for the purpose of having the defendant deemed to be a habitual offender and sentenced to a term of life. As a result, the defendant moved to withdraw the plea, averring that he had not been advised by anyone that the plea subjected him to a potential life sentence. The lower court refused to permit the withdrawal of the guilty plea and the defendant was found to be a habitual offender and was sentenced to life in prison.

The majority opinion recites that "it remains clear that a defendant has no absolute right to withdraw a guilty plea before sentencing" and that a trial court's decision on such a motion is reviewed only for an abuse of discretion. However, it was further acknowledged that the right to withdraw a plea can be granted for "any fair and just reason."

Again, the defendant's "fair and just reason" was that "he did not know the State could seek a habitual offender sentence after he pled guilty *with the understanding* that he could receive no more than ten years in prison." The editor would add that the plea agreement also contained the State's promise to remain silent regarding the sentence.

The majority's analysis focused, first, on the trial court's obligation. The majority reiterated a point of law that the court was obligated at the plea hearing to inform the defendant of the "direct" consequences of the plea, not the "collateral" consequences. The "collateral" consequences were defined as "all possible ancillary or consequential results which are peculiar to the individual and which may flow from a conviction of a plea of guilty." The habitual offender proceeding was deemed to be a "collateral" consequence, therefore, because its life sentence was not "definite, immediate and largely automatic." Indeed, the habitual offender proceeding was deemed to be "a classic example of a conviction's consequences that is collateral in the sense that the consequence requires application of a legal provision extraneous to the definition of the criminal offense and the provisions for sentencing those convicted under it."

The majority was not persuaded by arguments that the decision of the United States Supreme Court in *Padilla v. Kentucky*, 599 U.S. 346 (2010), cast a significant pall over the state court's precedent. The majority rejected the argument stating that deportation was a "direct" consequence of the plea, not a "collateral" consequence. This was based largely on the assessment, apparently, that, consistent with the definition of a direct consequence, deportation was "largely automatic."

While holding that the "trial court and the prosecuting attorney did not have a duty under our law to inform the petitioner of the possibility of enhanced sentencing ... before the petitioner entered his guilty plea," the majority did "agree that it is preferable for a defendant to be advised of habitual offender proceedings before he or she enters a guilty plea." The implication is that the matter may be one for the Legislature to address, not the Supreme Court.

The majority did not address the issue of the State's agreement to stand silent on sentencing or the issue of the State's objection to immediate sentencing which would have prevented the filing of an information in order to enhance the sentence.

Justice Ketchum dissented, stating the defendant got "hoodwinked." The Justice made reference, as the majority failed to do, to the fact that the State, as its part of the agreement, agreed "to a maximum sentence." Presumably, this statement relates to the State's express agreement to remain silent on sentencing.

Justice Davis dissented, setting forth the opinion that the habitual offender proceeding is a direct consequence of the act of entering a guilty plea, and, accordingly, the defendant should be informed about the possibility under the Court's precedent.

WITNESSES: CONVICTION FOR A CRIME MAY BE HAD UPON THE UNCORROBORATED

TESTIMONY OF AN ACCOMPLICE.

INSTRUCTIONS: ACCOMPLICE'S PLEA OF GUILTY CANNOT BE CONSIDERED AS PROVING THE GUILT OF THE DEFENDANT AND MAY ONLY BE CONSIDERED FOR PROPER EVIDENTIARY PURPOSES SUCH AS TO IMPEACH TRIAL TESTIMONY OR TO REFLECT ON A WITNESS' CREDIBILITY.

State v. Jeffrey, 2015WL1740281 (W.Va.)

In the memorandum decision reported as *State v. Jeffrey, 2015WL1740281*, the Supreme Court addressed the issue of a conviction based on the testimony of an accomplice.

The defendant was convicted on counts of kidnapping, malicious wounding, second degree robbery, and assault during the commission of a felony. The resulting sentence was life with mercy and other concurrent terms of incarceration. The co-defendant pled guilty to one count of conspiracy to commit first-degree robbery. The co-defendant received a sentence of one to five years of incarceration.

The defendant challenged the trial court's admission of the testimony of the co-defendant because it lacked "credibility." The Supreme Court reiterated its precedent that a "conviction for a crime may be had upon the uncorroborated testimony of an accomplice." The Supreme Court noted, however, that, in this matter, the co-defendant's testimony was corroborated by the victim. Moreover, the Supreme Court found that the disclosure of the co-defendant's guilty plea was properly addressed in an instruction by the judge that the "accomplice's plea of guilty cannot be considered as proving the guilt of the defendant, and may only be considered for proper evidentiary purpose such as to impeach trial testimony or to reflect on a witness' credibility." Notably, this is a mandatory instruction in these circumstances IF requested by the defense counsel.

The Supreme Court also dismissed any concerns that the State had improperly bolstered the credibility of the witness before credibility was attacked, because the defense counsel attacked the credibility of the co-defendant in the opening statement.

Finally, the defendant accused the State of using false testimony from the co-defendant. The co-defendant stated she did not cut the victim with a knife, but the victim testified that she did. The Supreme Court's analysis was "this only shows the testimony was conflicting, not false." Moreover, the testimony, if false, was found to have no material effect on the jury's verdict in light of the "substantial evidence presented by the victim's testimony." The conviction was affirmed.

SENTENCES: PROBATION AFTER A PERIOD OF INCARCERATION COULD BE REVOKED FOR

PROHIBITED PHONE CALLS WHILE INCARCERATED EVEN THOUGH PHONE CALLS PRESENTED NO REAL DANGER AT THAT TIME.

State v. Krystal M., 2015WL1740302 (W.Va.)

In the memorandum decision reported as *State v. Krystal M., 2015WL1740302*, the defendant's appeal related to the revoking of probation for what the defendant deemed to be "technical violations."

The defendant pled guilty to a count of child abuse causing serious bodily injury. The defendant was sentenced to one to five years in prison, but the sentencing court suspended all but four months of petitioner's sentence and placed the defendant on five years of supervised probation. An agreed term of the probation was that the defendant would have no contact with her previously live-in boyfriend.

While incarcerated, however, the defendant contacted the boyfriend sixty-three times. The probation office moved for revocation of the probation, which the lower court granted. The original sentence was re-imposed with credit for time already served.

The defendant argued that the court had abused its discretion. Under the governing statute, W. Va. Code §62-12-10(a)(1)(C), the sentencing court is authorized to revoke the suspension of a sentence if the defendant violates a "special condition of probation designed to protect the public or victim." The Supreme Court rejected the defendant's argument that, because she was incarcerated, the telephone calls did not place her children in any danger and stated that the statute refers to a condition that is "designed" to protect the victim. Violating this condition was, therefore, grounds for revocation of the suspension of her sentence.

Moreover, the Supreme Court did not accept the defendant's argument that her violation should only result in a sixty-day term of incarceration as it was her first such violation. Instead, the Supreme Court considered her violations as numbering sixty-three, that is one violation for each separate call to her boyfriend, which was well in excess of the "statutory minimum required to revoke petitioner's probation."

The actions of the lower court were affirmed.

SUPPRESSION: FAILURE TO HOLD AN IN CAMERA HEARING ON ADMISSIBILITY OF CONFESSION DOES NOT ALONE CONSTITUTE REVERSIBLE ERROR BECAUSE MATTER CAN BE REMANDED FOR SUCH A HEARING AND A NEW TRIAL WILL BE GRANTED IF STATEMENT IS FOUND TO BE INVOLUNTARY UNLESS IT IS HARMLESS BEYOND A REASONABLE DOUBT.

State v. Holpp, 2015WL1740293 (W.Va.)

In the memorandum decision reported as *State v. Holpp*, 2015WL1740293, issues were raised with respect to the lower court's ruling on matters involving a purported confession and on the issue of the sufficiency of evidence.

The defendant was convicted of beating his girlfriend during a fight at a bar and causing bodily injury, but the defendant was acquitted of the charge of retaliating against his girlfriend as a witness. The defendant's sentence was enhanced due to the recidivist statute and resulted in a term of four to ten years of incarceration.

The lower court admitted, without an *in camera* hearing, the defendant's statement to an arresting officer that "if this costs me my job, I'll go back to prison." The defendant argued on appeal that this was reversible error.

The Supreme Court acknowledged that its precedent requires that any evidence regarding confessions must be first heard outside the presence of the jury in order to determine the voluntariness of the confession. However, the Supreme Court further emphasized that the failure to hold such a hearing does not, alone, constitute "reversible error." Instead, the failure to hold such a hearing requires that the matter be remanded to the trial court for a "voluntariness hearing." If the statement was voluntary, the verdict stands, but if the statement was involuntary, a new trial is warranted unless the "constitutional error is harmless beyond a reasonable doubt."

In the final analysis, however, the Supreme Court held that no *in camera* hearing was necessary because (i) the defendant's statement was not inculpatory in that he did not state that he had done anything, and (ii) the defendant did not provide any evidence that the statement was, in fact, involuntarily made.

The defendant additionally argued that because his girlfriend was not obviously permanently disfigured or disabled, the evidence was otherwise insufficient to prove his "intent to maim, disfigure, disable or kill" as required for a conviction of the crime of malicious assault. The Supreme Court disagreed, stating that the severity of the actual injuries and the description of the assault were sufficient to establish the requisite intent.

DUE PROCESS: PROSECUTION WAS REQUIRED TO GIVE NOTICE PRETRIAL THAT IT WOULD SEEK A FINDING THAT THE BATTERY WAS SEXUALLY MOTIVATED AND THE FAILURE TO DO SO WAS PLAIN ERROR WARRANTING A NEW TRIAL.

State v. Seen, 235 S.E.2d 174 (W. Va. 2015)

In the reported decision, *State v. Seen*, 235 S.E.2d 174 (W. Va. 2015), 2015WL1721012, the issue was whether the defendant's battery of a person required, upon his conviction that he register as a sex offender.

The defendant was a physician at a hospital who began an examination of a patient upon admission. The patient was seventy-seven years of age and was suffering from dementia, Parkinson's disease, arthritis, depression and anxiety. In the course of the examination, the patient bit off the defendant's tongue. The defendant physician did not immediately report the incident and did not immediately seek medical assistance, even though 1/2 to 3/4 of an inch of his tongue was missing. One hour after the incident the doctor contacted the emergency room physician about a consult, but did not explain the injury. The emergency room physician deferred and, at that time, the physician reported the incident to staff members. The report was made, however, by the defendant physician typing on a laptop computer as his mouth was covered with a paper towel or washcloth. The explanation was that the physician had leaned over the patient to better hear the patient's response when the patient, old and infirmed, grabbed his tongue and bit it. At that point, the emergency room physician was again contacted and he then came to treat the defendant. The defendant was then transported to another hospital for treatment by a specialist.

The emergency room physician then examined the patient and found the patient to be alert, but confused, disoriented and unable to communicate. The patient had blood around his lips and in his mouth. More disturbingly, the patient was chewing something, which was believed to be a portion of the defendant physician's tongue. The overall assessment by the emergency room physician was that, due to the arthritis, the patient "lacked the fine motor skills, strength, and grasping ability to hold the ... [defendant's] tongue" as described by the defendant.

When asked in a later examination about the incident, the patient became upset, indicating something had happened, but the patient refused to talk about the matter, stating that he did not want to dwell upon it.

The defendant's story during an internal investigation, which was somewhat inconsistent with his initial explanation, was that the patient had "grabbed the back of his neck with one hand and had reached up with his other hand to grab the ... [defendant's] tongue, pulling the ... [defendant] toward him." This explanation was not accepted by either the hospital officials or by the law enforcement personnel who investigated the matter upon the filing of a criminal complaint by the patient's daughter. In the state trooper's summation, the patient was "as frail ... a human being as [he had] ever attempted ... to speak to about anything."

A bench trial on the criminal charge resulted in the conviction of the defendant physician and the suspension of the defendant's medical license.

A person convicted of an offense that does not automatically result in “sex offender” status can, nonetheless, be required to register as a sex offender if the sentencing judge makes a written finding that the offense was “sexually motivated.” W. Va. Code §15-12-2(c).

The first time that the State expressed its intent to seek this finding was during the opening statement to the court at the bench trial. The court found the defendant guilty and made the finding that the battery was sexually motivated. The actual sentence was 300 hours of community service, registration as a sex offender for ten years, and the payment of a \$500 fine.

The most compelling issue on appeal was whether the defendant had been denied due process by the failure to provide any pretrial notice that the State intended to seek a finding of sexual motivation. The Supreme Court found the issue compelling enough to analyze it as plain error since the defendant’s counsel had not objected in the trial proceedings. Notably, the State agreed that it was plain error.

The Supreme Court held that, in *State v. Whalen*, 588 S.E.2d 677 (W.Va. 2003), “we unequivocally declared the requirement for pretrial notice in circumstances like those encountered in the present case.” The only issue was whether, because this was a constitutional error, the State could prove that the error was harmless beyond a reasonable doubt. The Supreme Court found that the State had failed to do so because, “as the petitioner contends, his trial strategy would have been altered drastically if he had known he had to defend against the contention that the act was sexually motivated.” Specifically, the defendant had proffered that he “would have considered utilizing expert evidence to prove he was not attracted to men and that he would not receive sexual gratification from kissing a man.”

The lesson in the opinion is if you have an offense without sexually explicit elements and the State references sexual motivation for the first time at the trial, object and assert the defendant’s constitutional right to due process in the form of a pretrial notice.

MISTRIAL: JUDGE’S QUESTIONS OF A WITNESS WERE NON-SUBSTANTIVE AND MERELY CONFIRMED ALREADY ELICITED TESTIMONY.

INSTRUCTIONS: DEFENDANTS ARE ON NOTICE THAT AN AIDING AND ABETTING INSTRUCTION MAY BE REQUESTED, EVEN IN THE ABSENCE OF AN INDICTMENT THEREON.

***State v. Horne*, 2015WL1741146 (W.Va.)**

In the memorandum decision reported as *State v. Horne*, 2015WL1741146, the appeal arose

out of the defendant's conviction for conspiracy to commit a felony, burglary, and petit larceny.

The defendant and two other individuals were arrested for the theft of firearms from a residence of an incarcerated person. The alleged facts were that the defendant was in the vehicle when a co-defendant twice entered the residence and returned with firearms. In his statement, the defendant denied knowing that the co-defendant was stealing the guns from the residence, but admitted that he assisted the co-defendant in selling the guns.

The defendant was tried, convicted and sentenced on the conspiracy charges.

On appeal, the defendant complained that the trial court judge had exceeded the bounds of impartiality in the questioning of witnesses. The first instance was when an alleged co-conspirator, who was required by the terms of a plea agreement to testify against the defendant, was reluctant in his testimony and vague in his answers. The court interjected and instructed the witness as follows: "You've given a statement. ... Now, this lawyer shouldn't have to drag things out of you. If you know something about the case, spit it out. If you don't then that's fine too. But, now, listen to the question and try to respond to it as best you can. All right, go ahead and ask him the question." The defendant argued that the scolding of the witness resulted in testimony consistent with the former statement, implicating the defendant in the robbery of the firearms.

The court further interjected when the purported co-conspirator identified the defendant as the person who had given him orders to reenter the residence. The court questioned the witness at this point and had him describe the shirt worn by the defendant at the trial so that the identification would be certain.

The court then later permitted the co-conspirator to be recalled to testify as to threats made by the defendant, purportedly, when both had been transported to the courthouse from the jail. The court began the questioning by asking the witness, "did you arrive at court this morning with the defendant?" The questioning was then turned over to the attorneys.

The Supreme Court rejected, summarily, all three grounds stating the circuit court did not lose its impartiality. The first questions were non-substantive and the second set of questions merely confirmed an identification that had already been made. The court's decision to allow the witness to be recalled concerned threats that, in the Supreme Court's opinion, would explain the witness' initial reluctance to testify and should be made known to the jury in their evaluation of the evidence.

The defendant also argued on appeal that the binding Supreme Court precedent was that "an indictment must allege all of the elements of the offense charged, including accomplice liability." The Supreme Court disagreed stating that its binding precedent put all defendants on "constructive notice" that "an aiding and abetting instruction may be requested, even in the

absence of an indictment thereon.” Moreover, the Supreme Court believed the defendant had actual notice of the accomplice liability theory because the police report and a co-defendant’s statement made it clear that someone else actually broke into the house and then delivered the guns to the defendant and because the State talked about the theory during jury selection. The Supreme Court found no prejudice to the defendant in any event because his theory on defense would not have changed even if he had been given formal notice of the potential accomplice theory.

JURY: IMPROPER INFLUENCE OF JUROR REQUIRES CLEAR AND CONVINCING EVIDENCE; THE MERE OPPORTUNITY TO INFLUENCE A JUROR IS NOT ENOUGH.

JURY: COMMUNICATION BETWEEN BAILIFF AND JUROR AT BEGINNING OF JURY’S DELIBERATION WAS NOT A CRITICAL STAGE OF PROCEEDINGS REQUIRING DEFENDANT’S PRESENCE.

State v. Loudin, 2015WL1741150 (W.Va.)

In the memorandum decision reported as *State v. Loudin, 2015WL1741150*, the Supreme Court considered the appeal of a defendant who had been convicted of unlawful assault and who was sentenced to a term of incarceration of one to five years.

The defendant punched another person in the eye. The person who was hit suffered an orbital blowout fracture, nasal bone and septum fractures, and abrasions, and, as a result, had a titanium plate inserted into the face.

The first assignment of error was that a motion to set aside a verdict should have been granted when the bias of several jurors became known. One juror’s sister had been disappointed with the defendant’s construction work and another juror’s husband owned a business that was stiffed on an invoice when the defendant filed bankruptcy. The Supreme Court noted that “the question as to whether or not a juror has been subjected to improper influence affecting the verdict, is a fact primarily to be determined by the trial judge from the circumstances, which must be clear and convincing to require a new trial, *proof of mere opportunity to influence the jury being insufficient.*” [emphasis added]. The Supreme Court noted that voir dire should be used for these purposes and, moreover, the defendant had no proof that the jurors were even aware of their family’s connections with the defendant.

A second assignment of error was that the jury communicated with the court bailiff outside of the defendant’s presence. The bailiff also relayed the jury’s question to the court outside the defendant’s presence. The court then convened the counsel and the parties to discuss the matter and then brought in the jury to put the jury’s question on the record and to then instruct the jury on how to communicate future questions.

The defendant argues that this violated his right to be present during all critical stages of a criminal proceeding. The Supreme Court found this brief communication between the jury and the bailiff and between the bailiff and the court occurred at a point that was not critical since the jury had just began deliberations. Moreover, the Supreme Court noted that the defense counsel had not objected even when prompted by the court.

A third assignment of error was the use of a photograph at trial that had been obtained from the defendant's cell phone without the process of a warrant. The defendant's problem is that his trial counsel stipulated to the admission of the photograph which showed the victim in the hospital and the counsel never questioned how the photograph came into the State's possession. Without a record on this issue, the Supreme Court refused to find that error was committed.

A fourth assignment of error concerned the court's interjection during the defendant's counsel's cross-examination of an investigating officer. The defense counsel asked the officer to read a portion of the police report when, according to the defendant, the court stopped the questioning and encouraged the State to object. The report was then found to be hearsay. The Supreme Court found the record to be inadequate to fairly determine the issue and also found that the jury was able to review the document in any event because it was admitted during the cross-examination of another witness.

In the final analysis, this decision is significant because it demonstrates two common problems that hinder prosecuting appeals. One problem is the failure to object at the trial court level and the second problem is the failure to adequately designate a record that supports the arguments.

The decisions of the lower court were affirmed.

SENTENCE: THE REQUIREMENT TO PAY COURT COSTS IS COMPENSATORY AND NOT PART OF THE PUNISHMENT OR PENALTY FOR COMMITTING THE CRIME.

SENTENCE: THE LEGISLATURE DETERMINES WHAT IS A FELONY OR MISDEMEANOR AND WHAT IS A SCHEDULE I CONTROLLED SUBSTANCE.

State v. Nutter, 2015WL867812 (W.Va.)

In the memorandum decision reported as *State v. Nutter, 2015WL867812*, the Supreme Court of Appeals of West Virginia was confronted with the argument that "West Virginia's system of designating all crimes as either a felony or misdemeanor violates the state constitutional provision requiring that penalties shall be proportional to the character and degree of the offense."

The defendant was sentenced for his conviction of the delivery of a controlled substance, i.e., marijuana, to a police officer and another person. The defendant was sentenced to two concurrent terms of one to five years. The sentences were suspended, however, and the defendant was placed on probation for five years. The costs of the proceeding, which were

almost three thousand dollars, were imposed on the defendant, but no monetary fines were imposed.

The defendant's contention on appeal was that "the non-violent crimes of which he was convicted should not be categorized and punished in the same manner as more egregious offenses, particularly given that... marijuana is no longer considered to be a dangerous drug." Essentially, the defendant was challenging the felony/misdemeanor designations of crimes.

The Supreme Court stated, simply, that "the Legislature made a policy decision in classifying ... [the] crime as a felony, a decision with which this Court will not interfere."

The defendant continued, however, to argue that, because counties bear the costs for incarcerating persons convicted of misdemeanors and the State bears the costs for persons convicted of felonies, the counties are pressured to charge and only accept pleas for felonies. This, the defendant concludes, violates the constitutional provision that "justice shall be administered without sale." W. Va. Constitution, Art. III, sec. 17. The defendant emphasized that the sentence ultimately imposed was the same as if he had been convicted of a misdemeanor. The only difference is that the state was now faced with bearing the costs, not the county.

The Supreme Court's resolution of the issue was to simply state that the suggestion of "undue pressure" was "completely unfounded and supported in the record."

The defendant additionally argued that marijuana did not possess the characteristics of a Schedule I drug, which are, the drug "has high potential for abuse" and "has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision." The defendant asserted that the State's burden included proving that marijuana met these statutory requirements.

The Supreme Court again deferred to the Legislature's determination that marijuana was a Schedule I substance.

The State needed only to prove that the substance was marijuana.

Finally, the defendant argued that he should not have to pay the costs of the proceedings since he was convicted of only two of the five counts and was forced to trial only because the State refused to meaningfully negotiate with him. At the very least, he should only have to pay 40% of the costs.

The Supreme Court resolved the argument by reiterating that "costs are not punishment or part of the penalty for committing a crime." The purpose is purely "compensatory." Because "requiring a convicted criminal to pay court costs is well settled in West Virginia law," the Supreme Court rejected the argument.

The defendant's convictions were affirmed.

INDICTMENT: AN INDICTMENT WILL BE REVIEWED ONLY FOR CONSTITUTIONAL ERROR AND PROSECUTORIAL MISCONDUCT.

INDICTMENT: SUPREME COURT WOULD ONLY INQUIRE INTO THE EVIDENCE CONSIDERED BY THE GRAND JURY IF WILLFUL INTENTIONAL FRAUD COULD BE FOUND.

PLEA AGREEMENTS: A DEFENDANT HAS NO CONSTITUTIONAL RIGHT TO HAVE A CASE DISPOSED OF BY WAY OF A PLEA BARGAIN.

RULE 404(b): MENTION OF PREVIOUS CHARGES IN OPENING STATEMENT AND IN A WITNESS' ANSWER WILL NOT BE FOUND TO BE ERROR WHEN TRIAL COUNSEL DID NOT OBJECT; THE CHARGES, ALTHOUGH SUBSEQUENTLY DROPPED, WERE PART OF THE CURRENT INDICTMENT; AND DEFENSE COUNSEL USED THE FACT THAT THE CHARGES WERE DROPPED IN CROSS EXAMINATION.

EVIDENCE: THE "CURATIVE ADMISSIBILITY RULE" ALLOWS A PARTY TO PRESENT OTHERWISE INADMISSIBLE EVIDENCE ON AN EVIDENTIARY POINT WHERE AN OPPONENT HAS "OPENED THE DOOR" BY INTRODUCING SIMILARLY INADMISSIBLE EVIDENCE ON THE SAME POINT.

State v. Frank A., 2015WL867912 (W.Va.)

In the memorandum decision reported as *State v. Frank A., 2015WL867912*, the defendant appealed from a conviction on two counts of first degree sexual assault against a minor child and two counts of sexual abuse by a parent against a minor child. The defendant was sentenced to two consecutive terms of ten to twenty years and two concurrent terms of one to five years.

The defendant's first ground for appeal was that the grand jury had been informed by the testifying police officer that the defendant had been previously arrested for a crime related to sexual assault or abuse, but the charges were dismissed. The record reveals that the victim had recanted her allegations in the course of the prior proceedings. The defendant argued this was impermissible evidence under Rule 404(b) of the Rules of Evidence, governing the use of other crimes, wrongs or other acts to prove a pending charge.

The Supreme Court held that an indictment would be reviewed only for constitutional error and prosecutorial misconduct, neither of which the defendant alleged. The Supreme Court further noted that it would only inquire into the evidence considered by the grand jury if "willful, intentional fraud" could be found.

The defendant then asserted that the case should not have been allowed to proceed to trial due to his "limited mental status" and his failure, therefore, to understand a plea offer. The Supreme Court determined that the lower court's "better vantage point" to determine competency should not be disturbed absent any abuse of discretion. The record demonstrated that no evidence had been presented to demonstrate incompetency and no motion for a mental capacity evaluation had been made.

The record did show that, upon inquiry by the trial court, the defendant had trouble remembering the details of a plea offer that had been made. The defendant asserted on appeal that this demonstrated his lack of competency. However, the Supreme Court noted that no participant in the proceeding raised any concern about the defendant's behavior and the defendant "clearly indicated to the circuit court that he understood and did not wish to accept the plea offer." The Supreme Court emphasized that a defendant "has no constitutional right to have his case disposed of by way of a plea bargain."

The defendant then raised the prohibited use of evidence of crimes, wrongs, or other acts in the trial proceedings under Rule 404(b). The prosecuting attorney mentioned, in opening statement, the previous criminal charges that had been dismissed. A witness during questioning mentioned that he had not seen the defendant "since a previous court hearing." The defendant believed this prejudiced the jury against him. Due to a lack of objection at the trial court to either instance, the defendant was deemed to have waived these issues. Moreover, the previous charges were part of the current indictment and the defense counsel understandably used the recanting of the previous charges in the cross-examination of the witness. Accordingly, no prejudice could be found in the prosecutor's or witness' reference to the prior charges.

Similarly, the expert testimony of another witness regarding situations in which victims recant testimony was deemed to be waived when, despite an initial objection, the defense counsel withdrew the objection and then stipulated to the qualification of the expert witness. The editor notes that this might have been a trial strategy on the part of defense counsel because the opinion notes that the defense counsel solicited certain expert opinions upon cross-examination of the witness.

Finally, the defendant complained that the prosecutor cross-examined him about statements made against him by individuals who were not called as witnesses at the trial because they were unavailable to testify. The Supreme Court found these questions did not violate the Confrontation Clause because defense counsel raised in the defendant's direct testimony the issues to which these statements related. The defendant opened a door which the Confrontation Clause would not close. The Supreme Court stated "the curative admissibility rule allows a party to present otherwise inadmissible evidence on an evidentiary point where an opponent has 'opened the door' by introducing similarly inadmissible evidence on the same point." The Supreme Court further stated "an appellant or plaintiff in error will not be permitted to complain of error in the admission of evidence which he offered or elicited, and this is true even of a defendant in a criminal case." Also, it was noted that one question merely asked if the statement of an unavailable witness had been seen by the defendant. No questions were asked about the statement's content. Because the inquiry was not "testimonial in nature," the Confrontation Clause was not invoked.

For these reasons, the Supreme Court found no error.

WITNESS: A FOUR YEAR OLD WAS FOUND TO BE COMPETENT TO TESTIFY, ESPECIALLY CONSIDERING THAT THE RAPE SHIELD LAW STATES THAT “NEITHER AGE NOR MENTAL CAPACITY OF THE VICTIM SHALL PRECLUDE THE VICTIM FROM TESTIFYING.”

State v. Darrell L., 2014WL6634367 (W.Va.)

In the memorandum decision reported as *State v. Darrell L., 2014WL6634367*, the Supreme Court dealt with the issue of the competency of a witness who was four years of age.

After a bench trial, the defendant was convicted of various sex crimes involving the then three year old child of his “live-in girlfriend.” On appeal, the defendant argues that the lower court erred in permitting the young child to testify.

The lower court ordered a psychological evaluation of the child and found that the child was competent to testify via closed circuit television.

Notably, the “rape shield law plainly states that ‘in any prosecution under this article, neither age nor mental capacity of the victim shall preclude the victim from testifying.’ W. Va. Code §61-8B-11(c) [1986].” Moreover, the Supreme Court emphasized that competency was not tied to any “precise age.” Finally, the Supreme Court did not agree with defendant that the lower court had failed to undertake its own examination of the child, pointing to the examination done by a psychiatrist who then testified before the court and to the court’s obvious observation of the child during the testimony.

The defendant also took exception to the fact that an advocate was with the child during the testimony and prompted the child, at one point, “to use her words.” The Supreme Court found this prompting to make a response to be “common in many courtrooms” and did not establish that the child was unable to competently testify. The lower court had admonished the advocate not to make such prompts, but, again, the Supreme Court did not find the circumstances indicative of any coaching.

Finally, the defendant complained about the inability of the court to provide him a transcript of the hearing on the defendant’s motion for a new trial due to the inoperability of the computer onto which the proceeding had been loaded. The Supreme Court found that without any evidence that the proceedings were not fairly characterized by the order denying the motion for a new trial, the “presumption of regularity of court proceedings” would be sustained.

PLEA AGREEMENTS: CLAIMING BIPOLAR DISORDER IS NOT SUFFICIENT GROUND FOR WITHDRAWING PLEA AS THE PROCEEDINGS MUST IN SOME MANNER REFLECT THAT THE DISORDER IMPACTED THE DEFENDANT’S ABILITY TO COMPREHEND THE PROCEEDINGS.

***State v. Holstein*, 770 S.E.2d 556 (W. Va. 2015)**

A plea agreement came under scrutiny in the reported case of *State v. Holstein*, 770 S.E.2d 556 (W. Va. 2015). The defendant was involved in a rather violent home invasion resulting in the death of a homeowner. Two co-defendants pled guilty to first degree felony murder and were sentenced to life imprisonment with the possibility of parole.

Subsequently, the defendant Holstein pled guilty to first degree felony murder in consideration for the State's dismissal of the robbery and breaking and entering charges and the State standing silent on sentencing. On that same day, the plea hearing was held and the defendant testified that he had read, reviewed and discussed the plea agreement with counsel.

The petitioner did give the sentencing court details regarding his medical history, which, while it did not include hospitalization for mental illness, did include a diagnosis of bipolar disorder and the prescription of antidepressants. The defendant's counsel attested, however, to the defendant's continuing lucidity throughout the proceedings and his orientation toward time and events.

A 121 page pre-sentence report was prepared. The report detailed an extensive criminal history, including the fact that this crime was committed within three months of being discharged from parole. Moreover, the report detailed that the defendant had essentially been brought into the scheme due to his expertise and his knowledge of "how to commit such a robbery 'properly.'" Further, the evidence pointed to the defendant as the one who pulled the trigger on the shotgun blast that killed the homeowner. Finally, the probation officer found no evidence that the defendant was sincerely remorseful and further described the defendant as manipulative and deceptive.

Despite the harshness of the report, the defendant's counsel stated at the sentencing, in response to the court's inquiry, "There is nothing that is factually inaccurate in the report...." The petitioner's testimony included the statement that "I don't expect to get mercy today." And, he did not. The Court sentenced the 29 year old defendant to life imprisonment without the possibility of parole.

On appeal, the defendant argued that the plea was not made knowingly, voluntarily and intelligently. The defendant emphasized the effect of the bipolar disorder on his decision making.

In reviewing other state's precedent on the issue of bipolar disorder, the Supreme Court noted that the consistent ruling was that claiming the disorder is not sufficient. Instead, the proceedings must in some manner reflect that the disorder impacted the defendant's ability to comprehend the proceedings. And in the absence of such a finding, a competency evaluation is not required to be had. An example of the other states' position is the following summary of the holding in *Douglas v. State*, 2010WL2196082, made by a Texas Appellate court: "finding trial court did not abuse its discretion by failing to conduct informal inquiry into defendant's competency after she testified that she had been recently diagnosed with 'schizoaffective disorder and bipolar disorder, suffered from hallucinations, and was taking medications that quiet the voices she hears and control her racing thoughts' where record showed defendant's testimony was 'lucid, her

answers to the questions posed were responsive and clear, and she coherently relayed her side of the story.”

Essentially, unless the Rule 11 plea colloquy by the defendant reflects the effects of a stated mental disorder or the counsel states a concern about the client’s mental status, then the court is not required to do a mental competency evaluation notwithstanding the existence of a diagnosis of a mental illness or disorder. Moreover, the defendant will be deemed to have entered the plea voluntarily, knowledgeably, and intelligently.

Also, the Supreme Court found no abuse in discretion by sentencing the defendant differently than his co-defendants in light of the matters set forth in the pre-trial sentencing report which, again, the defendant’s counsel stated was not factually inaccurate.

The crux of the case is that counsel must be attuned to the impact of the presentence report and must be able to present some mitigation. Simply affirming the report’s accuracy may be effectively assuring a harsh result. For example, the bipolar disorder might have been a matter to explore in mitigation of the sentencing, if it was not so used.

SENTENCE: DEFENDANT’S FAILURE TO GET AN EVALUATION REQUIRED FOR PROBATION WOULD NOT BE GROUNDS FOR RESENTENCING AS PROBATION IS A MATTER OF GRACE AND NOT A RIGHT AND COURT’S SENTENCE WAS WITHIN THE STATUTORY LIMITS.

***State v. Brichner*, 2015WL1236005 (W.VA.)**

In the memorandum decision reported as *State v. Brichner*, 2015WL1236005, the issue arose of out the sentencing of a defendant as a result of a *Kennedy* plea to one count of first degree sexual abuse. The sentence was to run concurrently with a sentence that was being served for delivery of cocaine. Additionally, the defendant was to register as a sex offender for life and was to be under supervised release for twenty years.

The defendant was not encumbered from arguing for any sentence, but, if probation were to be possible, a psychiatric evaluation would be required. See W. Va. Code §62-12-2(e). Discussion ensued at the plea hearing whether the expense of the evaluation would be paid by the public defender corporation due to the fact the defendant was presently incarcerated and due to the highly unlikely possibility of probation being granted. Without resolution of this issue, the plea was entered. Eventually, a sentence was imposed consistent with the plea, but without any evaluation having been done.

The court denied post-trial motions for new counsel, for a psychiatric evaluation, and for resentencing based upon the requested evaluation. Under the plea agreement, the defendant was entitled to ask for any lawful sentence, which could include probation but only if an evaluation was done. On appeal, the defendant argued he was denied this opportunity.

The Supreme Court denied relief indicating that it was not an abuse of discretion for the court to impose sentence without an evaluation, thereby precluding the consideration of probation. Noting that probation was a matter of grace and not a right and that the sentence was within statutory limits, the court's sentencing was upheld. The matter of ineffective assistance of counsel was considered an improper issue on appeal.

JURY: WHEN A JUROR MAKES AN INCONCLUSIVE OR VAGUE STATEMENT THAT ONLY INDICATES THE POSSIBILITY OF BIAS OR PREJUDICE, THE PROSPECTIVE JUROR MUST BE QUESTIONED FURTHER BY THE TRIAL COURT AND/OR COUNSEL TO DETERMINE IF ACTUAL BIAS EXISTS.

State ex rel. Parker v. Keadle, 776 S.E.2d 133 (W. Va. 2015)

In the reported opinion, *State ex rel. Parker v. Keadle, 776 S.E.2d 133 (W. Va. 2015), 2015WL3649611*, the prosecuting attorney sought a writ of prohibition against the circuit court judge who ordered a new trial based upon the court's failure to strike a juror for cause.

Specifically, a defendant had been convicted by a jury of twenty-seven counts of first degree sexual assault, twenty-seven counts of sexual abuse by a parent, guardian or custodian, and twenty-seven counts of incest. Sixty-nine counts additional counts had been dismissed upon the State's motion. The number of counts in the indictment was, therefore, one hundred and fifty.

An initial trial commenced but resulted in a mistrial when two jurors were stricken for cause.

For the second trial, a questionnaire was prepared, which consisted of thirteen pages and sixty-nine questions. One juror answered several questions indicating she had formed an opinion as to the defendant's guilt. One handwritten comment was that "I try to presume innocence until found guilty, but when I read there were up to 50 counts, I know my thinking was that this person must have done something." In response to the question as to whether the fact of indictment would lead her to believe that the defendant was guilty, the juror had answered "it would lead me to believe there is a suspicion."

The court denied the initial motion to strike for cause, but stated the motion might be renewed after the individual voir dire. But during the individual voir dire, no questions were asked of the juror by either the court or the counsel. And the defense counsel made no objection when the juror was empaneled.

After conviction, the defendant's post-trial motions were heard by a different judge. An additional fact was made known which was that, after the trial, the subject juror sent a thank-you letter to the prosecuting attorney complimenting his performance. The new judge agreed that the juror should have been stricken for cause and that the juror's bias was obviously confirmed by the thank-you letter. A new trial was ordered, therefore, and the prosecution's petition for a writ of prohibition was then filed.

The Supreme Court stated that “a juror is considered to be biased where the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant.” The Supreme Court then acknowledged that “actual bias can be shown either by a juror’s own admission of bias or proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed.” The Supreme Court then noted that it could “interfere with a trial court’s discretionary ruling on a juror’s qualification to serve because of bias only when it is left with a clear and definite impression that a prospective juror would be unable faithfully and impartially to apply the law.” Finally, the Supreme Court elaborated that “when a prospective juror makes a clear statement of bias during *voir dire*, the prospective juror is automatically disqualified and must be removed from the jury panel for cause.” But, “when a juror makes an inconclusive or vague statement that only indicates the possibility of bias or prejudice, the prospective juror must be questioned further by the trial court and/or counsel to determine if actual bias or prejudice exists.”

In the Supreme Court’s opinion, the answers given by the juror in the questionnaire did not “manifest a clear and definite impression” that the juror would not be able to “fairly and impartially apply the law.” And because neither the trial court nor counsel made any further inquiry, the Supreme Court did not believe the totality of the circumstances established that the juror should have been dismissed for cause. Accordingly, the lower court should not have granted the motion for a new trial as a matter of law and a writ of prohibition would properly issue. The Supreme Court never addressed the significance, if any, of the juror’s thank-you letter to the prosecutor as evidence of the juror’s actual bias.

Justice Ketchum dissented, stating the juror’s answer was “clear” and “she had formed an opinion before hearing the evidence.”

DOUBLE JEOPARDY: COURT WOULD NOT RULE ON ISSUE OF DOUBLE JEOPARDY FOR CHARGES OF ABDUCTION WITH INTENT TO DEFILE AND ABDUCTION BECAUSE THE ISSUE WAS NOT RAISED IN THE TRIAL COURT AND DEFENSE COUNSEL REQUESTED THE INSTRUCTIONS ON THE OFFENSE OF ABDUCTION.

BURGLARY: A NAMED LESSEE CAN BE CONVICTED OF BURGLARY BY ENTERING THE LEASED PREMISES IF THE CO-LESSEE HAS BEEN GRANTED SOLE OCCUPANCY BY THE PROTECTIVE ORDER.

RECIDIVISM: RULE OF LENITY DOES NOT REQUIRE THAT A RECIDIVISM ENHANCEMENT BE APPLIED TO THE LEAST HARSH PENALTY.

***State v. Lewis*, 776 S.E.2d 591 (W. Va. 2015)**

In the reported opinion, *State v. Lewis*, 776 S.E.2d 591 (W. Va. 2015), 2015WL3448047, the relevant facts were that the defendant went to the apartment of his former girlfriend in violation

of a protective order. The defendant had previously lived with the girlfriend in the apartment and remained a tenant on the lease for the apartment. The protective order gave the former girlfriend exclusive possession of the apartment, however. The allegation is that when the former girlfriend, L.F., tried to close the door on the defendant, he kicked it open and entered the apartment. Another person in the apartment then witnessed the defendant's abduction of L.F. from the apartment. The person did not follow the defendant because he was unclothed, but the person did dial 911. The police arrived but could not locate either the defendant or L.F.

The testimony was that the defendant took L.F. to another apartment in which the defendant and the girlfriend had previously resided, but which was currently unoccupied. The defendant then allegedly sexually assaulted the former girlfriend. L.F. eventually escaped, but was followed by the defendant back to her apartment. The defendant was then reported by the defendant and the other person in the apartment to have stated that L.F. "should telephone the police because he knew he was going to prison for rape and kidnapping." The police were called and the defendant was arrested.

Trial was had on the resulting charges except for the violation of the terms of a protective order to which the defendant pled guilty. After the prosecutor's case in chief, a motion for a judgment of acquittal on all charges was made and was denied. The defense did not call any witnesses. The jury found the defendant guilty of burglary by entering without breaking, abduction with the intent to defile as a lesser included offense of kidnapping, and second degree sexual assault. The defendant was found not guilty of breaking and entering and second degree sexual assault by oral intercourse.

A recidivist information was filed before sentencing with respect to the defendant's conviction in Virginia in 1994 by his plea of guilty to the felony offense of voluntary manslaughter.

The resulting sentence was twelve months for violating the protective order which was to run concurrently with the consecutive sentences of one to fifteen years for burglary; three to ten years for abduction with intent to defile; and an enhanced twenty to twenty-five years for the second degree sexual assault.

One assignment of error was that the convictions on the charge of sexual assault and the charge of abduction with intent to defile violated the Double Jeopardy Clause. The argument was, based upon case law, that the movement of L.F. to the other apartment was "merely intended to facilitate the commission of the sexual assault" and the abduction, therefore was "merely incidental or ancillary to the commission of the other offense" and could not be separately charged.

The Supreme Court deemed this point of error to be waived, noting that the issue was not raised in the circuit court and, moreover, the defense counsel specifically requested that the jury be instructed on the charge as a lesser included offense of kidnapping. The defense counsel also approved the verdict form. The Supreme Court concluded, therefore, that the defendant "cannot now complain of his tactical decision."

Although waived, the Supreme Court further held that Double Jeopardy was not present in this case because the distance between the apartments and the length of time L.F. was held made the abduction more than incidental to the commission of the sexual assault.

Another assignment of error was that the instruction on the charge of abduction with intent to defile was deficient. The first problem for the defendant is that the instruction was proffered by the defendant and given over the State's objection. The second problem is that the purported deficiency was the absence of an element of sexual motivation or purpose, but the instruction proffered by defendant defined "defile" as "having a sexual purpose or motivation." Needless to say, the assignment was rejected in one paragraph.

Another assignment of error concerned whether the defendant could be convicted of burglary of an apartment when he was a named lessee. Essentially, the defendant argued that he had not "entered the premises of another." The Supreme Court noted that it was "possession or occupancy" of a building or premises that was the determining factor and the protective order had given the former girlfriend sole possession of the apartment. Accordingly, the defendant could be convicted of burglary.

Additionally, the defendant argued that the records of conviction from Virginia should not have been admitted in his recidivist proceeding because no transcript existed to establish that his conviction by reason of a guilty plea was done knowingly, voluntarily, and willingly. The Supreme Court rejected this argument holding that the records would be presumed valid absent any proof from the defendant of any irregularity and, moreover, the asserted grounds would be deemed to be waived absent any actual attack of the prior conviction on the grounds now argued by the defendant.

Finally, the defendant argued that the recidivist enhancement should not have been applied to the harshest statutory penalty under the rule of lenity. The rule of lenity would require the strictest construction of the recidivist statute against the State and because it did not direct which sentence was to be enhanced, it should be the least harsh penalty. The Supreme Court disagreed, holding that the "selection of the sentence to be enhanced is committed to the sound discretion of the trial court" and, "unless based on some impermissible factor" and unless the resulting sentence is not within statutory limits, that exercise of discretion would not be reviewed.

SUPPRESSION: FIFTH AMENDMENT IS INVOKED IN CUSTODIAL SITUATIONS ONLY WITH RESPECT TO QUESTIONING INITIATED BY LAW ENFORCEMENT OFFICERS.

SUPPRESSION: RIGHT TO COUNSEL DOES NOT ATTACH DURING TRANSPORT WHEN A FORMAL PROSECUTION SUCH AS AN ARRAIGNMENT OR PRELIMINARY HEARING HAS NOT YET COMMENCED.

HEARSAY: A SELF-INCULPATORY STATEMENT MADE BY A PURPORTED COHORT WHO WAS

UNAVAILABLE BY PLEADING THE FIFTH AMENDMENT PRIVILEGE FALLS WITHIN THE HEARSAY EXCEPTION.

EVIDENCE: STATEMENTS MADE BY THE PURPORTED PARTNER IN CRIME TO A WITNESS WHILE SMOKING POT WERE NOT TESTIMONIAL IN NATURE AND, THEREFORE, CONFRONTATION CLAUSE WAS NOT INVOKED.

WITNESS: POLICE OFFICER'S LAY OPINION THAT CERTAIN SHOES MADE FOOT PRINTS IN THE SNOW WAS PERMITTED TO SHOW A COMPLETED INVESTIGATION AND AID THE JURY'S UNDERSTANDING OF THE CASE.

***State v. Bouie*, 776 S.E.2d 606 (W. Va. 2015)**

In the reported opinion, *State v. Bouie*, 776 S.E.2d 606 (W. Va. 2015), 2015WL3822768, the defendant's convictions of felony murder and conspiracy to commit burglary of a residence were affirmed.

At 3:15 a.m., the defendant and another person allegedly prepared to enter an apartment through a rear bedroom window in order to steal money and drugs. Unexpectedly, the occupant of the apartment confronted the pair. The person accompanying the defendant fatally shot the occupant in the chest.

Surveillance videos were found establishing that one of the persons trying to break into the apartment wore sneakers even though it was a snowy morning.

During his transport in a police cruiser from his place of incarceration on other charges in Pennsylvania, the defendant asked to see a copy of the complaint resulting in his arrest in West Virginia. Upon reviewing the complaint, the defendant asked why he was being charged with murder when he was not the shooter. Further statements placed him at the scene of the shooting at the time of the shooting. For felony murder purposes, the defendant had effectively confessed.

The Supreme Court held that, at this time, the Sixth Amendment right to counsel had not attached because a "formal prosecution" had not yet commenced. The defendant was being transported and had not yet been arraigned or brought before a magistrate for a preliminary hearing. Acknowledging that the defendant had not been Mirandized, the Supreme Court further held that the defendant's comments were made spontaneously and without prompting from the police officer. The Fifth Amendment is invoked in custodial situations only with respect to "questioning initiated by law enforcement officers." The statements were admitted at the trial, therefore.

At trial, a witness testified as to statements made by the purported shooter. The statements confirmed the shooting and confirmed the fact of the robbery. The declarant refused to give testimony for fear of self-incrimination. The defendant argued that the statements were inadmissible hearsay and violated the Confrontation Clause.

The Confrontation Clause did not apply, according to the Supreme Court, because the

statements were not testimonial in that the statements were not “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” A hearsay exception applied because the declarant was technically “unavailable” by reason of asserting the Fifth Amendment privilege and the statements were against the declarant’s “own penal interest.” Restated, “the very fact that a statement is ‘genuinely self-inculpatory’ ... is itself one of the particularized guarantees of trustworthiness.” Moreover, the Supreme Court found the trustworthiness was not compromised by the fact the witness and declarant were smoking pot at the time. The irony is, however, that the statements were not found to be testimonial for Sixth Amendment purposes, but the statements were found to be “inculpatory” for hearsay purposes. If the defendant did not expect the statements to be used at a trial, were they truly inculpatory?

The defendant further moved to suppress recorded phone calls that he made from the jail. The defendant’s problem is that each phone call started with a warning that the calls were recorded and, therefore, the defendant essentially “ignored the warnings at his own peril.”

The final issue in the case was the testimony regarding a pair of tennis shoes that were stated to be similar to the shoes worn the night of the burglary based upon prints found in the snow below the window and images on the surveillance video. These shoes were also similar to shoes owned by the defendant. In other words, if the jury believed these were the shoes worn by the person in the video and the jury believed the shoes were similar to ones owned by the defendant, then the jury could conclude the defendant was the person in the video. The shoes depicted at trial were deemed to be “demonstrative evidence.” During the trial, the jury was informed on several occasions that the demonstrated shoes did not belong to the defendant. And the FBI testimony was that it could not be stated with certainty that this brand of shoe was the one worn by the unidentified person in the surveillance videos. Indeed, a cautionary instruction was given by the presiding judge.

The defendant objected to the “lay” opinions offered by the investigating officer that the shoe accurately depicted a shoe that made the prints in the snow and that seemingly visually matched shoes worn by the defendant in surveillance videos found on the night of the shooting and attempted robbery. The Supreme Court found no abuse in permitting the investigating officer’s testimony stating, somewhat perplexedly, that “it doubtlessly aided the jury’s understanding of the case to hear that Sergeant Cox had taken note of these salient facts and examined their potential significance, else it might presume that this investigation had been incomplete or – worse – that the police or prosecutor had concealed exculpatory information.” The explanation seems to be that an investigating officer’s unqualified opinions on scanty forensic evidence should be permitted so the jury can understand why the officer is convinced of the defendant’s guilt.

Finally, the court found that the circumstantial evidence was sufficient to prove a burglary was intended and the defendant was involved in the plan. The defendant’s convictions were affirmed.

Justice Davis dissented criticizing the majority's opinion that the investigating officer could offer lay opinions that shoes he purchased on eBay were similar to the shoes worn by the defendant when "he did not personally observe the defendant on the night in question" and "merely viewed barely visible video footage of footwear of an unidentified person on the night of the incident." The Justice further noted that the jury was able to see what the investigating office saw and, therefore, "where the jury is capable of drawing their own conclusions, the lay witness's testimony is unhelpful and thus should not be permitted." The Justice found this error to be prejudicial and not simply harmless error.

INDICTMENT: "OPERATING" OR "ATTEMPTING TO OPERATE" A CLANDESTINE DRUG LABORATORY ARE NOT SEPARATE OFFENSES, BUT TWO WAYS TO VIOLATE THE STATUTE; THUS, INDICTMENT WAS NOT DEFECTIVE.

TRAFFIC STOP: USE OF A DRUG DOG IS NOT A SEARCH REQUIRING A WARRANT, BUT IT CANNOT EXTEND THE TRAFFIC STOP.

State v. Brock, 774 S.E.2d 60 (W. Va. 2015)

In the reported opinion, *State v. Brock, 774 S.E.2d 60 (W. Va. 2015), 2015WL3385059*, the appeal was taken from the defendant's conviction after a jury trial on charges of operating or attempting to operate a clandestine drug laboratory and conspiracy to operate or attempt to operate a clandestine drug laboratory. The resulting consecutive sentences were suspended and the defendant was given a three year period of probation.

The charges arose out of a vehicle stop. A police officer followed a Monte Carlo at around 1:40 a.m. in the morning and observed the vehicle traveling left of center three times and the driver was also tapping the brakes and causing the vehicle to go right of the fog line. Evidence was not permitted at the trial that the purpose for following the car in the first place was the observation of the car on two different occasions at a house which was under surveillance by a team of drug enforcement officers. The officer was in plain clothes and called a marked car to make the traffic stop.

Notably, the marked car pulled over the vehicle based only on the first officer's observation of impaired driving. Defendant was driving and produced the vehicle's registration but could not produce any personal identification when first asked. The car was registered to defendant's girlfriend who had given him permission to use the vehicle. After being ordered to step out of the car, the defendant then produced a revoked Ohio driver's license. The officer's assessment was that the defendant "was acting real nervous. He was fidgety."

The officer asked to search the car, but the defendant refused. The officer then called a canine unit to the scene. After the unit arrived, the dog alerted to the presence of drugs. A resulting search of the car resulted in the discovery of materials that were believed to be the components of "a young pop clandestine laboratory or shake and bake." An odor and vapor was also

present in the car. Additionally, the officers found a syringe, a cold pack, coffee filters, a used filter with a white powder residue, and ammonium nitrate. Testing of the material found evidence of methamphetamine.

The first assignment of error was that the circuit court should have dismissed the indictment. The defendant argued that, pursuant to Rule 8 of the W.Va. Rules of Criminal Procedure, the “operation” of, or the “attempting to operate”, a clandestine drug laboratory were separate offenses and should not have been charged together in one direct count.

The Supreme Court disagreed, stating that the statute provided for one offense that could be committed in two ways, i.e., either (i) operating, or (ii) attempting to operate, a clandestine drug laboratory.

The more substantive ground for the appeal was whether the search of the car was proper. The interesting facet of this opinion is that it was argued on April 21, 2015. On April 21, 2015, the United States Supreme Court also issued its opinion in *Rodriguez v. United States*, 135 S.Ct. 1609, holding that, without articulable suspicion, a traffic stop cannot be extended for the purpose of calling a canine unit to the scene to do a sniff.

No additional argument was apparently had in light of this development of controlling precedent. However, the eventual opinion in this matter did discuss the United States Supreme Court’s *Rodriguez* opinion.

Consistent with the federal precedent, the Supreme Court found that use of a drug dog did not constitute a search and did not require, therefore, probable cause or a warrant. But, under *Rodriguez*, the Supreme Court had to determine if the traffic stop was impermissibly delayed to bring the drug dog to the scene.

The Supreme Court then stated that the drug sniff occurred during a time in which the traffic stop was not completed due to the defendant’s “nervousness” and inability to produce identification and exiting of the vehicle. The Supreme Court then found that the “evidence fails to show that the mission of the lawful traffic stop was completed at the time the dog sniff of the vehicle occurred.” Notably, a videotape of the stop existed and was reviewed and the time involved was noted to be thirteen minutes. A close reading of *Rodriguez* would further require, however, a determination that the officer had completed the traffic stop as expeditiously as possible. No discussion of this issue can be found in the opinion, although, again, the videotape was apparently reviewed by the Supreme Court.

The final ground for the appeal was the purported insufficiency of the evidence that the defendant had constructive possession of the chemicals found in the vehicle. The Supreme Court focused on the evidence at trial that the material was found in the front seat, was emitting a strong odor, and was emitting a vapor cloud. Based on these facts, the Supreme Court found that the defendant, as the operator of the car, and as one of only two persons in the car, both of whom were in the front seat, had to know that an active meth lab was operating and he had

clear dominion or control over the material as it was within his reach and observation. The defendant's conviction was affirmed.

EVIDENCE: ANY INTERVAL OF TIME BETWEEN THE FORMING OF THE INTENT TO KILL AND THE EXECUTION OF THAT INTENT IS SUFFICIENT TO SUPPORT A CONVICTION FOR FIRST DEGREE MURDER.

EVIDENCE: MALICE MAY BE INFERRED FROM THE INTENTIONAL USE OF A DEADLY WEAPON.

WITNESSES: WITHOUT A SHOWING OF ACTUAL PREJUDICE, A PROSECUTOR IS NOT DISQUALIFIED BECAUSE A WITNESS CHANGED DETAILS OF HER STORY DURING TRIAL PREPARATION WITH THE PROSECUTOR'S OFFICE.

State v. Murray, 773 S.E.2d 656 (W. Va. 2015)

In the reported opinion, *State v. Murray, 773 S.E.2d 656 (W. Va. 2015)*, the defendant was tried on, and convicted of, the charges of first degree murder without mercy and concealment of a deceased human body.

The victim, who resided with the defendant and a mutual friend, had stolen computers and television from the defendant's father. The defendant and the friend and the defendant's father did not want to inform the police about the identity of the thief due to the fact the victim was privy to their own criminal activities, including, drug use. The Solomonic solution was simply to beat up the victim, "possibly breaking his fingers, or his knees, or something." The father offered to forgive a debt of the defendant's friend and to give his son and friend drugs once the beating was administered.

One night the defendant and his friend told everyone to leave the premises, presumably to carry out a plan to kick the victim out of the house after beating him up. When confronted, the victim pushed the friend into a wall and held him by the throat. In response, the friend grabbed a large wrench from the table and hit the victim on the head two or three times. Eventually, the victim let the friend go and sat down on a couch and slumped over.

According to the friend's testimony at trial, he started to leave when the defendant picked up the same wrench and started hitting the victim repeatedly on the head. The friend left and subsequently the defendant appeared stating that the victim had "peed himself" and "was dead."

The defendant and the friend then proceeded to dispose of the body. The body was rolled up in a carpet. The bloody couch was removed from the house and burned. The body was eventually placed in a hole on a riverbank and the carpet was burned.

When the body was found two weeks later, the friend's girlfriend contacted the police and identified the defendant and his friend as the killers. At the subsequent trial, the friend testified

against the defendant pursuant to a proposed plea agreement resulting in a conviction on second degree murder. The defendant did not testify and did not present any witnesses.

The defendant appealed on various grounds, including the argument that the evidence failed to show any premeditation and malice. The Supreme Court articulated its established rulings on this issue noting that some period of time, whatever length it might be, must exist which permits reflection on the formed intent to kill. Again, it was noted that “the duration of that period cannot be arbitrarily fixed” and “varies as the minds and temperaments of people differ and according to the circumstances in which they may be placed.” Further, “any interval of time between the forming of the intent to kill and the execution of that intent ... is sufficient to support a conviction for first degree murder.” Finally, “malice may be inferred from the intentional use of a deadly weapon.” In the circumstances of this matter, the Supreme Court found that the defendant’s observation of his friend striking the victim and then retrieving the large wrench and continuing the beating while the victim was slouched on the couch permitted the jury to find premeditation and malice.

The second ground for appeal was that the prosecutor’s office should have been disqualified in the matter. A potential witness changed details of her story during trial preparation with the prosecutor’s office. The witness’ testimony supported a potential conspiracy charge. The defendant argued that this made the attorney in the prosecutor’s office a witness and moved to disqualify the office. The Court deferred a ruling until it actually became an issue, but it never did because the witness was not called and the conspiracy charges were dismissed. Without showing some actual prejudice, the defendant’s argument was deemed to be unfounded.

During deliberations, a juror suddenly realized that she knew the defendant’s ex-wife. She immediately notified the trial court. Upon defense counsel’s request, the juror was replaced by an alternate. On appeal, the Supreme Court was asked to review, under the plain error doctrine, whether the trial court should have examined the remaining jurors to make certain that no prejudicial remarks had been made by the excused juror. The Supreme Court found no error, believing that the juror had not displayed any lack of candor that would suggest bias and noting that the defense counsel had not objected to the continuation of the deliberations at the time.

Another assignment of error was the playing of a recorded conversation between the defendant and his girlfriend at the sheriff’s office that was captured on a closed-circuit video camera. The investigating officer had brought the defendant and his girlfriend to the station for questioning. After both were interviewed, the defendant and the girlfriend were seated together in the interview room. The audio on the video was barely discernible, but it apparently demonstrated a very agitated defendant admonishing the girlfriend for talking. Without discussion, the Supreme Court upheld the lower court’s admission of the video as relevant, and more probative than prejudicial.

The final assignment of error concerned the potential vouching of the friend as a witness by his testimony that his plea agreement required that he “offer truthful testimony.” The trial court gave

the standard cautionary instruction that the jury could not consider the witness' plea agreement as evidence of the defendant's guilt. Instead, the fact of the plea agreement was merely to be used to assess the witness' credibility. The assignment of error was rejected by the Supreme Court primarily because the defense counsel never objected to the introduction of the condition in the plea agreement that the witness had to provide truthful testimony.

The conviction of the defendant was affirmed.

DOUBLE JEOPARDY: THE QUESTION IS WHAT THE LEGISLATURE INTENDED TO BE A UNIT OF PROSECUTION AND IT IS CLEAR FROM THE STATUTE THAT EACH IMPROPER USE OF A STATE CREDIT CARD WAS A SEPARATE OFFENSE.

DOUBLE JEOPARDY: MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE DO NOT OCCUR WHERE THE ALLEGED CRIMES DO NOT ARISE, TEMPORALLY, FROM THE SAME ACT OR TRANSACTION OR WHEN EACH CRIME HAS ELEMENTS THAT THE OTHER DOES NOT.

State ex rel. Lorenzetti v. Sanders, 774 S.E.2d 19 (W. Va. 2015)

In the reported opinion, *State ex rel. Lorenzetti v. Sanders, 774 S.E.2d 19 (W. Va. 2015)*, 2015WL3385051, the prosecuting attorney sought a writ of prohibition against the enforcement of a circuit court judge's order dismissing fifty-three counts of a fifty-four count indictment.

The defendant, a dean of students at Shepherd University, allegedly used a state purchasing card for purposes other than official state business. The issue was whether, under a Double Jeopardy analysis, the fifty-four transactions were chargeable only as one offense rather than fifty-four separate offenses.

The circuit court deemed the purchases to be "part of a continuing offense." Accordingly, Double Jeopardy principles dictated that only one count in a criminal charge under the unlawful use statute could be made. Moreover, the separate charge of a fraudulent "scheme" and the now consolidated charges of unlawful use of a state purchasing card overlapped, creating Double Jeopardy concerns. In this manner, fifty-four counts became one count.

The Supreme Court articulated that "the question under the Double Jeopardy Clause whether punishments are multiple [for the same offense] is essentially one of legislative intent." The legislative intent relates to what was intended to be a "unit of prosecution."

The circuit court relied upon language in a preamble to a 2014 legislative amendment to determine that the legislature intended the offense of unauthorized use of a purchasing card to be a "continuing offense," even though the actual amended statute did not contain the language. Moreover, the circuit court was using the 2014 actions of the Legislature to construe the provisions of the governing 1996 statute which also did not make reference to a "continuing offense."

The Supreme Court found the 1996 language to be unambiguous which then precluded the

circuit court's attempts to construe the language by reference to the 2014 legislative action. The statute unambiguously criminalized the "use" of the card "to make any purchase".

The Supreme Court engaged in a grammatical analysis and found that "use" was a transitive verb requiring an object, which then provides the context for the transitive verb. Because "purchase", which was the object of the transitive verb, is singular, the verb "use" must be limited to a single event. Accordingly, "each purchase made in violation of the statute constitutes a separate chargeable offense and a distinct unit of prosecution." The opinion is a somewhat interesting linguistic study and includes an analysis of the difference between "utter," a transitive verb, and "swear," an intransitive verb, in distinguishing or applying case law precedent.

With respect to whether multiple punishments were being imposed by the same offense, the Supreme Court again acknowledged that this involved statutory construction. Did the legislature require in each offense "proof of an additional fact which the other does not"?

The Supreme Court noted, however, that the described transactions supporting the charge of an unlawful scheme and the transactions supporting the charges of unlawful use occurred at different times. Accordingly, "the prohibition against multiple punishments for the same offense is not implicated where the alleged crimes do not arise from the same act or transaction." Upon review of the two statutes, however, the Supreme Court further determined each had elements that were not contained in the other and, therefore, double jeopardy was not implicated.

Accordingly, the Supreme Court granted the writ of prohibition, thus reinstating the additional fifty-three counts of the indictment.

Justices Loughery and Workmen concurred in the opinion, but engaged in an analysis that went beyond double jeopardy. As the Justices have articulated in several opinions, the "propriety of multiple or single charges ... is measured by evidence of multiple separately-formed or singular intent(s), as determined by a jury." The analysis seems to suggest that the prosecution needs to prove not only the elements of the offenses, but that each offense involved a newly formed intent. Accordingly, while prosecution of multiple counts is proper in this matter, multiple convictions will turn on the jury's determination of whether a specific intent existed for each transaction.

SENTENCE: FOR PURPOSES OF COMMITMENT, AN ACT OF VIOLENCE AGAINST A PERSON IS AN ACT THAT INDICATES AN INCOMPETENT DEFENDANT POSES A FUTURE RISK OF HARM TO THE PUBLIC, AND, THEREFORE, THE MERE POSSESSION OF A GUN ON EDUCATIONAL PREMISES SATISFIED THE FINDING.

***State ex rel. Smith v. Sims*, 772 S.E.2d 309 (W. Va. 2015)**

In its reported opinion, *State ex rel. Smith v. Sims*, 772 S.E.2d 309 (W. Va. 2015), the Supreme Court of Appeals of West Virginia again granted a writ of prohibition with respect to a circuit court order dismissing charges. See also, *State ex rel. Lorenzetti v. Sanders*, 774 S.E.2d 19 (W.

Va. 2015), 2015WL3385051, discussed above.

In this matter, the issue was whether a crime involved an act of violence against a person such that the charges against an incompetent defendant did not have to be dismissed but, instead, could result in the commitment of the defendant to a psychiatric facility pursuant to the provisions of W. Va. Code §27-6A-3(h).

The defendant was a twelve year old boy who brought a gun from his grandparents' house to his school with the intent to scare a girl who had been bullying him. The principal discovered the gun in the defendant's backpack in his locker after confronting the defendant. The gun was never brandished nor used for any purpose by the defendant. The defendant was evaluated after the resulting petition was filed for the charge of possession of a deadly weapon on the premises of an educational facility. His IQ was measured as 70, "which is equivalent to a nine-year-old child," and he was "functioning at about the third grade level." The evaluator concluded that the defendant did not have "a rational, as well as factual, understanding of proceedings against him" and was not competent to stand trial "due to his limited intellectual abilities and high distractibility." The resulting motion to dismiss the charges pursuant to W. Va. Code §27-6A-3(g) was granted because, in the circuit court's opinion, no violence against a person since the "weapon was not seen by anyone prior to its discovery" and was "never brandished" and the defendant made no "specific threats to, or against, anyone. " Restated, "absent any use or threatened use of physical force against a person by [the defendant], the alleged offense ... is not an offense [that] constitutes an 'act of violence against a person.'" If an act of violence had occurred, the charges could not be dismissed and the defendant would be committed under the following subsection of the statute.

Subsequently to this ruling by the circuit court, the Supreme Court of Appeals of West Virginia issued its opinion in *State v. George K.*, 760 S.E.2d 512 (W. Va. 2014) in which the language of the competency statute was found ambiguous due to the "absence of an explicit statutory definition" for what constitutes an "an act of violence against a person." In that matter, the incompetent defendant had sexual relations with a young girl that was consensual and did not involve force.

In divining the legislative intent, the Supreme Court found that an "act of violence against a person" within the meaning of W. Va. Code §27-6A-3 is "an act that indicates an incompetent defendant poses a future risk of harm to the public." While no harm was potentially suffered by the young girl in the charged offense, "it does not follow that another child subject to a similar encounter in the future would also not suffer severe harm." In summary, the Supreme Court found that the legislature was intending to protect the public, not just the immediate victim, and this meant that harm did not have to actually occur in the offense underlying the commitment but, rather, harm might potentially occur if the behavior recurred. Indeed, violence is not even required to be an element of the offense under this analysis.

With respect to bringing the gun onto the premises of the educational facility, it was "clear" to

the Supreme Court that “the actions of ... [the defendant juvenile] posed a significant risk of harm to the other students as well as school personnel ... [and] [i]t was only because of timely intervention by the principal that a potential tragedy was avoided.” Consistent with the ruling in *George K.*, therefore, the charges represented “an act of violence against a person.”

The actual holding was, however: “we now hold that possession of a deadly weapon on the premises of an educational facility with the express intent to intimidate another student ‘involves an act of violence against a person’ as set forth in W. Va. Code §27-6A-3.” The language seems to suggest that if an incompetent person brought a weapon to school for a benign purpose, the charges for possession of a weapon on the premises of an educational facility might be properly dismissed. In any event, the defendant in this matter was required to be committed subject to the requirements of an annual review and commitment in the least restrictive environment.

The petition for a writ of prohibition was granted.

RULE 404(b): PROSECUTOR’S REFERENCE TO DEFENDANT AND AN EXPERT’S DIAGNOSIS OF DEFENDANT AS A PEDOPHILE WAS AN IMPROPER ATTEMPT TO ESTABLISH A CHARACTER TRAIT, BUT WAS HARMLESS IN LIGHT OF THE “OVERWHELMING” EVIDENCE OF GUILT.

***Ballard v. Hunt*, 772 S.E.2d 199 (W. Va. 2015)**

In the reported opinion, *Ballard v. Hunt*, 772 S.E.2d 199 (W. Va. 2015), the Supreme Court of Appeals of West Virginia reversed the decision of the circuit court to grant a new trial upon a petition for a writ of *habeas corpus*.

The petitioner had been convicted of sexual abuse in the first degree and sexual abuse by a custodian. The offenses were allegedly against an eleven year old boy. The circuit court found that the references by the State’s expert witness and the prosecutor to the petitioner as a pedophile during the trial warranted a new trial.

The petitioner was a newspaper delivery person, twenty-four years of age. On his route, he sometimes invited the victim. The sexual offenses allegedly occurred in the car. The abuse was discovered when the parents overheard a telephone conversation between the defendant and the young boy in which the defendant asked the young boy when they would have sex again.

In the opening statement, the prosecutor referred to the defendant as a pedophile. Moreover, the prosecutor stated that the defendant “has a lustful disposition toward young children” and that, “consistent with being a pedophile,” the defendant “participated in only the minimum amount of therapy and counseling while incarcerated for a previous sexual offense involving a young girl.”

An expert witness testified regarding his counseling of the defendant while incarcerated. He testified to “a diagnostic impression on file” stating that the defendant was a “pedophile.”

In closing, the prosecutor referred to the “minimal counseling and the diagnostic impression that ... [the defendant] is a pedophile.”

The defendant took the stand and denied any sexual encounters with the young boy and further asserted that he was wrongly convicted of the offense for which he had been incarcerated.

A direct appeal was denied. The subsequent petition for a writ of *habeas corpus* alleged that his due process rights were violated due to the references to him at trial as a pedophile. Relief was granted after the omnibus hearing.

The circuit court determined that the reference to the defendant as a pedophile was “inadmissible character evidence under Rule 404(a).” Specifically, “to be diagnosed as a ‘pedophile’ is not evidence of a prior bad act or crime but evidence of the character (propensity) of the petitioner to engage in particular conduct.” The circuit court found this to be highly prejudicial evidence and entirely unnecessary since the State proved the defendant’s prior conviction for sexual abuse of a child.

The Supreme Court, in the majority opinion, found error in the use of the term pedophilia to establish a character trait of the defendant and to prove that the defendant acted in conformity with this trait on a particular occasion. However, the opinion further found that this error was subject to a harmless error analysis. Consistently, the comments by the prosecutor on such evidence were also improper, but were also subject to a harmless error analysis. The Supreme Court had no doubt, however, that the error was harmless and recited the evidence that, in its opinion, “overwhelmingly established the ... [defendant’s] guilt of the crimes charged.”

An inconsistency in the holding seemingly exists, however. The Supreme Court seemed to apply the standard that the harmless error had to be established so that “there is no reasonable possibility that the violation contributed to the conviction.” This followed the Supreme Court’s acknowledgment that the error was prejudicial to the defendant “at trial,” which seemingly rises to the level, therefore, of a constitutional violation. Subsequently, however, the holding states that “a petitioner is only entitled to reversal if the error affected his substantial rights” and the Court then finds “this error did not rise to a level of a constitutional violation or otherwise violate Hunt’s substantial rights.” It is not certain, therefore, whether the Supreme Court believed the standard of harmless error beyond a reasonable doubt applied and was met or whether the lesser standard of harmless error applied and was met. Again, both standards were recited and analyzed.

Justice Loughery and Justice Workman concurred in the result, but dissented with respect to the finding that error occurred in allowing the defendant to be characterized as a pedophile. Essentially, evidence can show a lustful disposition and that is the essence of a diagnosis of pedophilia disorder. Accordingly, the justices would permit “expert testimony concerning that diagnosis.”

The lower court’s order granting relief was reversed.

DUE PROCESS: A CRIMINAL DEFENDANT HAS THE RIGHT, ABSENT SOME NECESSITY RELATING TO COURTROOM SECURITY OR ORDER, TO BE TRIED FREE OF PHYSICAL RESTRAINTS.

DUE PROCESS: THE BETTER PRACTICE IS TO REMOVE RESTRAINTS BEFORE A PRISONER IS BROUGHT BEFORE THE JURY AND REASONABLE EFFORTS SHOULD BE MADE TO PREVENT PRISONERS UNDER SUCH RESTRAINTS FROM BEING SEEN BY JURORS.

Ballard ex rel. Mount Olive Correctional Center v. Meckling, 772 S.E.2d 208 (W. Va. 2015)

In its reported opinion, *Ballard ex rel. Mount Olive Correctional Center v. Meckling, 772 S.E.2d 208 (W. Va. 2015)*, the Supreme Court of Appeals again reversed the grant of relief by a circuit court on a petition for a writ of *habeas corpus*. See also, *Ballard v. Hunt, 772 S.E.2d 199 (W. Va. 2015)*, discussed above.

The defendant was charged with kidnapping, malicious assault, driving while revoked for DUI, and abduction with intent to defile. The charges arose out of an incident in which the defendant “allegedly assaulted and kidnapped his longtime girlfriend ... outside of a bar and allegedly forced her to give him money to buy crack cocaine.”

The defendant appeared for his trial and, at the lunch recess, the court ordered the defendant to be taken into custody for violating his bond because he had contacted the victim. A warrant had been issued prior to the trial, but not executed. No reason is stated for why the defendant was not taken into custody immediately upon appearing for trial.

A motion for mistrial was made due to the defendant being placed in handcuffs in front of at least one, but perhaps several, members of the jury. The motion was denied.

The record reflects that, in fact, some jurors saw the handcuffing. For the remainder of the trial, however, the defendant was free of restraints.

The jury convicted the defendant of the felony count of abduction with intent to defile and the misdemeanor offense of battery. A recidivist information was filed and, subsequently, the defendant was sentenced to a term of imprisonment for life.

Eventually, the circuit court granted the petition for writ of *habeas corpus* finding that the defendant had been “deprived of his due process rights ... when it ordered him shackled during the course of trial in the presence of the jury, and security and order did not warrant such intrusive conduct.”

Upon review, the Supreme Court recited its precedent that “a criminal defendant has the right, absent some necessity relating to courtroom security or order, to be tried free of physical restraints.” The articulated reasons for this is that (i) “such treatment of a defendant must inevitably cause the jury to infer that the judge thinks him to be a dangerous man”; (2) “physically restraining the defendant may also interfere with his ability to participate in his own defense or

his privilege of being a competent witness on his own behalf”; and (3) “such treatment of the defendant detracts from the dignity and decorum of the judicial process.”

However, the Supreme Court noted that this precedent related to wearing handcuffs “throughout the duration of their trials.” In this matter, the handcuffing was for a brief period of time and in view of only some of the jurors. Accordingly, it was deemed to not be a ground for mistrial or reversible error. However, the Supreme Court did admonish that it is the better practice to “remove restraints before a prisoner is brought before the jury ... [and that] ... reasonable efforts should be made to prevent prisoners under such restraints from being seen by jurors.”

The order of the lower court granting relief was reversed.

SENTENCE: FEDERAL COURT DECISION VACATING CONVICTION ON SIX OF EIGHT COUNTS DUE TO IMPROPER APPLICATION OF THE RAPE SHIELD STATUTE IN VIOLATION OF THE CONFRONTATION CLAUSE RESULTED IN RESENTENCING, BUT DID NOT GIVE DEFENDANT THE RIGHT TO A NEW SENTENCING HEARING.

State v. Donald B., 2015WL3751987

The Supreme Court issued a memorandum decision in *State v. Donald B.*, 2015WL3751987. As background, the defendant had been convicted in 1999, after a jury trial, of eight counts of sexual offenses related to two minor victims. The Fourth Circuit Court of Appeals (“FCCA”) vacated six of the counts related to one of the victims. The FCCA held that the trial court’s application of the rape shield statute violated the defendant’s rights under the Confrontation Clause. Specifically, the defendant had been precluded by the state court from cross-examining an expert witness about whether abuse by other men might account for the victim’s post-traumatic stress symptoms. The defendant had evidence that the victim had accused other men of abuse.

The state court applied the rape shield statute to preclude this line of questioning. Pursuant to the opinion in *Michigan v. Lucas*, 500 U.S. 145 (1991), the “use of any per se evidence rule favoring either the prosecution or the defense” is rejected and “a state court must determine on a case-by-case basis, whether application of the rule is arbitrary or disproportionate to the State’s legitimate interests.” Indeed, *Lucas* involved a rape shield statute. After review of the matter, the FCCA held the trial court erred in its application of the statute because precluding the defendant’s right to present a defense was a disproportionately harsh result to the protection of the victim in these circumstances, and the FCCA vacated six of the eight counts of conviction.

The memorandum decision addressed the defendant’s appeal of his sentencing on the remaining two counts. Initially, the defendant had been sentenced to terms of ten to twenty-five years, but this was based on a version of the statute that was in effect in 1991. The acts that were alleged occurred in 1989 and 1990. Eventually, the defendant prevailed on a petition for habeas corpus in federal court on ex post facto grounds and the defendant was resentenced by the state court to a term of ten to twenty years under the statute that governed before 1991.

The defendant had wanted a “plenary” sentencing hearing so that he could argue for an “alternative sentence.” The court eventually entered an order without a hearing as simply an order correcting the term limits.

Under Rule 35(a), the “court may correct an illegal sentence at any time.” The defendant argued that because the federal court vacated the sentencing order, no order existed to be corrected. Accordingly a new sentencing hearing was required. The Supreme Court rejected the argument stating that the only requirement imposed on the court was to enter a sentencing order correcting the illegal sentence.

The Supreme Court further rejected the petitioner’s argument that he had been improperly denied the right “to allocution, presentation of mitigation evidence, an opportunity for his attorney to address sentencing alternatives, and to be present in person at a sentencing hearing.” Because the defendant had this opportunity originally, the Supreme Court could find no “controlling authority entitling him to a second plenary hearing.” The federal mandate was simply that the defendant be re-sentenced and he was. No relief was granted, therefore.

SENTENCE: A VICTIM’S IMPACT STATEMENT CAN INCLUDE ALLEGATIONS THAT RELATE TO DISMISSED CHARGES IF THE ALLEGATIONS RELATE IN SOME MANNER TO CHARGE OF CONVICTION, I.E. CONSPIRACY

State v. Ganey, 2015WL3689225

In the memorandum decision of *State v. Ganey, 2015WL3689225*, the Supreme Court of Appeals considered the defendant’s argument that “his due process rights” had been violated by the circuit court “in the manner in which it allowed the victim to make an impact statement.”

The defendant pled guilty to one count of conspiracy to commit malicious assault. The assault was carried out by another person and entailed both the beating and stabbing of the victim.

At the plea hearing, the defendant denied doing anything more than serving as a “lookout.” The victim’s account was that the defendant participated in the attack and that the victim gave the defendant a black eye during the assault. The defendant countered that the black eye was suffered before the attack, as established by pictures on his cell phone.

The defendant was sentenced to a term of one to five years.

The appeal was made on the grounds that, through the impact statement, the “victim was impermissibly allowed to present allegations related to charges that were dismissed, factually inaccurate allegations, and irrelevant disparaging comments toward ... [the defendant’s] counsel.” Moreover, the “victim’s mannerisms and demeanor were overly emotional and inappropriate.”

The Supreme Court noted that W. Va. Code §61-11A-2(b) requires the court to allow a victim

impact statement in these circumstances. The statute does require, however, “that the statement must relate solely to the facts of the case and the extent of injuries, financial losses and loss of earnings directly resulting from the crime for which the defendant is being sentenced.” The defendant posited, therefore, that the victim’s statements about the actual assault were improper because that charge was dismissed and were generally inaccurate.

The Supreme Court simply held that the attack related to the conspiracy charge and it was not improper for the victim to discuss it. Moreover, the victim’s allegations were not clearly inaccurate and were consistent with the “State’s version of events contained in petitioner’s pre-sentence investigation report, **to which petitioner did not object.**” [emphasis added]. The Supreme Court determined, therefore, that the sentencing court did not rely on any impermissible factors.

PLEA AGREEMENTS: DEFENDANT WAS PROPERLY DENIED THE RIGHT TO WITHDRAW HIS KENNEDY PLEA BEFORE SENTENCING BECAUSE HE COULD NOT SHOW A “FAIR AND JUST REASON” FOR DOING SO THAT DID NOT CONTRADICT HIS RESPONSES TO THE COURT’S QUESTIONS DURING HIS PLEA HEARING.

State v. Frank D., 2015WL3689178

In the memorandum decision of *State v. Frank D., 2015WL3689178*, the Supreme Court affirmed the circuit court’s decision to not permit the defendant to withdraw his *Kennedy* plea. The defendant was indicted on fifty-nine counts of sex-related crimes. The defendant eventually pled guilty to six felonies pursuant to *Kennedy v. Frazier, 357 S.E.2d 43 (W. Va. 1987)*. The resulting sentence was a cumulative term of fifteen to fifty years in prison.

Prior to sentencing, the defendant moved to withdraw his guilty plea. The Supreme Court emphasized that, while “a defendant is to be given a more liberal consideration in seeking leave to withdraw a plea before sentencing, it remains clear that a defendant has no absolute right to withdraw a guilty plea before sentencing.”

The Supreme Court found that the circuit court did not abuse its discretion in denying the motion because the defendant presented no “fair and just reason” for the withdrawal. The defendant claimed in the motion that his counsel did not provide him a copy of a statement, but at the plea hearing defendant agreed with his counsel that he was prepared for trial and had reviewed the discovery. The defendant claimed that he disagreed with the State’s description of events, but he acknowledged this disagreement even before he entered the plea. The defendant claimed he was coerced into the plea by counsel, yet he affirmatively acknowledged to the court on several occasions that he wanted to plead and that he had not been forced by anyone to do so. The defendant’s claim of innocence formed the basis of a *Kennedy* plea in the first instance. So, no circumstances had changed from the time the plea was entered to the time the motion to withdraw was filed. The motion was properly denied, therefore, in the opinion of the Supreme Court.

PLEA AGREEMENTS: FACT THAT DEFENDANT WAS HUMILIATED BY PROSPECT OF USE OF A PREVIOUS CONVICTION DURING A TRIAL DID NOT MAKE HIS GUILTY PLEA INVOLUNTARY.

APPEAL: A DIRECT APPEAL FROM A CRIMINAL CONVICTION BASED ON A GUILTY PLEA WILL LIE WHERE AN ISSUE IS RAISED AS TO THE VOLUNTARINESS OF THE GUILTY PLEA OR THE LEGALITY OF THE SENTENCE.

***State v. Richard D.*, 2015WL3751819**

In the memorandum decision of *State v. Richard D.*, 2015WL3751819, the Supreme Court of Appeals of West Virginia again confronted the desire of a defendant to withdraw his plea of “nolo contendere” to five counts of possession of material depicting minors engaged in sexually explicit conduct. In exchange for the plea, the State dismissed the remaining counts including one count of sexual assault on an eight year old; five counts of use of minors to produce obscene matter; and five counts of use of minors in filming sexually explicit conduct. Moreover, the State agreed not to seek a recidivist enhancement relating to a 2010 conviction of sexual abuse by a parent, guardian or custodian.

At the plea hearing, the defendant gave every acknowledgment regarding the plea and his understanding of the plea. Asked twice if he wanted to continue the plea agreement or change his mind, the defendant “unequivocally answered” yes. The defendant further signed the plea agreement in which it was stated that the maximum sentence for each count was two years in prison.

Before sentencing, however, the defendant moved to withdraw his plea. His primary contention was, intriguingly, that he possessed the graphic images of his eight year old niece for “legitimate reasons.” The reasons were not stated. He acknowledged, however, that, despite dissatisfaction with his counsel, he had not been coerced into the plea and it was in his best interests. The defendant was sentenced to five consecutive prison terms of two years. The defendant appealed.

The Supreme Court reiterated the standard for such an appeal: “a direct appeal from a criminal conviction based on a guilty plea will lie where an issue is raised as to the voluntariness of the guilty plea or the legality of the sentence.” The defendant claimed he was, in fact, coerced into the agreement by the amount of time he was facing on all the counts charged by the State and he was humiliated that the State might use his 2010 conviction on a count of sexual abuse by a parent, guardian or custodian.

The Supreme Court quickly dealt with these issues, stating that the State has the authority to seek indictments and has the authority to move for the admission of collateral acts or crimes, especially when it concerns a lustful disposition toward children. The petitioner’s requested relief was denied.

INDICTMENT: THE MISTAKEN REFERENCE TO THE SAME COUNT IN AN INDICTMENT ON A JURY

VERDICT FORM FOR TWO IDENTICAL CHARGES INVOLVING DIFFERENT VICTIMS WAS NOT ERROR SUPPORTING RELIEF ON A HABEAS CORPUS PETITION.

HABEAS CORPUS: ERROR IN FINDINGS OF FACT ABOUT REVIEW OF A TRANSCRIPT OF A GUILTY PLEA WHEN DEFENDANT WAS ACTUALLY CONVICTED BY A JURY WAS ONLY A CLERICAL ERROR THAT COURT COULD CORRECT AT ANY TIME ON ITS OWN INITIATIVE AND, THEREFORE, NO APPELLATE RELIEF WAS WARRANTED.

Stuckey v. Ballard, 2015WL3751816

In the memorandum decision of *Stuckey v. Ballard, 2015WL3751816*, the appeal was from the denial of a petition for a writ of habeas corpus. Two interesting issues in the habeas corpus proceedings involved errors in the jury verdict form and in the lower court's subsequent findings of fact and conclusions of law. The petitioner had been tried and convicted by a jury on two counts of felony murder. The indictment named each victim in separate counts. On the jury verdict form, two counts separately referenced each victim but each identified the same count in the indictment, which was a mistake. The lower court found that this error "was not deserving of habeas relief." The Supreme Court of Appeals of West Virginia summarily found no error.

The second issue was the reference in the lower court's findings and conclusions that the circuit had reviewed "the transcript of the plea of guilty." The petitioner had been convicted, however, by a jury trial. So, this fact, although found by the lower court, was obviously incorrect.

The Supreme Court classified this as merely a "clerical error," although, presumably, a clerk did not prepare the findings of fact. Accordingly, the error could be corrected "by the court at any time of its own initiative" pursuant to W. Va. R. Civ. Pro. 60(a) (Note: habeas proceedings are civil matters). Because no other findings or conclusions related to this erroneous statement, the error was deemed to be harmless. Moreover, the defendant was chided for "his reliance on this seven-word phrase in a nineteen-page order" and thus ignoring the "pages" of findings and conclusions "discussing his jury trial." The order denying the petition was affirmed.

SENTENCE: ON RULE 35(b) MOTIONS, CIRCUIT COURTS SHOULD CONSIDER ONLY THOSE EVENTS THAT OCCUR WITHIN THE 120-DAY FILING PERIOD; HOWEVER, AS LONG AS CIRCUIT COURT DOES NOT USURP THE ROLE OF THE PAROLE BOARD, IT MAY CONSIDER MATTERS BEYOND THE FILING PERIOD WHEN SUCH CONSIDERATION SERVES THE ENDS OF JUSTICE.

State v. Turner, 2015WL3687867

In the memorandum decision of *State v. Turner, 2015WL3687867*, the defendant filed a *pro se* appeal from the denial of a motion for reduction of a sentence. In 1997, the defendant had been convicted by a guilty plea of three counts of first-degree sexual assault and three counts of first-degree sexual abuse. The resulting sentence was three prison terms of fifteen to thirty-five years to be served consecutively to three prison terms of one to five years.

The petitioner filed a motion for reduction of sentence. No hearing was held, however, until seven years later and only after an additional motion had been filed for a psychological evaluation. The motions were denied. The Supreme Court of Appeals affirmed the order denying the motion, noting that all the matters raised by the defendant as not having been considered had, in fact, been considered.

The decision is discussed, however, to note the Court's reaffirmation of its 1996 holding that, "When considering West Virginia Rules of Criminal Procedure 35(b) motions, circuit courts generally should consider only those events that occur within the 120-day filing period; however, as long as the circuit court does not usurp the role of the parole board, it may consider matters beyond the filing period when such consideration serves the ends of justice." Syl. Pt. 5, *State v. Head*, 480 S.E.2d 507 (W. Va. 1996).

IMPROPER REMARKS BY A PROSECUTOR: PROSECUTOR'S ARGUMENT TO JURY THAT DISMISSED CHARGES WERE NONETHELESS TRUE DID NOT WARRANT RELIEF WHEN DEFENSE COUNSEL USED DISMISSED CHARGES IN HIS CLOSING TO SHOW FAILURE TO CONDUCT AN IMPROPER INVESTIGATION.

EVIDENCE: RAPE SHIELD PRECLUDED EVIDENCE OF A VICTIM'S CONSENSUAL ACTIVITY WITH A BOYFRIEND AND ANOTHER VICTIM'S ABUSE BY ANOTHER PERSON BECAUSE THESE INCIDENTS DID NOT BEAR ON QUESTION OF DEFENDANT'S GUILT OF CHARGES.

RULE 403: EVIDENCE OF SEXUAL ACTIVITY BY A VICTIM AND EVIDENCE OF OTHER ABUSE SUFFERED BY A VICTIM WAS UNDULY PREJUDICIAL AND SUCH PREJUDICE CLEARLY OUTWEIGHED ANY PROBATIVE VALUE.

State v. Michael C., 2015WL3672733

In the memorandum decision of *State v. Michael C., 2015WL3672733*, the defendant was found guilty after a jury trial of five counts of incest, five counts of first-degree sexual assault, and six counts of sexual abuse by a parent, guardian, custodian or person in a position of trust. The appeal was taken from an order denying a motion for a new trial.

One assignment of error related to the prosecutor's explanation to the jury why five counts against one victim had been dismissed by the Court on a motion for judgment of acquittal. Specifically, the counts had been dismissed because no evidence of penetration of this victim had been presented. In closing, the prosecutor explained to the jury that, in fact, the victim had been penetrated but "didn't want to talk about it." The prosecutor then stated, "the mere fact she doesn't want to tell you, that's on me, ladies and gentlemen, not on her. It's okay if she doesn't want to tell you." Defendant's counsel objection was sustained.

The Supreme Court reiterated its standard that "a judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney to a jury which do not clearly

prejudice the accused or result in manifest injustice.” The Court then restated its guidance for determining when reversal is required by improper comments: “(1) the degree to which the prosecutor’s remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.”

The Supreme Court then opined that, in this matter, “the State’s commentary was *not so damaging* as to require reversal.” [emphasis added]. Apparently, the State’s extraneous information that the victim was penetrated even though the counts had been dismissed “hurt,” but was not “hurtful” enough.

But, as in many cases, the wounds were somewhat self-inflicted. The defense counsel had argued in closing that the dismissal of the counts attested to the State’s failure to “conduct an appropriate investigation.” The prosecutor’s comments were found to be responsive to this argument and not an attempt to “divert attention.” And, besides, the defendant’s guilt was readily established by the victims’ testimony.

A second assignment of error was the asserted invalidity of the rape shield statute. In the course of trial, the defendant was precluded, by reason of the provisions of the rape shield statute, from asking a victim about her current pregnancy and the other victim about her abuse by another adult. The defendant claimed that Rule 404 of the Rules of Evidence would allow such testimony and, therefore, the rape shield statute was invalid. (As a note, Rule 404 has been amended.)

The Supreme Court found, however, that the Rule 404 created an “exception” to the statute and, accordingly, was not in conflict with the statute. The paradox is that, obviously, the Rule and the statute were in conflict because the rule changed the application of the statute. The court did not explain why the “exception” was permissibly created in the rule and found, instead, that there was “no conflict.” This may be a practical recognition of the fact that the new Rules of Evidence simply supersede the rape shield statute and the issue before them was effectively moot.

A third assignment of error was the lower court’s application of the provisions of the rape shield statute. Again, the evidence that the defendant wanted to present was one victim’s consensual activity with a boyfriend and another victim’s abuse by another person. The Supreme Court then articulated its test for whether a defendant’s due process rights are violated by application of the statute: “(1) whether that testimony is relevant; (2) whether the probative value of the evidence outweighed its prejudicial effect; and (3) whether the State’s compelling interests in excluding the evidence outweighed the defendant’s right to present relevant evidence supportive of his or her defense.” The lower court’s application of the test is to be reviewed for an abuse of discretion.

The Supreme Court determined that no relevance attached to any of the issues raised by the defendant because it did not bear on the question of whether the defendant had or had not committed the alleged acts. The effect of the evidence was also found to be unduly prejudicial, thus clearly outweighing the probative value. Accordingly, error was not found in precluding the

evidence.

A fourth assignment of error related to the testimony of witnesses that the victims had told them “the petitioner engaged them in sexual conduct.” The Supreme Court analyzed whether the hearsay testimony was permitted under the “other exceptions” provision of the hearsay rule which analyzes five factors going to the trustworthiness and probative value of the testimony.

But the decision does not really critique whether the admission of the testimony was proper as the Supreme Court found “no error” due to the “unique circumstances before us, including the availability of the victims for cross-examination, and the testimony of neither [witness] added anything substantive to the children’s testimony.” Candidly, this statement seems more consistent with finding error, but declaring it harmless. This is supported by the footnote in which the following language is found: “when a child witness is present to testify, however, it would generally seem to be a better practice not to permit [another witness] to testify as to the child’s extrajudicial statements ... But it is harmless when, viewed in the spectrum of all the evidence, it creates no prejudice to the defendant.” *State v. Edward Charles L.*, 398 S.E.2d 123 (1990). In any event, relief on this ground was denied.

SENTENCE: EXPUNGEMENT COULD NOT BE GRANTED TO PETITIONER FOR MISDEMEANOR CHARGES RELATED TO CONSUMPTION OF ALCOHOL AT COLLEGE BECAUSE OF A PREVIOUS CHARGE AND CONVICTION FOR UNDERAGE CONSUMPTION.

PROCEDURE: PETITIONER FOR EXPUNGEMENT WAS NOT ENTITLED TO A HEARING AS PROCESS IS INTENDED TO BE A SUMMARY PROCEDURE BASED UPON A VERIFIED PETITION.

***State v. T.D.*, 2015WL3448196**

In the memorandum decision of *State v. T.D.*, 2015WL3448196, the petitioner appealed the denial of his petition for the expungement of five misdemeanor offenses “related to the consumption of alcohol while a freshman at West Virginia University.”

The offenses occurred on three different dates. Additionally, the defendant had been also convicted of underage consumption in Pennsylvania. The circuit court reluctantly denied the expungement because, technically, the offenses, with respect to one another, represented “other prior or subsequent charges,” which, under the governing statute, made the defendant ineligible for expungement. See W. Va. Code §61-11-26(b).

On appeal, the Supreme Court disagreed with the petitioner that the circuit court should have permitted his live testimony. The statute requires a “verified” petition and lists the subjects to be addressed. Indeed, the statute provides for a “summary” grant or denial of the petition, supporting the conclusion that the lower court did not have to take testimony.

The Supreme Court further supported the circuit court’s conclusion that the petitioner was not eligible for expungement. While the statute does refer to “convictions” in the plural, the statute

only permits expungement of multiple convictions that arise out of “offenses from the same transaction.” The petitioner’s offenses arose out of three different incidents. Relief was properly denied, therefore.

RULE 404(b): AN ADULT’S TESTIMONY AS TO HER ABUSE IN SIMILAR CIRCUMSTANCES SEVEN YEARS BEFORE THE ABUSE OF OTHER VICTIMS CHARGED IN THIS CASE WAS REASONABLY CLOSE IN TIME TO BE PERMITTED TO SHOW A LUSTFUL DISPOSITION TOWARD CHILDREN.

EVIDENCE: FROM THE TESTIMONY, THE JURY COULD INFER THAT THE DEFENDANT WAS NOT MARRIED TO THE SIX AND NINE YEAR OLD VICTIMS.

EVIDENCE: PROOF OF LUSTFUL DISPOSITION SATISFIED PROOF OF SEXUAL GRATIFICATION ELEMENT OF CRIMES.

John K. v. Ballard, 2015WL3448204

In the memorandum decision of *John K. v. Ballard, 2015WL3448204*, the denial of a petition for a writ of habeas corpus was appealed.

John K. was found guilty by a jury of sexual abuse in the first degree of one victim, sexual abuse by a parent, guardian, or custodian of that victim, a sexual assault in the first degree of a second victim, and sexual abuse by a parent, guardian, or custodian as to the second victim.

An issue raised by the habeas was the testimony by an adult witness of her abuse by the petitioner when she was a child. The testimony was permitted under Rule 404(b) of the Rules of Evidence for the “limited purpose” of proving the petitioner’s lustful disposition toward children. (As an editorial comment, this is a common prosecutorial practice of using an adult witness to testify as to prior acts in matters in which the victims are young and possibly poor witnesses.) The petitioner’s primary contention was that the acts to which this witness testified ended in 2002 and the charges for which he was prosecuted occurred between 2005 and 2006. The petitioner argued that this did not satisfy the requirement that the prior acts be “reasonably close in time.” The Supreme Court did not flinch, stating that the similar fact pattern, *i.e.*, the abuse occurred in the petitioner’s bedroom, and the lapse of only seven years did not make the testimony inadmissible. The Supreme Court noted that it had previously upheld the use of a sixteen year old conviction because of the similarity in conduct giving rise to the conviction and to the pending charges.

The remaining issues concerned whether the state had proved that the defendant was not married to the nine and six year old victims and that the acts were done for purposes of sexual gratification. Because the victims had testified that the petitioner was married and living with their grandmother, the Supreme Court held that the jury had sufficient evidence to resolve this matter in the State’s favor. Because the adult witness testified to prove the petitioner’s lustful disposition toward children, the proof of this lustful disposition was held to sufficiently prove the

desire for sexual gratification.

No error was found, therefore, in the denial of the habeas relief.

SUPPRESSION: THE DEFENDANT'S MISTAKEN BELIEF THAT SHE WOULD BE RELEASED ON A SURETY BOND IN EXCHANGE FOR HER STATEMENT WAS NOT BASED, IMPERMISSIBLY, ON A PROMISE OF LENIENCY BECAUSE THE COLLATERAL BENEFIT OF A BOND DID NOT RELATE IN ANY MANNER TO A BENEFIT TO THE ACCUSED WITH RESPECT TO THE CHARGED CRIME.

RULE 404(b): A HEARING WAS NOT REQUIRED TO BRING OUT TESTIMONY REGARDING DEFENDANT'S DRUG DEALING DURING THE MURDER TRIAL AS IT WAS PART OF THE *RES GESTAE* OF THE CRIME, AS EVIDENCED BY DEFENDANT'S OWN USE OF THE FACT TO SHOW A LACK OF MOTIVE.

INSTRUCTIONS: THE USE OF THE TERM CO-CONSPIRATOR RATHER THAN "ACCOMPLICES" IN THE JURY INSTRUCTIONS WAS NOT IMPROPER BECAUSE DEFENDANT WAS ACTUALLY CHARGED WITH CONSPIRACY.

State v. Watson, 2015WL3369768

In the memorandum decision of *State v. Watson, 2015WL3369768*, the defendant appealed from her convictions of first degree felony murder, first degree robbery, burglary, and conspiracy, resulting in a life sentence without mercy.

The defendant moved into an apartment with Ms. Cooke and apparently sold crack cocaine from the apartment. The defendant was aware, therefore, that Ms. Cooke received a child support check in the amount of \$6,000 which she cashed in the form of two pre-paid credit cards, three money orders, and cash. Ms. Cooke became uncomfortable with the level of drug dealing and asked the defendant to move out.

Shortly afterwards, two masked men entered Ms. Cooke's apartment and demanded the money and the pre-paid credit cards, together with the necessary PIN numbers. A third person was present in the background whom Ms. Cooke identified as the defendant due to the "unmistakable" hair and body shape. In the course of the robbery, Ms. Cooke's boyfriend tried to intervene in the rough handling of Ms. Cooke and was fatally shot. Ms. Cooke was also wounded.

Once apprehended, the defendant agreed to identify the gunmen in exchange for her release on a surety bond rather than the existing cash bond. While the defendant's story corroborated the robbery, her identification of the gunmen provided no usable details. The State refused, therefore, to agree to a modification of the bond.

The defendant appealed the convictions, asserting various errors.

The defendant first argued that no evidence existed to prove that she was anything other than

a witness to the crime. The Supreme Court noted that the entire robbery was to obtain the prepaid credit cards, which was an obvious connection between the defendant and the masked men, who had never been to West Virginia before that night. Accordingly, the Supreme Court found the evidence to be adequate to support the jury's verdict.

The defendant then argued that her statement was involuntary in that she was duped into believing that she would be given a surety bond, rather than a cash bond. The Supreme Court acknowledged that any evidence obtained by promises of leniency was not admissible. However, the court did not equate the agreement to modify a bond with a promise of leniency. The "collateral benefit" of a bond did not relate in any manner to a "benefit to the accused with respect to the crime under inquiry." Accordingly, the Supreme Court found the statement to be voluntary and admissible. Moreover, the promise of the State was not "false" and, therefore, was not coercive. The defendant's statement was incomplete and she provided no more than that which was already obtained from other witnesses and records.

The defendant then argued that the evidence of her drug dealing was improper, especially in the absence of a hearing under Rule 404(b) of the Rules of Evidence. The Supreme Court agreed with the lower court that the drug dealing was part of the *res gestae* of the crime in that the robbery occurred only after the defendant was kicked out of the apartment. Moreover, it was noted that the defendant had herself admitted to the drug dealing in order to present a defense regarding a lack of motive, - why would she rob a partner in crime? As "intrinsic" evidence for both the prosecution and the defense, the admission of the drug dealing was not covered by Rule 404(b).

With respect to the issue of mercy, the defendant argued that it was a "runaway jury bent on ignoring the rules of evidence and the rule of Law to exact their own peculiar vision of Justice." The Supreme Court noted that the following facts supported the jury's lack of mercy: (i) the defendant robbed a person who had loaned her money and given her a place to stay; (ii) the robbery was accomplished in the "dead of night" by armed and masked men while children whom the defendant babysat slept nearby; and (iii) the shootings occurred within the sight of the victims' nine-year-old son.

Further, the defendant argued that the court improperly precluded evidence that the murdered boyfriend was also a drug dealer. The defendant wanted to posit a theory that out of towners killed the victim for reasons related to the drug dealing. No abuse of discretion was found because the defendant had no evidence to support this contention.

Finally, the defendant complained that the jury instructions on felony murder improperly referred to the gunmen as "co-conspirators" rather than "accomplices." The impact of the distinction is not clearly articulated except that, perhaps, the defendant believed it confused the jury in some manner regarding the separate charges of felony murder and conspiracy. The Supreme Court determined that because the defendant was actually charged with conspiracy, the use of the term in the felony murder instructions was fair and not misleading.

EVIDENCE: ELEMENT OF “FEAR OF BODILY INJURY” REQUIRED FOR CONVICTION OF SECOND DEGREE ROBBERY WAS SATISFIED BY PROOF OF THREATS MADE WHEN VICTIMS TRIED TO REGAIN POSSESSION OF PROPERTY.

State v. Imoh, 2015WL2382569

In the memorandum decision of *State v. Imoh, 2015WL2382569*, the defendant appealed his conviction of second degree robbery on the basis that the evidence was insufficient to establish second degree robbery “because none of the victims were placed in fear of bodily injury.” The stolen items were cellular phones that the defendant and another person took from three minors. In one instance, the phone was grabbed out of the hands of the victim when he was not looking. In the other instances, the phones were handed over to the defendant and his co-defendant after a pretense was made about an emergency requiring use of the phones. No victim was dispossessed of the phones by use of a threat of bodily injury.

The Supreme Court affirmed the convictions stating that the testimony established that, in fact, the victims were placed in fear of bodily injury. In all instances, the fear arose after the phones were “copped.” In one instance, the victim demanded return of the phone to which the co-defendant replied that he would have to fight them for the phone. In the other instance, the victims were dissuaded from regaining possession by threats that the defendant and co-defendant would “beat [their] ass.” The Supreme Court seems to suggest that dissuading a person from regaining possession of property should be considered part of the commission of the robbery, although this point is not expressly articulated.

PROCEDURE: IT IS NOT AN ABUSE OF DISCRETION FOR A CIRCUIT COURT TO DECIDE THE MERITS OF A MOTION TO REDUCE A SENTENCE WITHOUT AN EVIDENTIARY HEARING, ESPECIALLY IF THE COURT HEARING THE MOTION DID THE SENTENCING.

SENTENCE: SUPREME COURT HAS UPHOLD THE PROPRIETY OF CONSECUTIVE SENTENCES WHEN A PLEA AGREEMENT RESULTS IN A MUCH LESSER SENTENCE THAN THE CRIMES FOR WHICH DEFENDANT WAS ORIGINALLY INDICTED.

State v. David G., 2015WL2382577

In the memorandum decision of *State v. David G., 2015WL2382577*, the Supreme Court reaffirmed that “it is not an abuse of discretion for a circuit court to decide the merits of a motion to reduce a sentence without having an evidentiary hearing.” It was noted, however, that “the circuit court was “both the original sentencing court and the court that denied the Rule 35(b) motion and thus it had the benefit of the entire record to review in determining the appropriate sentence to impose.” Finally, the Supreme Court “disagree[d]” with the proposition that a “pro se litigant should be afforded a degree of leniency in any action before the circuit court.”

The defendant's real issue was that the sentences on the two of the six counts of sexual abuse by a parent, guardian or custodian to which he pled guilty were imposed consecutively. The Supreme Court noted that "we have previously upheld the propriety of consecutive sentences imposed when a plea agreement results in a much lesser sentence than the crimes for which defendant was originally indicted." In other words, you pled guilty to two crimes, but you were guilty of much more, so be satisfied. The order denying the Rule 35 motion was affirmed.

SENTENCE: AN INMATE WHO IS PAROLE ELIGIBLE WILL NOT GET CREDIT FOR TIME SERVED WHEN SENTENCED FOR AN ASSAULT WITHIN THE PRISON BECAUSE, WHILE HE WAS NOT RELEASED ON PAROLE DUE TO THE ASSAULT, HE WAS SERVING THE SENTENCE ON THE ORIGINAL CHARGE.

State v. Wade, 2015WL2382580

In the memorandum decision of *State v. Wade, 2015WL2382580*, the defendant argued that "because he became parole eligible on his prior charges during his prosecution for malicious wounding, he was held on that [i.e., the malicious wounding charge] and is accordingly entitled to time-served credit for that offense." In other words, he would have been out of prison but for the pending charges arising out of an attack on another inmate. He demanded credit, therefore, for the additional time awaiting prosecution. The Supreme Court of Appeals disagreed, noting that he was in prison in the first place for the prior charges, not for the pending charges. Moreover no guarantee existed that the defendant would be paroled, as "parole is not a right." The defendant did point to a code provision that an inmate who commits an assault while incarcerated cannot be discharged while the prosecution is pending. See W. Va. Code §62-8-2(d). Seemingly, his continued incarceration could then be tied to the pending charges. The defendant's only problem is that, while the statute was applicable on its face, it was not the statute under which he was charged. The State chose to prosecute under the provisions for malicious assault, which did not have similar language. The order denying the motion for correction of the defendant's sentence was affirmed.

RULE 404(b): AN IDENTICAL DRUG TRANSACTION TO THE ONE CHARGE WAS ADMITTED, DESPITE ITS PREJUDICIAL EFFECT, IN REBUTTAL OF DEFENDANT'S TESTIMONY DENYING INVOLVEMENT IN A DRUG TRANSACTION AND PROCLAIMING THAT HE DOES NOT MESS WITH DRUGS.

State v. Robertson, 2015WL2381193

In the memorandum decision of *State v. Robertson, 2015WL2381193*, the application of Rule 404(b) was raised as an issue.

The defendant was involved in two controlled buys of oxycodone on the same date, but about

three (3) hours apart. The buys involved the same police officers and the same confidential informant. Two separate indictments issued with the first indictment focusing on the later transaction. The State filed a motion to use the earlier transaction as 404(b) evidence in the trial on the first indictment. The Court held the matter in abeyance.

At the trial, the defendant took the stand and denied that he had been involved in a drug transaction and that he “didn’t mess with them [drugs] anymore.”

After the defendant’s case, the prosecution renewed the motion to use the earlier drug transaction to prove the defendant’s intent to deliver a controlled substance. The court held an *in camera* hearing and found, by a preponderance of the evidence, that the earlier transaction occurred and that it was more probative on the issue of the defendant’s intent than it was prejudicial. Accordingly, the prosecution was now able to present in its rebuttal a transaction substantially identical to the charged offense, subject to the court’s limiting instructions. The jury found the defendant guilty.

The Supreme Court upheld the introduction of the earlier transaction even though it involved the same confidential informant, the same two police officers, and the same general testimony and had to be extremely prejudicial to the defense.

SENTENCE: DEFENDANT IS NOT GIVEN CREDIT FOR TIME SERVED ON UNRELATED CHARGES EVEN IF STATE OF WEST VIRGINIA HAS PLACED A DETAINER ON DEFENDANT.

SPEEDY TRIAL: GENERALLY, A DEFENDANT INCARCERATED IN ANOTHER STATE IS ENTITLED TO A TRIAL WITHIN THREE TERMS WHICH REQUIRES STATE TO APPLY FOR TEMPORARY CUSTODY.

SPEEDY TRIAL: THE THREE TERM RULE DOES NOT APPLY WHEN FAILURE TO TRY A DEFENDANT IS DUE TO DEFENDANT’S ESCAPE FROM JAIL OR FAILURE TO APPEAR.

State v. Rodeheaver, 2015WL2382921

In the memorandum decision of *State v. Rodeheaver, 2015WL2382921*, the defendant demanded credit for time-served in another state and raised the issue of the violation of the speedy trial provisions of the state code.

The defendant was indicted and arraigned on a charge of aggravated robbery. The defendant was released on his own recognizance to attend a medical hearing, but the defendant did not report, as ordered, to the jail the following day. A *capias* was issued.

About six months later, petitioner was arrested, and pled guilty, on charges resulting in his incarceration in Pennsylvania. The States of West Virginia and Maryland then both placed a detainer on the defendant. Defendant then served time in Maryland and was then extradited to West Virginia.

The defendant plead guilty to the West Virginia charge and was sentenced to twelve years in prison, which was suspended so that defendant could be remanded to the Anthony Center for Youthful Offenders. The defendant completed the program and was placed on five years of probation.

The defendant's probation was revoked for use of controlled substances and for failing to report to the probation office. The original sentence was imposed and credit for time served was given for the previous time spent in jail in West Virginia and for the time spent incarcerated in Maryland while awaiting extradition. However, the defendant was not given credit for the time served on the Maryland charges during which West Virginia had a detainer placed on him.

The defendant challenged the court on the failure to credit his time while in Maryland and additionally alleged that his rights to a speedy trial were denied.

The Supreme Court gave short shrift to the denial of credit for time-served noting that it is settled that "criminal defendants are not entitled to credit for time served on unrelated charges."

The Supreme Court gave more attention to the speedy trial argument, acknowledging that a statute does require the State "in certain circumstances" to apply for temporary custody of a defendant incarcerated in another state so that the defendant may be tried within three terms of court. See W.Va. Code §62-14-1. However, an express exception to the three term rule in W. Va. Code §62-3-21 exists for when "the failure to try him was caused ... by reason of his escaping from jail, or failing to appear according to his recognizance." The defendant failed to report and his whereabouts were unknown, so the statute did not apply in the Supreme Court's opinion.

No discussion is had about whether the state should have tried the defendant upon learning of his incarceration and placing the detainer on him or whether the state properly waited until the detainer was honored. Presumably, the three terms had already ran when the State learned of the defendant's incarceration and issued the detainer, but, again, should not the state then have fulfilled its duty to bring the defendant to trial? The exception for failing to appear is logical for as long as the state is unaware of the defendant's whereabouts but, in this case, the defendant was found, so why did the state not have a mandatory duty to bring the defendant to trial? Notably, the appeal was filed *pro se*, and perhaps these issues were simply not raised.

The order denying the defendant's motion was affirmed.

SENTENCE: THE 2013 VERSION OF THE STATUTE GOVERNING INCARCERATION PERIODS UPON REVOCATION OF PROBATION DOES NOT APPLY RETROACTIVELY.

***State v. Henry*, 2015WL2402464**

In the memorandum decision of *State v. Henry*, 2015WL2402464, the Supreme Court reviewed

the circumstances of the revocation of the defendant's probation.

Defendant pled guilty to four counts of delivery of a controlled substance for which he was sentenced to a cumulative term of four to thirty years of incarceration. The sentence was suspended and a five year probationary period was imposed.

On the third petition to revoke his probation, the circuit court did so. The charges were possession of a controlled substance, i.e., Oxycodone, and obstructing a police officer. The circuit court imposed the original sentence.

The issue became the application of the provisions of W. Va. Code §62-12-10(a)(2) which was enacted in 2013. The 2013 version of the statute provided that the number of violations would determine the length of the resulting sentence due to the revocation of probation. If this was the second violation, the sentence would be one hundred and twenty days. The circuit court found that the petitioner had exceeded three violations and, therefore, no limitation on the period of incarceration existed and the original sentence could be imposed.

Upon review, the Supreme Court found that the 2013 version of the statute had no application to the defendant, whose probation violations occurred before the statute was enacted. The Supreme Court found that "West Virginia Code §62-12-10 (2013) was intended to operate prospectively" since the "Legislature did not include the necessary language for the 2013 amendments to apply retroactively." So, the circuit court did err, but it erred only in the reason why the 2013 amendments had no effect. So, the error was harmless.

HABEAS CORPUS: COURT FOUND NO MERIT TO PETITIONER'S ASSERTION THAT HIS COURT-APPOINTED COUNSEL WAS INCOMPETENT BECAUSE OF HIS LOW RATE OF COMPENSATION.

Young v. West Virginia Dept. of Corrections, 2015WL 2365926

In the memorandum decision of *Young v. West Virginia Dept. of Corrections, 2015WL 2365926*, the rate of compensation of court appointed counsel was made an issue, among other grounds. The petitioner in the habeas corpus proceeding had pled guilty to the second degree murder of an 81 year-old man.

The petitioner alleged (i) ineffective assistance of counsel, both at trial and on appeal; (ii) that his guilty plea was predicated on a coerced confession and involuntary statements; and (iii) the rate of compensation for court appointed counsel violated his Sixth Amendment rights.

With respect to the ineffective assistance of counsel claims, the Supreme Court stated its intent to "decline to second-guess the strategic decisions of petitioner's trial or appellate counsel and find that the circuit court did not err in denying the amended petition for writ of habeas corpus on these grounds."

With respect to the coerced confession claim, the Supreme Court noted that the petitioner's

plea hearing was completely devoid of any stated concerns regarding the voluntariness of the plea or the existence of any pressure to enter the plea. Again, the Supreme Court found no error.

With respect to the issue over the rate of compensation for court-appointed counsel, the petitioner argued that “this inadequacy of pay threatens criminal defendants’ Sixth Amendment right to counsel.” The purported factual basis was that the counsel would have spent more time on the case if more highly compensated. The Supreme Court summarily dismissed this ground, stating “we find no merit to petitioner’s assertion that his court-appointed counsel, simply because of their lower rate of pay, are incompetent.”

SENTENCE: COURT DID NOT FIND THAT UNDUE EMPHASIS WAS PLACED ON VICTIM IMPACT STATEMENT WHICH CONSTITUTED 72% OF THE SENTENCING HEARING AND INCLUDED NUMEROUS PHOTOGRAPHS AND VISUAL AIDS, ESPECIALLY WHEN RECORD SHOWED THAT THE SENTENCING COURT HAD REVIEWED A PRE-SENTENCE INVESTIGATION REPORT AND HAD CONSIDERED THE DEFENDANT’S CRIMINAL HISTORY AND DRUG ABUSE HISTORY AND HAD EXAMINED FAMILY’S LETTERS OF SENTIMENT.

State v. Chapman, 2015WL2382559

In the memorandum decision of *State v. Chapman, 2015WL2382559*, the defendant’s appeal was that the sentence for his first degree robbery charge was excessive and that the circuit court placed undue emphasis on the victim’s impact statements during sentencing.

After a night of drinking and drug use, the defendant entered a residence in search of money or prescription drugs. The defendant was confronted by the resident whom he then struck. The defendant left the residence with a television and several pieces of jewelry.

The defendant pled guilty to one count of first-degree robbery and one count of malicious wounding. The resulting sentence was a term of incarceration of eighty years on the robbery charge and a consecutive term of two to ten years on the malicious wounding charge.

The defendant argued that the eighty year term was disproportionate in violation of the provisions of Article III, Section 5 of the West Virginia Constitution. The sentence was properly reviewable on this ground because no maximum limit was imposed on the sentence by statute.

The defendant did not argue that the sentence was “subjectively” disproportionate in that it would shock the conscience of the community. Under the objective standard, the Supreme Court did not find that the sentence was excessive. The defendant entered the home knowing it was occupied, destroyed the home in a rage, and struck the victim with his hands. The violence was extreme, resulting in the victim suffering multiple facial fractures, multiple brain bleeds, cervical fractures, multiple broken ribs, and a broken arm. A comparison of other jurisdictions supported the length of the sentence. Relief was denied, therefore.

The defendant's argument that undue emphasis was placed on the victim's impact statements was also rejected. The defendant's primary point was that the statements "constituted seventy-two percent of the sentencing hearing and ... included numerous photographs and visual aids." The Supreme Court opined that the statute obligated the circuit court to consider the statements to some degree, but that from the record the circuit court also reviewed the presentence investigation report, which included the defendant's prior criminal history and extensive drug abuse history, and the defendant's and his family's letters of sentiment. Accordingly, the Supreme Court found no evidence that undue emphasis was placed on the victim impact statements.

STATUTE OF LIMITATIONS: THE FILING OF THE CRIMINAL COMPLAINT TOLLS THE STATUTE OF LIMITATIONS SO THAT A SUBSEQUENT WARRANT FILED MORE THAN ONE YEAR AFTER THE COMMISSION OF THE OFFENSE IS NOT UNTIMELY.

SPEEDY TRIAL: THE FAILURE TO COMMENCE A TRIAL ON A MISDEMEANOR CHARGE WITHIN 120 DAYS OF THE EXECUTION OF A WARRANT DID NOT REQUIRE DISMISSAL BECAUSE THE STATE'S INABILITY TO OBTAIN ITS EVIDENCE THROUGH NO FAULT ON THE PART OF COUNSEL CONSTITUTED GOOD CAUSE TO TWICE CONTINUE THE TRIAL.

State v. Caldwell, 2015WL2381318

In the memorandum decision of *State v. Caldwell, 2015WL2381318*, the defendant complained that the delay in his Magistrate Court trial on a DUI charge violated the speedy trial rule and resulted in the expiration of the statute of limitations. The defendant was found in his car wrapped around a tree. The defendant stated during treatment by EMT personnel that he had been drinking alcohol. He had to be treated in an out of state hospital and required a month's recuperation. No sobriety test was taken at the scene.

A month after the completion of his recovery a criminal complaint for the misdemeanor offense of DUI was filed. However, a warrant was not issued and executed until more than one year later, apparently due to the seriousness of the defendant's injuries and due to the fact that the defendant was already regularly reporting to a probation officer.

A trial date was set. Two continuances in his trial date were granted on the State's motion because the out-of-state hospital at which the defendant was treated had not yet complied with the subpoena for the results of blood testing. A third continuance was granted to consider the defendant's motion that the statute of limitations had run and the continuances were "without good cause."

When the defendant's motion to dismiss the charges was denied by the magistrate court, the defendant entered a conditional plea, preserving two issues for appeal. The circuit court affirmed the magistrate court's decisions. The appeal to the Supreme Court then ensued.

With respect to the statute of limitations' argument, the defendant argued that the delay

between the charges being filed and his arrest resulted in the one year statute of limitations on misdemeanors expiring. The Supreme Court of Appeals declined to “broaden the scope of that statute to govern delays between the filing of a criminal complaint and the warrant’s execution.” Instead, the Court reaffirmed that “the filing of a criminal complaint ... commences prosecution on that offense and tolls the statute of limitations.” The complaint was filed one month after the accident.

With respect to the requirement that “unless good cause for delay exists, criminal trials in magistrate court should be commenced in one hundred and twenty days of the execution of a warrant,” the court found good cause in this case due to the “State’s inability to obtain its only evidence through no fault of its own.”

The defendants’ primary contention that good cause was lacking was based on the fact the continuances had been granted through *ex parte* communications between the State and the Court. No service of a motion for a continuance was made upon defendant’s counsel and no opportunity was provided for defendant’s counsel to oppose the same. The Supreme Court refused to consider this argument because the defendant’s counsel had not raised this issue in the appeal to the circuit court and had no valid excuse for failing to do so. Moreover, the Supreme Court found no prejudice to the defendant resulting from the delay because his incarceration during the delay was due to other charges, not the pending charges.

The circuit court’s order denying the motion was affirmed.

SENTENCE: PETITIONER’S FRIVOLOUS COMPLAINT WARRANTED THE LOSS OF 60 DAYS OF GOOD-TIME CREDIT.

Andy E. v. Doe, 2015WL2381320

In the memorandum decision of *Andy E. v. Doe, 2015WL2381320*, the Supreme Court upheld the petitioning inmate’s loss of good time credit for filing a purportedly frivolous civil action against certain correctional entities.

The inmate was a convicted sex offender. He was moved several times on his own request due to his fear that he would be beaten by other inmates due to the nature of his crimes. Eventually, he was beaten.

The inmate sued his captors “alleging the respondents herein violated his constitutional rights by allowing him to be physically harmed by fellow inmates and not securing him in a housing unit designated specifically for sexual offenders or high risk inmates.”

The circuit court reviewed the complaint under the provisions of the West Virginia Prisoner Litigation Reform Act, W. Va. Code §§25-1A-1, *et seq.* The circuit court dismissed the complaint as frivolous and failing to state a claim upon which relief could be granted. Moreover, the circuit

court “ruled that petitioner must forfeit sixty days of good-time credit pursuant to West Virginia Code §25-1A- 6 as a result of his frivolous filing.”

The Supreme Court of Appeals affirmed the circuit court’s actions stating that the civil action had “no arguable basis in fact or law.” This warranted the forfeiture of good time under the Act because the action, by definition, constituted a “frivolous” complaint if there was no “arguable basis” for it. See W. Va. Code §25-1A-4(b)(1). No discussion was had about the petitioner’s actual beating and whether the correctional institution had knowledge of the threats, yet took no precautions.

WITNESSES: IN SECOND RETRIAL, CO-DEFENDANTS UNWILLINGNESS TO TESTIFY MADE THEM UNAVAILABLE AND, BECAUSE THE CO-DEFENDANTS HAD BEEN CROSS-EXAMINED IN PREVIOUS TRIALS, THE TRANSCRIPTS OF THE TESTIMONY WERE PROPERLY USED IN THIS TRIAL.

IMPROPER REMARKS BY PROSECUTOR: DISCUSSING THE DEFENDANT’S POTENTIAL MOTIVE FOR MURDER AS GREED OR A “MACHO THING” WAS NOT AN IMPROPER REMINDER TO THE JURY THAT THE DEFENDANT HAD NOT TESTIFIED, DESPITE PRECEDENT THAT BY DIRECTING ATTENTION TO WHAT WAS IN THE APPELLANT’S MIND IS STEALTHILY EMPHASIZING THAT DEFENDANT HAD NOT TESTIFIED.

PROCEDURE: A CONFERENCE AMONG THE DEFENSE COUNSEL, PROSECUTOR AND THE COURT ON WHAT PORTIONS OF A TRANSCRIPT ARE TO BE READ IS NOT A CRITICAL STAGE OF THE PROCEEDING THAT REQUIRES DEFENDANT TO BE PRESENT BECAUSE IT CONCERNS A TECHNICAL QUESTION OF LAW THAT IS NOT DEPENDENT UPON FACTS WITHIN THE PERSONAL KNOWLEDGE OF THE DEFENDANT.

***Swafford v. Ballard*, 2015WL2364503**

In the memorandum decision of *Swafford v. Ballard*, 2015WL2364503, the Supreme Court of Appeals reviewed the denial of a petition for a writ of *habeas corpus*.

The petitioner had been indicted for the offenses of first degree murder, attempted aggravated robbery, and conspiracy to commit a felony. A first trial ended in a mistrial. A second trial ended with convictions, but was overturned because the prosecutor overtly referred to the failure of petitioner’s codefendant to testify.

So, a third trial was had. In this trial, however, two co-defendants stated that, at this trial, the co-defendants would not be witnesses for the state. Due to their refusal to testify, the Court approved the use of the transcripts of their testimony from the second trial. The petitioner was then convicted of the murder charge and sentenced to life with mercy.

The petitioner on appeal argued that the admission of the transcripts of the co-defendants violated his rights under the Confrontation Clause. The use of the transcripts was consistent with

precedent in that the witnesses were unavailable and had been subject to cross-examination. The petitioner was seemingly arguing that the witnesses were not truly unavailable, but the Supreme Court noted that the lower court had ordered them to testify to no avail, so they were undeniably unavailable.

The petitioner then argued that the prosecuting attorney had again made remarks that drew attention to the petitioner's election not to testify. The prosecutor did say that "now, as attorneys, we like to have witnesses testify from the stand." Standing alone, the statement appears to be improper, but, in the provided context, the prosecutor was actually referring to the situation in which the transcripts of the co-defendants had to be read and was reminding the jury that "you're to consider that the same as if those women took the stand personally in this courtroom."

In discussing motive, the prosecutor did attribute actions to the petitioner, suggesting that it was greed or "a macho thing." The Supreme Court has found in previous matters that, "by directing attention to what was in the appellant's mind, the prosecutor stealthily emphasized that he had not testified and had not revealed his thoughts." In this matter, the Supreme Court found that "the prosecuting attorney properly argued potential motive for the murder, and nothing in the prosecuting attorney's comments appears to serve as a reminder, implicit or otherwise, that petitioner did not testify in his own defense." This demonstrates the nebulous nature of the rule "formulated for ascertaining whether a prosecutor's comment is an impermissible reference, direct or oblique, to the silence of the accused," which is "whether the language used was manifestly intended to be a reminder that the defendant did not testify." Apparently, this ground will exist only when the prosecution overtly mentions that the defendant did not supply an explanation for an action, which the prosecution did not do in this matter.

The petitioner also argued that he was not present at a critical stage in the trial of his matter as required by Article III, Section 14 of the West Virginia Constitution and W.Va. Code §62-3-2. Specifically, the petitioner was not present when his counsel and the prosecutor agreed on the portions of the transcripts to be read during the trial. The defendant's "right to a fair trial" was not affected by this process, so it was not a "critical stage." Essentially, the defendant need not be present "at a conference or argument upon a technical question of law *not depending upon the facts within the personal knowledge of the defendant.*" W. Va. R. Crim. Pro. 43(c)(3) [emphasis added]. Because the referenced discussion "primarily concerned the technical question of omitting inadmissible portions of the prior transcripts," the defendant's presence was not required.

For these reasons, the order denying the petition for *habeas corpus* was denied.

JURY: THE USE OF A PREEMPTORY CHALLENGE TO REMOVE A JUROR WHO WAS A SPOUSE OF AN EMPLOYEE IN THE PROSECUTOR'S OFFICE DID NOT PREJUDICE DEFENDANT WHO STILL GOT WHAT HE IS PROMISED – AN UNBIASED JURY.

EVIDENCE: A STUDY OF REPORTED SHAKEN BABY INCIDENTS WAS DEEMED TO NOT BE

SCIENTIFIC IN NATURE REQUIRING, AS DEFENSE COUNSEL DEMANDED, A *DAUBERT* ANALYSIS, BUT BECAUSE DEFENSE COUNSEL DID NOT OBJECT TO ITS RELEVANCE, ITS ADMISSION WAS NOT AN ABUSE OF DISCRETION AND WOULD BE HARMLESS ERROR IN ANY EVENT.

EVIDENCE: DENIAL OF MOTION FOR ACQUITTAL ON BASIS THAT MOTIVE NEED ONLY TO BE PROVED BY A PREPONDERANCE OF EVIDENCE WAS MERELY INARTFUL ARTICULATION OF THE STANDARD THAT THE COURT DOES NOT HAVE TO BELIEVE THAT PROOF BEYOND A REASONABLE DOUBT EXISTS BUT THAT THE JURY NEED ONLY TO HAVE SUFFICIENT EVIDENCE TO JUSTIFY BELIEVING SO.

***State v. Fannin*, 2015WL2364295**

In the memorandum decision of *State v. Fannin*, 2015WL2364295, the defendant was convicted of the offense of death of a child by a parent, guardian, custodian or other person by child abuse. The defendant had a relationship with a mother of a four month old infant. The mother, who worked at a hospital, had not yet made daycare arrangements, so the defendant babysat the child for a few days when the mother returned to work.

One hour and a half after the baby was brought to the defendant one morning, the defendant reported to the mother that the baby was not acting normally and was acting like “she had a cold or was congested.” The baby was brought to the hospital and was found to be unresponsive. Four days later, the baby died. The baby’s head was swollen, the pupils were enlarged, the retina was covered in blood, and the blood covered the eye from front to back.

The defendant told different stories regarding the baby’s injuries. The first story was that the baby had fallen from his arms onto the sofa, without hitting anything hard. The second story was that the baby had been dropped onto a concrete floor, head first.

The testimony of medical experts was that the injuries were consistent with violently shaking the baby.

A next door neighbor testified that, on the morning of the tragedy, the defendant had been yelling and screaming at the baby to shut up and stop “getting on his nerves.”

The defendant was convicted by the jury.

The first issue was the defendant’s request that the Supreme Court reverse its precedent that the use of a preemptory challenge to remove a biased juror requires prejudice before relief will be granted. The defendant had to use a preemptory challenge to remove the husband of an employee in the very prosecutor’s office that was prosecuting the matter. The Supreme Court refused to reverse its precedent, stating that the defendant admitted that the remaining jurors were unbiased and, therefore, the defendant got what he is promised constitutionally, a trial by unbiased jurors.

The second issue is one that is not so clearly resolved. The circuit court permitted a medical

doctor to discuss a study that was a “historical reporting of injuries that were diagnosed as shaken baby syndrome, the age of the baby, the inconsistency in the reported cause with physical findings, and a high proportion of male perpetrators.” Each of these factors coincided with the actions of the defendant in this matter, thus supporting the conclusion that the baby’s injuries were not the result of an accident. Yet, the Supreme Court of Appeals did not find this testimony to be scientific in nature and subject to the requirements for admission of such testimony. Instead, the Supreme Court treated the testimony as neither novel nor scientific and thus its admission was a matter within the discretion of the circuit court. The Court did note that the doctor “offered no opinion derived from the study and petitioner did not object to its relevance.”

Moreover, “in any event, we believe any error in the admission of the study is harmless.” Essentially, “there was ample evidence that Emma died from being shaken and slammed and that petitioner was the only person who could have inflicted the trauma that killed her.” In other words, the defendant was guilty, so the evidence of the study was not prejudicial.

Finally, the defendant correctly pointed out that the court denied his motion for acquittal on the grounds that malice had not been shown by incorrectly stating that “the State has met its burden, which is obviously not beyond a reasonable doubt, it’s simply a preponderance of the evidence.” The lower court may have inartfully articulated the standard which is that the court does not have to believe that proof beyond a reasonable doubt exists, but the court must find that enough evidence existed to justify a jury’s finding that proof beyond a reasonable doubt existed. The Supreme Court excused the unartful phrasing of the circuit court and found that the motion for a judgment of acquittal was properly denied. A finding of malice was deemed to be justifiably found by the jury by reason of the neighbor’s testimony and the medical testimony that the baby was not accidentally dropped.

EVIDENCE: DIRECT PROOF OF PREMEDITATION IS SELDOM POSSIBLE AND IS GENERALLY PROVED BY ONLY CIRCUMSTANTIAL EVIDENCE.

INSTRUCTION: AN INSTRUCTION THAT IN ORDER TO CONSTITUTE A PREMEDITATED MURDER AN INTENT TO KILL NEED EXIST FOR ONLY A MOMENT WAS PROPERLY GIVEN.

EVIDENCE: DEFENSE COUNSEL MUST PROVE EVIDENCE WOULD BE FAVORABLE BEFORE FAILURE TO TURN IT OVER IS A *BRADY* VIOLATION.

APPEAL: DEFENSE COUNSEL’S BOLD STATEMENT, WITHOUT CITATION TO THE CONTROLLING PRECEDENT, THAT EVIDENCE SHOULD HAVE BEEN PRESERVED WAS INSUFFICIENT TO ESTABLISH GROUNDS FOR RELIEF ON APPEAL.

State v. Medley, 2015WL2364302

In the memorandum decision of *State v. Medley, 2015WL2364302*, the appeal was taken from the defendant’s conviction of first degree murder with mercy and the concealment of a human

body.

The defendant gave a statement to the police that detailed the crime as follows: “he and the victim had been arguing and that the victim slapped him. ... He just flew off ... grabbed her neck an [sic] choked her.” Defendant further admitted that he hit the victim in the head and, upon realizing she was dead, defendant put her on the floor of her Jeep and pushed the Jeep into a lake. The defendant was arrested because his brother recounted to the police that the defendant came to him and sought assistance in the dumping of the body and because the defendant’s friends saw him push the Jeep into the lake.

One ground for error was that the State had failed to prove malice or premeditation. Because death was by strangulation, the defendant stressed no time existed for premeditation. The Supreme Court noted that “regarding premeditation, we have stated that direct proof thereof is seldom possible and that generally it can be proved only by circumstantial evidence.” Accordingly, testimony that trouble existed between the petitioner and the victim for days before the victim’s death; the petitioner’s statement that there was an argument and it escalated before he strangled her; and the petitioner’s disposal of the body (presumably evidence of a plan) supported, in the circumstances, a finding of malice and premeditation.

A second ground for error was purportedly conflicting instructions on the definition of premeditation. Indeed, the jury asked, again, for the definition of premeditation in the course of its deliberations. The standard instructions spoke about “any interval of time between the forming of the intent to kill and the execution of that intent, which is of sufficient duration for the accused to be fully conscious of what he intended, is sufficient to support a conviction for first degree murder.” The prosecution had submitted another instruction, which was given, that “in order to constitute a premeditated murder and [sic] intent to kill need exist for only an instant.” The language came from *Billotti v. Dodrill*, 394 S.E.2d 32 (W. Va. 1990). The Supreme Court found that the instructions were not inconsistent and that giving the prosecution’s instruction was not error.

A third ground was that the prosecution had made several *Brady* violations by failing to produce fingernail clippings taken from the body during the autopsy; failing to test blood splatter in the residence to determine whose blood made the splatters; and failing to test fingerprints from the Jeep. The defendant’s problem on appeal was that he could not inform the Court whether the evidence was favorable; whether the suppression was willful; and whether the evidence was material. Accordingly, the defendant failed to meet even one component of the test for a *Brady* violation.

A fourth ground was the State’s failure to preserve the victim’s cellphone. The cellphone had been examined by the police and returned to the victim’s daughter who then discarded it. The defendant’s counsel boldly stated that this was error. Notably, the Supreme Court commented that defendant’s counsel had failed to even cite to the controlling precedent on the matter, *i.e.*, *State v. Osakalumi*, 461 S.E.2d 504 (W.Va. 1995). Upon review, however, the Court found no error in the failure to preserve the phone because, essentially, it was of no merit. It was a

prepaid Walmart flip phone used weeks before the murder and rarely used because reception was poor at the victim's residence. Without any argument regarding the significance of the phone and its contents, no error would be found.

The gist of the memorandum decision was, if you are going to raise errors, you need to consider the findings that must follow, i.e., prejudice to the defendant or materiality of the conclusion. If you just raise issues hoping the Supreme Court will develop the arguments for you, you will be routinely disappointed.

HABEAS CORPUS: ORDINARY TRIAL ERROR NOT INVOLVING CONSTITUTIONAL VIOLATIONS WILL NOT BE REVIEWED IN A HABEAS CORPUS PROCEEDING.

JUDGE: JUDGE DOES NOT NEED TO AFFIRMATIVELY DISCLOSE A RELATIONSHIP WITH THE VICTIM, ONLY RELATIONSHIPS WITH THE LITIGANTS.

***Lively v. Ballard*, 2015WL3388309**

In the memorandum decision of *Lively v. Ballard*, 2015WL3388309, the appeal was taken from an order denying the petitioner's requested *habeas corpus* relief. The petitioner and a co-defendant were both tried for first degree murder and arson; however, their trials were separate and in different venues. The victim was a well-known doctor and both had moved for a change of venue. The same judge presided over both trials.

In their respective trials, the petitioner was convicted, but the co-defendant was acquitted. The petitioner received mercy and was sentenced to life with the possibility of parole.

The Supreme Court first emphasized that "a habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed."

The first point of error concerned the actions of the Circuit Clerk of McDowell County. The prosecuting attorney had shared details of the case with the Clerk. In this manner, the Clerk became aware that a potential witness had recanted a previous statement and further became aware that the prosecuting attorney was having trouble reaching the witness. The Clerk reached the witness' girlfriend and apparently questioned her about the witness' recantation and "reportedly admonished" the girlfriend, "stating that [the witness'] ... recantation could cause problems for [him] ... and his family." The petitioner asserted that this was "misconduct that constitutes defiant impropriety." This was purportedly compounded by the prosecuting attorney's "suborning" the intimidation of a material witness and "disregarding his affirmative duty to disclose potentially exculpatory information to defense counsel."

The Court's emphasis on what can be considered in a *habeas corpus* proceeding proved to be foreshadowing. The Court refused to consider these issues because they were known to defense counsel before trial and were not raised in his criminal appeal and did not, in the Supreme Court's opinion, rise to the level of constitutional error.

A second point of error was the State's failure to disclose the identity of a confidential informant. Because the petitioner failed to explain how the evidence would be or could be favorable or exculpatory, the Supreme Court refused to consider whether a *Brady* violation occurred.

The third point of error concerned the relationship of the trial judge with the victim. Apparently the victim was "long-time figure in McDowell County politics." While the trial judge did, in fact, have a relationship with the victim that he did not disclose on the record, the Supreme Court opined that it is a relationship with a "litigant" that must be affirmatively disclosed, not a relationship with the victim. The Court's seemingly sarcastic, yet literally true, remark is that the murder victim, if he made contributions to the judge, was not going to "gain any advantage from favorable rulings from the trial judge in the proceedings below." Moreover, the petitioner had the opportunity to move for the judge's recusal, but failed to do so, and the Supreme Court did not find that the risk of actual bias in these circumstances warranted a voluntary recusal.

Other issues were summarily dismissed as not supported by the record. The order denying the petition for a writ of *habeas corpus* was affirmed.

EVIDENCE: THE CRIME OF CONCEALING A BODY EXTENDS TO CONCEALING THE BODY OF A PERSON WHO OVERDOSED ON SELF-ADMINISTERED DRUGS, EVEN THOUGH THE BODY WAS NOT A VICTIM OF THE DEFENDANT'S CRIMINAL ACTIVITY OF INGESTING DRUGS.

***State v. Smith*, 2015WL3388353**

In the memorandum decision of *State v. Smith*, 2015WL3388353, the defendant had been convicted of violating W. Va. Code §61-2-5a(a), which makes it a felony for "any person who, by any means, knowingly and willfully conceals, attempts to conceal or who otherwise aids and abets any person to conceal a deceased human body *where death occurred as a result of criminal activity....*" [emphasis added].

The deceased in this matter had ingested a deadly cocktail of bath salts, heroin, codeine, and other narcotics. The defendant and others were found to have taken the body and dumped it at a carwash after the not surprising overdose. After a trial by jury, the defendant was found to have conspired to conceal a human body in violation of the criminal statutes.

First, the Supreme Court made note that the defendant was incorrectly referring to the motion in the trial proceeding as one for a directed verdict when, instead, under Rule 29 of the Rules of Criminal Procedure, motions for judgment of acquittal are to be used in place of motions for directed verdict, which "are abolished."

Second, the defendant argued that neither she nor any other co-defendant caused the death. Also, the statute when first drafted made reference to its purpose as creating a "crime for concealing a human body of a victim of a murder, voluntary manslaughter, or involuntary

manslaughter.” The defendant’s argument is that it is intended to apply to a person committing the crime causing the death. The Supreme Court rejected the arguments noting that the statute referred to “criminal activity” and did not limit the scope.

However, the Supreme Court did not directly address the more nuanced argument of whether the deceased had to be a victim of the defendant’s criminal activity. Understandably, the concealment of a body to hide a crime is not tolerated, but does this extend to hiding a body when the crime was committed by the victim? In this case, the victim overdosed on self-administered narcotics and drugs. The defendant was merely involved with relocating the body after the victim’s criminal activity had ceased.

The Supreme Court further found sufficient evidence of an agreement to support a conviction for conspiracy to commit the crime. The following cryptic comment led to this opinion: “Petitioner’s statements to police generally established that she knew she was transporting Ms. Adams’ body but had convinced herself that she was not, in part because petitioner also used illegal bath salts during the time in question.” It is not clear whether this is the defendant’s statement to the police or the Supreme Court’s commentary on the defendant’s psychological break from reality at the time.

The sentencing of the defendant on the conviction was affirmed.

SPEEDY TRIAL: FACT THAT DEFENDANT WAS IN CUSTODY FOR UNRELATED CHARGES WAS SIGNIFICANT FACTOR IN FINDING NO PREJUDICE TO DEFENDANT IN THE CONTINUANCE OF HIS TRIAL TO ANOTHER TERM.

State v. Hedrick, 2015WL2364249

In the memorandum decision of *State v. Hedrick, 2015WL2364249*, the defendant was convicted of charges of robbery in the first degree, assault in the commission of a felony, malicious assault, burglary, and conspiracy. Due to a recidivist information, the defendant was eventually sentenced to life imprisonment.

The defendant appealed on the basis of whether his rights to a “speedy trial” had been violated. Specifically, the defendant had moved to be tried in the same term within which he was indicted pursuant to W. Va. Code §62-3-1. This is the “one-term rule.” The rule applies, however, only when a defendant is in custody. The defendant was in the custody of the Division of Corrections but not because of the pending charges. The defendant’s parole on a previous conviction had been revoked.

The State moved to dismiss the charges because it intended to re-indict the defendant due to a possible flaw in the original indictment and to add additional conspiracy charges. The defendant opposed the motion and emphasized that a motion for a “speedy trial” had been filed and that he was in custody. The lower court denied the motion, noting that his custodial situation was

unrelated to these charges and no harm could be found in allowing the State to re-indict the defendant.

Upon reviewing the matter, the Supreme Court noted that, “this Court has previously acknowledged that a dismissal of an indictment and a subsequent re-indictment constitute a continuance under West Virginia Code §62-3-1.” Accordingly, the matter was reviewed under the standard for determining whether good cause had been shown for the continuance of the trial date, acknowledging, however, that this was a matter within the “sound discretion of the trial court.” The standard requires a showing that the “state has deliberately or oppressively sought to delay a trial”; “such delay has resulted in substantial prejudice to the accused” and the dismissal of the indictment should only be done “in furtherance of the prompt administration of justice.”

In this matter, the court found no substantial prejudice to the defendant considering that the defendant was going to remain in custody no matter what the resolution of the pending charges was.

PLEA AGREEMENT: STATEMENTS MADE DURING PLEA COLLOQUOY PRECLUDED DEFENDANT’S ARGUMENT THAT HIS NOW DISBARRED ATTORNEY PROMISED HE WOULD GET PROBATION AND THAT HE DID NOT UNDERSTAND THE PROCEEDINGS WHICH DEFENDANT THOUGHT SHOULD HAVE BEEN OBVIOUS TO THE COURT UPON DEFENDANT’S DISCLOSURE THAT HE WAS ON SOCIAL SECURITY DISABILITY.

Kristopher V. v. Ballard, 2015WL2069412

In the memorandum decision of *Kristopher V. v. Ballard, 2015WL2069412*, the circuit court denied a *habeas corpus* petition asserting ineffective assistance of counsel and the failure of the circuit court to continue a plea hearing in order to evaluate the petitioner’s competency.

The petitioner was charged with 108 counts arising out of his anal intercourse with a ten year old. The defense counsel negotiated a plea agreement in which the petitioner pled guilty to two counts. At the plea hearing, the court informed the petitioner he was probably going to prison, but the petitioner continued with the plea. The resulting sentence was consecutive terms of fifteen to thirty-five years and ten to twenty years. The potential sentence for all the charges in the indictment was 936 years to 2,340 years. As the Supreme Court noted, the plea agreement made the petitioner “capable of discharging his sentences and being released from prison instead of serving a virtual life sentence.” However, the petitioner was seemingly surprised that he had not been given probation or an alternative sentence.

The petitioner attributed his apparent surprise to his counsel. The takeaway from the resulting decision is that such issues simply cannot be raised if in conflict with the plea colloquy. You cannot allege that counsel promised your client would get probation or an alternative sentence when the client informed the judge, on the record, that no such promise was made. You cannot allege that

counsel acted contrary to your client's instructions when the client informed the judge, on the record, that he was satisfied with his representation.

The potential motivation for these allegations was that the trial counsel subsequently had his or her license annulled. Perhaps the reasoning was that the court would deem the counsel's testimony at the evidentiary hearing not credible due to the disbarment. However, the Supreme Court had no trouble finding that the perpetrator of a "horrific" crime was less credible than a disbarred attorney.

The other ground for relief was that the sentencing court should have ordered a competency evaluation when, in the course of the plea colloquy, the defendant disclosed that he had been awarded a social security disability. The disability was seemingly tied to learning disabilities and behavioral problems. But, again, in the course of the colloquy, the petitioner acknowledged his understanding of the plea and stated, affirmatively, that he had placed his "sex organ in her butt." The court found this to be sufficiently indicative that the defendant knew his actions were wrong. The Supreme Court summarily found that the "test for competency to plead guilty is different than the standard used to determine disability for social security purposes." Simply stated, a competency hearing will not be triggered by the fact of a disability award alone.

The order denying the habeas relief was affirmed.

HABEAS CORPUS: COUNSEL'S LEAVING THE COURTROOM TO USE THE RESTROOM WHILE JURY WAS WATCHING A VIDEO RECORDING WAS INEFFECTIVE ASSISTANCE OF COUNSEL, BUT DEFENDANT SUFFERED NO PREJUDICE BECAUSE NO ADVERSARIAL MOMENT OCCURRED DURING COUNSEL'S ABSENCE.

***Parsons v. Farmer*, 2015WL2069374**

In the memorandum decision of *Parsons v. Farmer*, 2015WL2069374, the issue was whether the trial counsel's seemingly acknowledged deficient performance satisfied the "prejudice" prong of the two pronged test for ineffective assistance of counsel claims.

During jury deliberations, a request was made by the jury to review, again, a tape recording of the robbery that was the subject matter of the criminal charges against the petitioner. The recording had to be played, for technical reasons, in the courtroom. Counsel was present for the selection and setting-up of the recording, but went to the bathroom "to avoid an emergency" while the recording was watched by the jury. The record reflects that nothing was said by anyone during the counsel's absence. Again, the recording was shown during the actual trial and was actually moved into the record by defense counsel because no weapon was seemingly reflected, so counsel knew its contents.

The lower court found that this constituted a lack of counsel at a "critical stage," but found this constitutional violation to be harmless "beyond a reasonable doubt" in the circumstances.

The Supreme Court refused to adopt this analysis and reviewed it under the ineffective of assistance claim. Assuming that the counsel's bathroom trip constituted deficient performance under an objective standard of reasonableness, did this result in prejudice that satisfied the remaining prong of the test for ineffective assistance of counsel, that is: "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different."

The argument then became whether such prejudice should be presumed when counsel is absent from a critical stage of trial. The Supreme Court rejected this assertion, stating "the timing of counsel's deficient performance – whether it occurred at a critical stage of the proceedings – was not as important as whether the deficiency allowed the State's case to move forward without meaningful adversarial testing." Or, as restated by the Supreme Court, "a petitioner must demonstrate that he or she suffered the equivalent of a complete absence of counsel." In the circumstances of this matter, no adversarial moment occurred in which the petitioner was left without counsel, so no prejudice arose to justify the claim for ineffective assistance of counsel.

EVIDENCE: THE VALUE OF THE DAMAGE DONE TO A CAR IN ORDER TO CONSTITUTE A FELONY WAS SUFFICIENTLY ESTABLISHED BY THE OWNER'S TESTIMONY, THE NATURE OF THE DAMAGE, AND THE OPINION OF AN EXPERT WITH YEARS OF EXPERIENCE EVEN THOUGH THE EXPERT SAW ONLY PHOTOGRAPHS.

State v. Kenney, 2015WL1259555

In the memorandum decision of *State v. Kenney, 2015WL1259555*, the sufficiency of the evidence to convict the defendant of a felony destruction of property was at issue. The conviction resulted in a sentence of one to ten years in prison.

The underlying facts were that the defendant was charged with striking another person's vehicle with a tire iron and threatening the owner with the tire iron as well. The defendant was acquitted of charges relating, apparently, to threatening the owner.

No direct evidence was presented that all the damage to the car was done by the defendant and his tire iron. Moreover, an expert testified that the damage was \$3,200, but the opinion was based only upon the viewing of photographs and an assumption that the vehicle's condition was average.

The Supreme Court essentially held that the guilt of the defendant was solely within the province of the jury to decide based upon the circumstantial evidence. Moreover, the defense counsel never challenged the expert at the trial on the questions of value. With eyewitness testimony from the owner, the testimony regarding the breaking of glass, and the expert's years of experience as an appraiser, the Supreme Court felt that the "heavy burden" to challenge the sufficiency of evidence for the jury to convict had not been borne. The order sentencing the defendant was

affirmed.

JURY: MORE THAN THE JUROR'S RACE IS REQUIRED FOR A *BATSON* CHALLENGE AS DEFENDANT MUST SHOW THAT OTHER WHITE JURORS WERE NOT STRUCK WHO OFFERED SIMILAR RESPONSES IN *VOIR DIRE*.

MISTRIAL: A VICTIM'S REMARK ABOUT DEFENDANT'S POSSIBLE DRUG USE WAS ONLY SLIGHTLY PREJUDICIAL WHICH COULD HAVE BEEN READILY CURED BY COUNSEL'S REQUEST FOR A CURATIVE INSTRUCTION THAT WAS NOT MADE.

WITNESSES: POLICE OFFICER'S VOUCHING OF VICTIM'S TRUSTWORTHINESS WAS "APPROPRIATE REHABILITATIVE EVIDENCE" BECAUSE IN CROSS-EXAMINATION OF THE OFFICER THE DEFENSE COUNSEL RAISED THE ISSUE OF THE VICTIM'S CREDIBILITY.

***State v. King*, 2015WL1741394**

In the memorandum decision of *State v. King*, 2015WL1741394, an appeal was taken from the defendant's conviction in magistrate court of misdemeanor charges of domestic battery and domestic assault. The circuit court denied the appeal in a one page order. The appeal to the Supreme Court of Appeals ensued.

The first assignment of error is that the circuit court's single-page order demonstrated "a lack of appropriate consideration of the merits of [counsel's] ... arguments." Ironically, the one page order was found proper in a one paragraph opinion from the Supreme Court.

The second and third assignments of error concerned the dismissal of an African-American male from the jury venire. The resulting jury in the trial of the domestic offenses consisted of five female jurors and one male juror. The defendant was a white male, which, as the Supreme Court notes, is no longer relevant to the *Batson* challenge.

The defendant asserted that the State failed to offer a non-discriminatory reason for the preemptory strike. The Supreme Court found, however, that the defendant had to offer more than the fact of the potential juror's race to invoke the requirement that the State offer a non-discriminatory reason for the strike. Specifically, the Supreme Court would require that the defendant at least offer that the State failed to strike other similarly situated jurors. The Court does not explain what this means, but it must refer to other jurors who were white and who were not struck and who had similar responses in voir dire as the person who was struck. Only then would a *prima facie* case of discrimination be raised, thus requiring the State to articulate its reason for the strike. No such evidence was presented and, accordingly, the mere assertion that the person struck was African-American is insufficient to mount a challenge.

Another assignment of error was based on the victim's remarks, during cross-examination, that the defendant was acting like a "madman," "maybe ... because of the drugs they found in his

closet.” The trial court did not grant the motion for a mistrial. Resulting questions established that the victim had no knowledge of any actual drug use by the defendant. No curative instruction was requested and the record shows no other reference to the drugs.

The Supreme Court opined that “the prejudicial effect of the ... [victim’s] statement, if any, would have been easily cured by a limiting instruction, which petitioner did not request, and which the trial court was not required to give sua sponte.” Without the drugs being mentioned again, the statement was viewed as harmless. No error was found.

Another assignment of error was whether the trial court permitted the improper vouching of testimony by the victim. A police officer testified that he found the victim to be “trustworthy” and found her story to be “consistent.” The Supreme Court deemed the first statement to be reviewable because an objection was made and overruled, but refused to review the second statement because no objection was made. Notably, “a litigant may not silently acquiesce to an alleged error ... and then raise that error as a reason for reversal.”

And, as is commonplace, the Supreme Court found that cross-examination opened the door to the question of “trustworthiness.” The defense counsel had specifically asked the investigating officer if the victim had recounted her own violent behavior toward the defendant, thus raising an attack on the victim’s character and thus making the officer’s testimony on redirect “appropriate rehabilitative evidence.” No error was found.

Error was further raised regarding the failure of the disciplinary records of the investigating officer and the juvenile record of the victim to be produced, purportedly as ordered by the court. The Supreme Court found no error principally because the appellate counsel had provided no citations to the record to establish what had been requested and why. With respect to the juvenile records specifically, the Supreme Court observed that, if expunged, the juvenile record technically does not exist and may create barriers to its use in evidence generally.

EVIDENCE: IN LIGHT OF THE OVERWHELMING EVIDENCE OF DEFENDANT’S INTOXICATION, THE TRIAL COURT’S REFUSAL TO COMPEL PRODUCTION OF VOLUMINOUS MATERIALS ON THE INTOXIMETER WAS NOT A *BRADY* VIOLATION BECAUSE ITS EXCULPATORY VALUE WAS SPECULATIVE AT BEST.

APPEAL: ERROR WILL NOT BE PRESUMED, SO THE FAILURE TO RECORD POLICE OFFICER’S TESTIMONY AT A PRELIMINARY HEARING WAS NOT A GROUND FOR APPEAL WITHOUT ANY STATEMENT BY THE APPELLANT COUNSEL AS TO THE NATURE OF THE OFFICER’S TESTIMONY THAT MADE THE TESTIMONY SO IMPORTANT AND EXCULPATORY.

State v. Alexander, 2015WL1741114

In the memorandum decision of *State v. Alexander, 2015WL1741114*, the defendant was convicted of DUI, third offense, and obstructing an officer.

The rather compelling and compounding facts were: defendant was found by a refuse worker unconscious in his truck at 5:30 a.m. in a Wendy's restaurant parking lot, which was straddling the lane between the drive-through and the parking lot and blocking access to the garbage dumpster; the truck engine was running, the truck was in gear, the defendant's foot was on the brake; the defendant did not awaken despite the refuse worker's and then the police officers' knocking on the truck window and flashing a light; the defendant awoke and passed out several times before finally arousing and turning off the truck engine; the defendant had vomit on his shirt and the truck had a stench of vomit; the defendant smelled of alcohol; an empty liquor bottle was found inside the truck; and the defendant failed three field sobriety tests.

So, what was the BAC of the defendant? Well, the story on this is interesting. The first two preliminary tests were unsuccessful and the police officer advised the defendant that "he was not making an effort to blow into the machine because the machine was not making the sound it usually makes when air is blowing into it." On the third attempt, the petitioner then blew so hard that the straw was blown out of the machine. The machine could not register a result as no air still entered.

An arrest was then made and the defendant resisted. After restraint, the defendant was transported to the station where an Intoximeter was employed. Three more tests were attempted and the recorded result was an insufficient breath sample.

At trial, the defendant denied that he was drunk and denied that he smelled of alcohol or vomit. He claimed that he could not provide a breath sample because the police had broken his ribs. The incident at Wendy's was a result of his troubled sleeping patterns. He claimed to have actually passed the field sobriety tests.

Again, the defendant was convicted on all counts. The resulting appeal was based on three grounds. The first ground was the court's denial of his discovery request for the voluminous material relating to the operation and maintenance of, and the training with respect to, the Intoximeter. The defendant sought to prove that he had, in fact, provided a sufficient breath sample which would have been obviously exculpatory since he had not been drinking. This was a *Brady* violation, therefore.

The Supreme Court found this ground to be baseless since the defendant refused to even provide a breath sample. But this somewhat ignores the defendant's claim, which is that he gave a sufficient sample but it was either mechanical or operator's error that resulted in the failure to obtain a result. Obviously, the Supreme Court did not believe the defendant tried to provide a sufficient sample, but does not state this or explain this.

The Supreme Court's real focus was on the "overwhelming evidence that petitioner was intoxicated at the time he was discovered unconscious in his truck in the Wendy's parking lot at 5:30 a.m. ... [and] the truck's engine was running and the vehicle was in gear." The belief that the requested material would have been exculpatory was "speculative at best." Accordingly, the Supreme Court found no reason to criticize the lower court's refusal to compel production of the

voluminous material. The underlying rejoinder might be, but what was the harm in producing the material if defendant bore the cost of its reproduction?

The second ground was that the circuit court abused its discretion in refusing to permit the defendant to present evidence regarding the “extent of physical injuries he allegedly sustained when he was restrained by the police.” According to the defendant, if the jury did not believe the Intoximeter was not working properly, perhaps his peers would buy the argument that his injuries kept him from providing a sufficient breath sample.

The defendant’s problem is that, at trial, he did not have copies of the medical records and failed to “proffer to the circuit court the purpose or importance of the medical records.” Noting that it is “manifestly unfair for a party to raise new issues on appeal,” this ground was rejected.

The final ground was that the magistrate court had failed to electronically record the preliminary hearing and, therefore, the potentially exculpatory statements of the investigating officer were not able to be presented at the trial for purposes of impeachment. The recording equipment was seemingly functional at the time of the hearing, but, subsequently, it was determined that the hearing was not recorded and the magistrate had not made a written summary of the hearing. Rule 5.1(c) of the Rules of Criminal Procedure for Magistrate Courts sets forth the requirement of a recording or a written summary.

The circuit court made it the defense counsel’s obligation to ensure the working order of the recording equipment, although this would seemingly be beyond the defense counsel’s access to the courtroom and its equipment. The Supreme Court again refused to consider this ground because the appellate counsel failed to identify the “nature” of the officer’s testimony that would make it “very important” and exculpatory. “Error will not be presumed,” held the Supreme Court.

The order imposing the sentence after conviction was affirmed.

WITNESSES: WITNESS COULD NOT BE CROSS-EXAMINED ABOUT A COMPLAINT THAT HE HAD SEXUALLY ASSAULTED A PERSON FOR WHICH HE WAS SEEKING LENIENCY BY TESTIFYING BECAUSE NO CHARGES HAD BEEN CORROBORATED OR FILED AND WOULD HAVE CONFUSED AND MISLED THE JURY.

EVIDENCE: A CORPUS DELICTI OF A CRIME CANNOT BE ESTABLISHED SOLELY BY THE ACCUSED’S EXTRAJUDICIAL CONFESSION OR ADMISSION BUT, INSTEAD, MUST BE CORROBORATED BY INDEPENDENT EVIDENCE SUCH THAT, WHEN TAKEN IN CONNECTION WITH THE CONFESSION OR ADMISSION, ESTABLISHES THE CRIME BEYOND A REASONABLE DOUBT.

State v. Click, 2015WL1741409

In the memorandum decision of *State v. Click, 2015WL1741409*, the crime was the murder of

the mayor of War, West Virginia, accomplished by the placement of a plastic bag over the victim's head while lying in bed. Evidence existed that the victim had struggled during the asphyxiation. The defendant and his sister were charged with the crime. The motive was that the sister, who was the victim's daughter-in-law, was about to be charged by the victim with the unauthorized use of his bank account. Notably, the sister was separately tried and was acquitted of murder, but the jury deadlocked on the issue of the conspiracy. A subsequent *Kennedy* plea was entered and the defendant's sister received a sentence of one to three years in prison.

The defendant's alibi was that, at the time of the murder, he was making a sex tape with a woman who testified at the trial and who refuted the alibi. The sex tape was allegedly destroyed prior to trial. The defendant also sought to impeach a material witness, his uncle, on the grounds that the uncle had sexually assaulted his sister and was testifying for the State in order to thwart an investigation of the assault.

The defendant was tried and convicted of both murder in the first degree, with a recommendation of mercy, and conspiracy. A life sentence was imposed together with a term of one to five years of incarceration.

The defendant's appeal included the ground that he should have been permitted to impeach the uncle with the sexual assault allegation. While a complaint had been made by the co-defendant's sister, no charges resulted or were even investigated. The Supreme Court summarily found that the circuit court did not abuse its discretion in refusing to permit cross examination on the charges because the charges were uncorroborated and would have confused and misled the jury.

The second ground was insufficiency of the evidence. The Supreme Court recited its precedent that "the corpus delicti may not be established solely with an accused's extrajudicial confession or admission." Instead, the "confession or admission must be corroborated in a material and substantial manner by independent evidence." Finally, "the corroborating evidence need not of itself be conclusive but, rather, is sufficient if, when taken in connection with the confession or admission, the crime is established beyond a reasonable doubt." The Supreme Court found sufficient corroborating evidence.

The defendant pointed out that the evidence consistent primarily of statements by numerous witnesses about the defendant's incriminating statements. No less than six witnesses testified to separate incidents of statements by the defendant, the most pointed of which was, "I'll put it this way, the mother*****r is dead." However, the Supreme Court then pointed to the following corroborative testimony: medical testimony regarding the manner of death; the testimony regarding the motive; the missing money from the victim's home; the petitioner's activities on the morning of the crime; and the discovery of burned debris, including burned boots, at a location described by witnesses who accompanied the defendant to get rid of the evidence. The Supreme Court found, therefore, no error in the trial proceedings.

INSTRUCTIONS: DEFENDANT ADMITTED ELEMENTS OF MORE SERIOUS CHARGE AND, THEREFORE, EVIDENCE DID NOT SUPPORT INSTRUCTION ON LESSER INCLUDED OFFENSE.

RECIDIVISM: REQUIREMENT THAT THE INFORMATION BE FILED “IMMEDIATELY” AFTER CONVICTION IS MET IF FILED BEFORE THE END OF THE TERM OF COURT.

RECIDIVISM: THE RECIDIVIST INFORMATION DOES NOT HAVE TO STATE THE DATE ON WHICH THE PRIOR OFFENSES OCCURRED IF REASONABLE NOTICE OF THE NATURE AND CHARACTER OF THE PREVIOUS CONVICTION IS OTHERWISE GIVEN.

RECIDIVISM: DEFENDANT WAS NOT PREJUDICED DURING HIS RECIDIVIST TRIAL BY BEING IN SHACKLES DUE TO HIS MULTIPLE OUTBURSTS IN PRIOR PROCEEDINGS AND DUE TO THE INABILITY TO SEE THE SHACKLES BECAUSE THE DEFENSE TABLE WAS COVERED WITH A CLOTH SKIRT.

State v. Cearley, 2015WL1244437

In the memorandum decision of *State v. Cearley, 2015WL1244437*, the defendant’s conviction on charges of second degree sexual assault and unlawful wounding resulted in a life sentence due to the application of the recidivist provisions. The underlying incident involved the defendant grabbing the adult victim, slamming her head against a concrete wall several times, and then forcibly having sexual intercourse.

The defendant claimed the circuit court erred because it did not give an instruction on a lesser included offense of first degree sexual abuse with respect to the second degree sexual assault charge. The Supreme Court reiterated its holdings that “instructions must be based upon the evidence and an instruction which is not supported by evidence should not be given.” The defendant presented no evidence that he had not engaged in sexual intercourse with the purported victim but, instead, acknowledged intercourse and claimed it to be consensual. Because the assault is based on penetration and the lesser included offense involves only contact, the Supreme Court found that no evidentiary basis existed for the lesser included offense. The defendant noted that he had “licked the victim’s nipple,” but the Supreme Court held that, while this might have supported a charge of first degree sexual abuse, it did not absolve the defendant of the assault charge based on the actual intercourse.

The defendant then argued that the recidivist information is to be filed “immediately” after conviction, which, in his case, was not done. While the statute does impose this requirement, the Supreme Court opined that the defendant was “too narrowly” interpreting the language. The Supreme Court reiterated its previous holding that the immediacy requirement was met by a filing made before the end of the term of court in which the conviction was obtained and before sentencing. Accordingly, the filing of the information in the defendant’s matter was found to be compliant with the statute.

Additionally, the defendant pointed out that the recidivist information did not state the dates on

which the prior offenses occurred. The Supreme Court reiterated that a recidivist information is sufficient if it gives “reasonable notice to the defendant” of the “nature and character of the previous conviction,” “the court wherein the previous conviction occurred,” and the “identity of the person previously convicted.” Because the State had provided these details in the information regarding the prior convictions, including the dates of the convictions, the information was sufficient.

Finally, the defendant argued it was error for him to be in shackles during the recidivist trial. However, the defendant had been in shackles during the criminal trial due to his multiple outbursts in prior proceedings. The hearing held on that determination was deemed sufficient to warrant continuation of the shackles during the recidivist proceedings. Moreover, the presence of shackles was deemed to be harmless as the defense table was covered with a cloth skirt so that the shackles could not be seen.

The order of the circuit court imposing a sentence on the defendant was affirmed.

HABEAS CORPUS: PETITION IS PROPERLY DENIED AS MOOT WHEN DEFENDANT HAS FULLY DISCHARGED HIS SENTENCE AND IS RELEASED FROM INCARCERATION.

***Brennan v. Dingus*, 2015WL1236060**

In the memorandum decision of *Brennan v. Dingus*, 2015WL1236060, the Supreme Court continued its adherence to its precedent that “because petitioner fully discharged his sentence and was released from incarceration shortly after filing his petition for writ of habeas corpus, we find no error in the circuit court granting the State’s motion to dismiss the same as moot.” *But see, State v. Hutton*, 776 S.E.2d 621, (W. Va. 2015)(regarding the viability of a writ of *coram nobis* in West Virginia.).

PROCEDURE: LACK OF EVIDENCE SUFFICIENT TO PROVE GRAND LARCENY DID NOT PRECLUDE CONVICTION ON LESSER OFFENSE BECAUSE SUBMISSION OF THE CASE TO THE JURY WAS WARRANTED AND DENIAL OF REQUEST FOR JUDGMENT WAS PROPER DESPITE FAVORABLE JURY VERDICT.

***State v. Hawkins*, 2015WL1238802**

In the memorandum decision of *State v. Hawkins*, 2015WL1238802, the appeal was based on the fact that the defendant had beat charges of grand larceny. Instead, the jury found him guilty of joyriding and conspiracy to unlawfully take a vehicle. The defendant was sentenced to a two year term of probation and was ordered to pay \$9,612 in restitution.

On appeal, the defendant argued that no basis existed for the charge of grand larceny and the conspiracy to commit grand larceny because no evidence was presented that he intended to

permanently deprive the owner of the possession of the vehicle. The Supreme Court noted that the jury did not find him guilty of grand larceny, so denying the motion for a directed verdict on grand larceny did not prejudice the defendant and no relief needed to be given.

The defendant was seemingly arguing that if the court had granted the motion for a directed verdict, then the lesser included offense of joyriding would not have become an issue at the jury instruction stage. While the Supreme Court did not directly address this issue, the Supreme Court noted that, while the jury ultimately agreed on the insufficiency of the evidence, evidence did support the submission of the question of grand larceny to the jury in the first place. The petitioner admitted to the theft of the car and setting it on fire. Simply because the jury decided the charge in the defendant's favor did not mean the evidence could not have supported a conviction if the jury had decided otherwise.

Finally, the defendant tied the restitution obligation to the grand larceny charge. The Supreme Court noted that the loss of the vehicle occurred during the joyriding, so it was properly the subject of restitution under W. Va. Code §61-11A-4 for this misdemeanor offense.

SENTENCE: COURT DID NOT ABUSE ITS DISCRETION IN TRANSFERRING YOUTHFUL OFFENDER TO PRISON ON HIS TWENTY-FIRST BIRTHDAY NOTWITHSTANDING HIS ACHIEVEMENTS DURING HIS PRECEDING PLACEMENTS.

State v. Hambleton, 2015WL1244386

In the memorandum decision of *State v. Hambleton, 2015WL1244386*, the appeal was taken from the denial of a Rule 35(b) motion for reduction of sentence.

The defendant was a juvenile who, with others, robbed and shot a man, who subsequently died. The defendant pled guilty as an adult to second degree murder and first degree robbery in exchange for a forty-year determinate sentence, which sentence was then imposed. At age 18, petitioner was to be reevaluated for potential transfer to a penitentiary. A motion was then filed to be resentenced as a youthful offender. The court did not transfer the defendant to a penitentiary but did not rule on the resentencing motion. The defendant returned to his placement at the Salem Industrial Home for Youth. Three years later, the court entered an order transferring the defendant to the Division of Corrections on his twenty-first birthday. Another motion was filed to obtain a ruling on the previous motion for resentencing. After a hearing the original sentence was deemed to be proper.

The Supreme Court simply found no basis for finding that the circuit court abused its discretion. Specifically, “the circuit court’s conclusion is based on sound reasoning, practical considerations of the crime, notions of consistency and fairness, and justice for the victim.” The Supreme Court did acknowledge the defendant’s achievements, including his continued education, but further acknowledged the severity of the crime.

A potentially deciding factor in the analysis was the “petitioner’s upcoming parole date.”

The Supreme Court also refused to find that a 40 year determinate sentence for robbery, for which no statutory maximum sentence exists, shocked the conscience of society and, therefore, violated the proportionality principle. The order denying the Rule 35(b) motion was affirmed.

PROCEDURE: THE RULES OF PROCEDURE IN CRIMINAL AND CIVIL CASES DO NOT APPLY IN POST-CONVICTION HABEAS CORPUS PROCEEDINGS.

Ballard v. Mahood, 2015WL1244343

In the memorandum decision of *Ballard v. Mahood, 2015WL1244343*, the petitioner argued that a default should have issued on his petition for a writ of *habeas corpus* due to the State’s failure to respond within the timeframe ordered by the circuit court.

The Supreme Court first commented on the labeling of the motion as one for a “default judgment.” The Supreme Court noted that the actual request was for a “default” and not a default judgment since no sum was sought. Instead, the petitioner was seeking to have his conviction declared void. The Supreme Court also pointed out that “the rules of procedure in criminal and civil cases do not apply in post-conviction habeas corpus proceedings.”

With respect to the requested relief, therefore, the Supreme Court acknowledged that the State did not file a response to the petition by the date set forth in the court’s order, but noted that after filing the petition, the petitioner then filed a supplemental amended petition and “supplemental claims.” Accordingly, the Supreme Court held that “petitioner’s own actions prevented respondent from filing a response to the original petition.” Finally, the Supreme Court applied the provisions of W. Va. Code §55-17-4(2) which provides that a “judgment by default may not be entered against a government agency in an action....” However, this seemingly contradicts the Supreme Court’s earlier comment that this was not a motion for a default judgment. In any event, the order denying the petitioner’s *habeas corpus* petition was affirmed.

RULE 609: A PRETRIAL DIVERSION AGREEMENT DID NOT RESULT IN A CONVICTION AND THEREFORE IMPEACHMENT PERMITTED BY RULE 609 DOES NOT APPLY.

WITNESSES: WITNESS’ PROBATION ON UNRELATED CHARGES PRIOR TO DEFENDANT’S CHARGES WAS NOT A PROPER SUBJECT FOR CROSS-EXAMINATION IN THAT NO CONNECTION WAS FOUND TO HER VOLUNTARY STATEMENT TO INVESTIGATING OFFICER.

State v. Williams, 778 S.E.2d 579 (W. Va. 2015)

In the reported opinion, *State v. Williams, 778 S.E.2d 579 (W. Va. 2015)*, the issue was whether a witness’ credibility could be attacked on cross examination by use of the witness’ pretrial diversion agreement on charges not related to the defendant’s charges. At the time of the

witness' testimony, the pretrial diversion had been successfully completed and the charges had been dismissed.

The witness worked at a McDonald's drive-through window. When she handed the defendant his meal one day, she saw him with a gun in his lap and looking at the following car. Subsequently, a shot was fired in the parking lot striking the car that had been following the defendant's car.

Within thirty minutes after arriving at the scene, a state trooper took the witness' statement. The defendant was arrested and charged with being a felon in possession of a handgun and other charges. The defendant was convicted only of being a felon in possession. Because the witness was the person who testified the defendant possessed a gun, the credibility of the witness was critical.

Before trial, a motion *in limine* was filed to preclude the defense counsel's questioning of the witness about charges she had faced for conspiracy to commit a robbery.

The witness' pretrial diversion agreement had been executed about eight months before the shooting at her place of employment. A guilty plea was held in abeyance and she was on probation for 24 months. So, at the time of the incident with the defendant, the witness was on probation. By the date of trial, the probation period was reduced to one year, the probation period was deemed to be completed, the guilty plea was withdrawn, and the charges were dismissed.

No evidence existed that the witness was pressured into making her statement to the trooper because she was on probation at that time or that she was given a shorter period of probation due to her cooperation. In an *in camera* hearing, the witness denied receiving any favorable consideration for her testimony.

The motion *in limine* was granted. The grounds for appeal were that the defendant had been denied his right to "confront an accuser" under the Sixth Amendment, and the jury was prevented from truly adjudicating the credibility of the witness.

The Supreme Court reiterated the test for whether "restrictions on cross-examination violate the Confrontation Clause": (i) whether the excluded evidence was relevant; (ii) whether there were other legitimate interests outweighing the defendant's interest in presenting the evidence; and (iii) whether the exclusion of evidence left the jury with sufficient information to assess the credibility of the witness. Moreover, the Supreme Court restated the general guidelines for cross-examination: (i) the scope is "coextensive with, and limited by, the material evidence given on direct examination"; (ii) a "witness may also be cross-examined about matters affecting his credibility" which includes "interest and bias of the witness, inconsistent statements made by the witness and to a certain extent the witness' character"; and (iii) the "trial judge has discretion as to the extent of cross-examination."

The Supreme Court affirmed the trial court's order precluding the questioning of the witness. The facts did not support any connection between the witness' probation at the time and the statement to the state trooper thirty minutes into the investigation.

Moreover, the pretrial diversion agreement did not result in a conviction and, therefore, Rule 609 of the Rules of Evidence governing the impeachment of a witness by conviction of a crime did not apply.

In a concurring opinion, Justice Workman opined that the trial court abused its discretion in denying the right to cross-examine the witness about the charges, but, under a harmless error analysis, the conviction should nonetheless be affirmed. The principal fact underlying the opinion was that the police officer who arrested the witness on her charges was also assisting with the investigation into the defendant's charges. Moreover, the opinion emphasizes that "the test is the witness' expectation or hope of a reward, not the actuality of a promise by the State." Because the witness was still on probation at the time of her statement, the "hope of a reward" was relevant to her credibility. And, indeed, the witness was subsequently showed leniency on the length of her probation.

INDICTMENT: IT IS NOT NECESSARY IN AN INDICTMENT FOR MURDER TO SET FORTH THE MANNER IN WHICH, OR MEANS BY WHICH, THE DEATH OF THE DECEASED WAS CAUSED.

DUE PROCESS: STATE MAY SEEK A CONVICTION FOR FELONY MURDER AND PREMEDITATED MURDER WITHOUT ELECTING ONE OR THE OTHER SO LONG AS THE COURT INSTRUCTS THE JURY ON THE DISTINCTION BETWEEN THE TWO THEORIES.

INSTRUCTIONS: THE COURT IMPROPERLY INSTRUCTED THE JURY ON "LYING IN WAIT" AS NOT REQUIRING CONCEALMENT, BUT ERROR WAS HARMLESS BECAUSE SUFFICIENT EVIDENCE EXISTED TO SUPPORT OTHER THEORIES OF MURDER.

INSTRUCTIONS: DEFENDANT'S EXPERT ON DIMINISHED CAPACITY DID NOT TESTIFY THAT DEFENDANT LACKED CAPACITY TO FORM MALICE AND, THEREFORE, AN INSTRUCTION ON INVOLUNTARY MANSLAUGHTER WAS PROPERLY DENIED.

WITNESSES: ESTABLISHING WITNESS' CREDENTIALS AS A DOCTOR AND ADDRESSING THE WITNESS AS DOCTOR WAS NOT IMPROPER BOLSTERING OF THE WITNESS' CREDIBILITY AS IT WAS BACKGROUND INFORMATION RELEVANT TO JURORS IN ASSESSING CREDIBILITY.

EVIDENCE: EXAMINATION OF AN EXPERT ABOUT FACTS UPON WHICH HE OR SHE RELIED SHOULD NOT BE CONDUIT FOR INTRODUCING HEARSAY UNDER THE GUISE THAT THE TESTIFYING EXPERT USED THE HEARSAY AS THE BASIS OF HIS OR HER TESTIMONY.

State v. Lambert, 777 S.E.2d 649 (W.Va. 2015)

In the reported opinion, *State v. Lambert*, 777 S.E.2d 649 (W.Va. 2015), the defendant was convicted of first degree murder without mercy and was sentenced to life imprisonment without the possibility of parole. The victim was a professional ballet dancer and an employee at the Tamarack in Beckley, West Virginia. For a period of five months, the defendant and the victim had a relationship.

On the date on which the ballet dancer was killed, the defendant purchased a 14-inch Bowie knife at the local Walmart store. The defendant sat outside the victim's apartment in his car and had two encounters with the victim. When the victim returned to her apartment the second time, the defendant entered the apartment with the Bowie knife in his pants. A roommate saw the defendant enter the victim's bedroom. The victim was stabbed twenty-three times. The victim bled-out before arriving at the hospital.

The defendant admitted to the killing. The defense was his diminished capacity, which proved to be unsuccessful. The defendant assigned six errors to the trial proceedings.

The jury had been instructed on the "lying-in-wait" and "felony murder" theories of murder in the first degree. The indictment referred only to premeditated murder, however. The defendant argued that only the premeditated murder theory should have been permitted at trial. Restated, the defendant argued he "had received no notice of the State's intent to prosecute him on felony murder and murder by lying in wait."

The Supreme Court referred to its precedent and held that an indictment "which sets forth a charge of only premeditated murder does not preclude the other categories of first-degree murder from being used in a prosecution when the evidence supports them." The Supreme Court also cited to the provisions of W. Va. Code §61-2-1 (1991) which provides that "in an indictment for murder ..., it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, but it shall be sufficient in every such indictment to charge that the defendant did feloniously, willfully, maliciously, deliberately and unlawfully slay, kill and murder the deceased."

The defendant then argued that the prosecution should have been forced to elect between the theories of first-degree murder. Again, the Supreme Court relied upon its precedent that "the State may seek a conviction for felony murder and premeditated murder so long as the trial court instructs the jury on the distinction between the two theories." The trial court's discretionary ruling was not error, therefore.

The defendant then argued that the jury was insufficiently instructed on the lying-in-wait theory of first degree murder. The Supreme Court affirmed that "lying-in-wait" as a "legal concept" has "both mental and physical elements." Specifically, "the mental element is the purpose or intent to kill or inflict bodily harm" and "the physical elements consist of waiting, watching and secrecy or concealment."

The Supreme Court agreed with the defendant that the trial court failed to properly formulate a jury instruction on the lying-in-wait theory. Principally, the trial court instructed that “in order to prove lying in wait, the State is not required to prove that the killer was concealed or that the victim was unaware of his presence” and a “defendant acts in secrecy when he relies on the element of surprise in order to carry out his intent to kill or inflict bodily harm.” The Supreme Court noted that, by applying these principles, “all murders would be lying in wait unless the defendant made an announcement or warned the victim of his or her intent to kill.” The trial court’s instructions seemingly “negate[d] the requirement of waiting, watching and concealment or secrecy.” The error was harmless, however. Why? Because the prosecution was based on several theories including premeditated murder for which sufficient evidence existed (NOTE: and, of course, no election between theories was required.).

The defendant then argued that the trial court should have given his requested voluntary manslaughter instruction. The Supreme Court reiterated that “the absence of malice distinguishes the crime of voluntary manslaughter from the crime of murder.” The defendant presented evidence to establish a diminished capacity due to multiple mental disorders. However, the medical expert never testified that the defendant “lacked the capacity to form malice.” Accordingly, the court found the rejection of an instruction on voluntary manslaughter to be proper.

The defendant also assigned error to the State’s direct examination of a rebuttal witness. The witness testified as to the defendant’s acts of domestic violence against her. The witness identified herself as a “medical doctor, certified in internal medicine, and that she worked at the University of Virginia Hospital.” At that point, the prosecutor referred to her as “Dr. Osborne.” The defendant argued that the background information was irrelevant and the reference to her as “Doctor” was an improper bolstering of the defendant’s credibility. The Supreme Court dealt with this issue summarily, adopting language from a Kentucky case in which a doctor had testified as a lay witness that “background information is relevant to jurors in that it aids in assessing the credibility of fact witnesses and in determining the weight to give their testimony – questions within the unique province of the jury.” Ironically, the defendant was correct that the eliciting of such information did bolster the witness’ credibility, but the Supreme Court found this to be appropriate assistance to the jury.

The defendant also assigned as an error the playing of an entire transcript of his interview by a psychiatrist. The tape was partially relevant to impeach the defendant on statements he made while testifying on his behalf.

The Supreme Court did acknowledge its concern that the entire interview was played. However, the transcript was not designated as part of the record and as it was the defendant’s “burden of demonstrating that substantial rights were affected by the [alleged] error.” By failing to include a recording or transcript that could be reviewed, the defendant did not carry his burden and the Supreme Court found “no merit to this issue.”

The defendant's next assignment of error concerned the extent to which inadmissible evidence could be introduced through expert testimony. The testimony of the defendant's expert witness had been restricted. The rules of evidence provide for disclosure of the facts upon which the expert relied, either through direct examination or cross examination, even if the facts are not admissible. The Supreme Court opined that this is not an "unfettered" means, however, for "counsel to introduce inadmissible evidence." Especially, the expert cannot be a "conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony." Instead the facts are admitted, not as substantive evidence, but for the "independent purpose of enabling the jury to scrutinize the expert's reasoning." And, notably, the "trial judge has discretion to limit the admission of such underlying inadmissible data under Rule 403 if it is unduly prejudicial, confusing or misleading." Moreover, the appellate counsel was found to have failed to "set out the specific testimony that was excluded and the reasons why such exclusion was prejudicial." The Supreme Court found no merit in this assignment of error.

The conviction was affirmed.

PLEA AGREEMENT: A HEARING ON THE MOTION TO WITHDRAW A PLEA OF "NO CONTEST" WAS NOT REQUIRED TO BE HELD BECAUSE DEFENDANT'S ANSWERS AT THE PLEA HEARING UNDERMINED THE GROUNDS FOR THE MOTION TO WITHDRAW THE PLEA.

State v. Jason R., 2015WL555465

In the memorandum decision of *State v. Jason R., 2015WL555465*, the defendant argued that he should have been afforded a hearing on his motion to withdraw his no contest plea before he was sentenced.

The unique circumstance in this case was that the defendant had been declared to be incompetent to stand trial. However, his competency was later found to be restored after treatment at a psychiatric facility. Ironically, the trial court found the defendant's competency was clear from the defendant's letters to the trial court which "outlined the court process and the nature and history of the proceedings." Counsel should copy this part of the opinion to show to a client who insists on writing to a judge.

The defendant then entered his plea of no contest to two counts of third-degree sexual assault and one count of first-degree sexual abuse. Before sentencing, the defendant again took it upon himself to send a letter to the judge in which he requested to withdraw the plea because he "was not in the right state of mind." In the course of the subsequent plea colloquy, however, the defendant denied any mental illness, which was bolstered by the psychiatrist's competency report. The defendant was sentenced and then the motion to withdraw his plea was denied.

The Supreme Court opined, “notwithstanding that a defendant is to be given a more liberal consideration in seeking leave to withdraw a plea before sentencing, it remains clear that a defendant has no absolute right to withdraw a guilty plea before sentencing.”

The issue was, however, whether a hearing should have been held on the motion to withdraw the plea. The Supreme Court found no abuse in the decision to deny the motion without a hearing but, in great part, referred to the plea colloquy and the defendant’s answers to the trial court during sentencing to find that no reason had been proffered to support withdrawing the plea. In other words, the defendant wanted to avoid sentencing, but the defendant had to go through sentencing and answering the questions because no hearing on his motion to withdraw the plea had yet been held, which then warranted the denial of a hearing upon his motion because he had answered the questions during his sentencing.

SENTENCE: A DETAINER FOR CHARGES FOR WHICH NO BAIL HAD BEEN SET DID NOT GET DEFENDANT CREDIT FOR TIME SERVED DURING THIS PERIOD BECAUSE EVEN IF BAIL HAD BEEN SET, DEFENDANT WOULD STILL NOT HAVE BEEN RELEASED BECAUSE HE REMAINED INCARCERATED ON UNRELATED CHARGES.

State v. Campbell, 2015WL555574

In the memorandum decision of *State v. Campbell, 2015WL555574*, the defendant was indicted on petit larceny charges but was already incarcerated for parole violations arising out of previous criminal matters. A detainer letter was sent to the division of corrections regarding the new charges. At an arraignment on the petit larceny charges, the defendant requested bail which was deferred until the defendant’s release on the previous charges. One month later a motion to set bail was filed. One month later, a hearing was held at which bail was again deferred until the defendant was released on the previous charges or until the parties could agree on an amount. One month later, a scheduling conference was held at which bail was again discussed. Two months later, an agreed order was entered establishing the terms and conditions of a bail bond. Two weeks later, the defendant discharged his sentence for his parole violations and he was placed on bond supervision.

Subsequently, the defendant’s bond was revoked. Eventually, a plea agreement was made.

A dispute arose about the credit for time served. The probation officer calculated the time from the date when he was incarcerated for violating the bond conditions. The defendant wanted credit from the time of the indictment when he had moved for, and was denied, a bond. The defendant insisted that because he had no bail, he could not have been released from his current incarceration and thus the time served related to his current charges. However, no evidence was proffered that suggested that he had been held beyond any date due to the absence of bail.

The defendant was sentenced consistently with the probation officer’s calculation.

The Supreme Court found no merit in the defendant's assertion that he had been improperly denied bail. Because the defendant was being held on other charges, bail, even if set, would not have resulted in the defendant's release. Technically, the statute requires that bail be set when arrested, but the defendant's issue was "moot" because he could not have been released on bail in any event. The Supreme Court emphasized that "[m]oot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property, are not properly cognizable by a court."

With respect to the issue of the proper credit for time served, the defendant again tried to argue that because bail had not been set, he could not be released on the previous charges due to the detainer and, therefore, he should be considered to have been held on the current charges from the time of indictment. The Supreme Court was unyielding and found that the defendant "is not entitled to have time served credit applied to his current sentence for time spent incarcerated on unrelated charges." And, again, it was noted that the defendant had no evidence that he would have been released earlier on the previous charges even if he had been given bail earlier on the current charges.

The sentencing order was affirmed.

PROCEDURE: PRETRIAL DEFECTS WERE WAIVED WHEN DEFENDANT KNOWINGLY AND WILLINGLY ENTERED A PLEA OF GUILTY.

APPEAL: AN APPEAL ORDINARILY DOES NOT LIE IN A CRIMINAL CASE FROM A JUDGMENT OF CONVICTION RENDERED UPON A PLEA OF GUILTY.

State v. Harris, 2015WL5513491

In the memorandum decision of *State v. Harris, 2015WL5513491*, the defendant's eighteen month old child was found unshod and "wandering in the street." The defendant later claimed to be looking for the child for over one-half hour, but had not bothered to call the police. The mother was charged with the crime of child neglect creating risk of injury and, concurrently, an abuse and neglect proceeding was instituted.

A pretrial diversion agreement was made, requiring that the criminal charges be held in abeyance for twelve months. A standard condition was that the defendant would not violate state, federal or local law. If all conditions were satisfied at the end of a year, the charges would be dismissed.

However, the defendant made an overt threat to the presiding judge, stating that "if ... [the judge] thinks he is going to terminate my rights as a parent he's got another thing coming. I'm just going on a shooting spree and kill everyone involved. If my rights ain't terminated I'm going to sue, sue, sue the pants off the department, ... [the judge], and the [S]tate and I will never have to work again." It is not stated to whom the threats were relayed, but, when charged with

intimidating or harassing a public official, the judge withdrew, the defense counsel withdrew, and the pretrial diversion agreement was revoked without a hearing.

The defendant was indicted on the charge of felony child neglect, and the threats against a public official were bound over to a grand jury. The defendant's subsequent motion to enforce the pretrial diversion agreement was denied.

The defendant then entered into a plea agreement in which she pled guilty to the misdemeanor offense of contributing to the neglect of a minor and she entered a *Kennedy* plea to the misdemeanor offense of intimidation or harassment of a public official.

The defendant was sentenced to consecutive sentences of one year for each offense. In part, the sentence was imposed based upon the court's judicial notice of matters and reports in the pending abuse and neglect actions.

The defendant challenged the sentence on the basis that the pretrial diversion agreement should not have been revoked and the evidence in the child abuse and neglect proceedings should not have been considered.

What was the Supreme Court's reaction to these issues? The matters were, at most, pretrial defects which were waived when she knowingly and voluntarily entered her plea of guilty. Specifically, "[a]n appeal ordinarily does not lie in a criminal case from a judgment of conviction rendered upon a plea of guilty." The actual sentences were found to be within statutory limits and were based upon permissible factors including a prior criminal record, an ongoing history of abuse of controlled substances, and failure to enroll in substance abuse treatment. The sentences were affirmed.

RULE 404(b): BECAUSE WITNESS WAS CALLED BY DEFENSE COUNSEL WHO DID NOT OBJECT TO CROSS-EXAMINATION OF WITNESS ON PRIOR ACTS, NO RULE 404(b) VIOLATION OCCURRED.

PROMPT PRESENTMENT: CONFESSION WAS NOT INVOLUNTARY DUE TO PERIOD OF TIME SPENT AT POLICE STATION BECAUSE PURPOSE WAS INVESTIGATORY AND DEFENDANT WAS NOT UNDER ARREST.

PROCEDURE: BECAUSE DEFENSE COUNSEL HAD MADE NO REQUEST FOR TRIAL COURT TO SEE IF JURY HAD BEEN IMPROPERLY INFLUENCED BY THE PURPLE RIBBONS WORN BY THE VICTIM'S FAMILY, THE PURPORTED ERROR WAS WAIVED.

State v. Smith, 2015WL5514010

In the memorandum decision of *State v. Smith, 2015WL5514010*, the defendant's appeal of his second degree murder conviction was considered. The defendant described the events underlying the charges as follows: "[H]e had been sitting with his wife in their home, with his gun at his side.

[His] wife was bothered by the presence of his gun and made complaints to him regarding the gun. In response to his wife's complaints, [he]... picked up the gun, pulled the hammer back, and handed the gun to his wife (with the barrel pointed towards her with his finger on the trigger). The gun ... discharged as ... [he] was handing it to his wife." Based in part on the defendant's "calm" demeanor and his failure to "show any worry or concern about his wife," the investigating officers decided to arrest him after his statement was taken and charge him with first degree murder.

The defendant was convicted by the jury of second degree murder. The conviction was based, in the defendant's contention, on twenty-nine statements by seven different witnesses regarding his prior bad acts. This included testimony by the wife's "boyfriend" who relayed several incidents told to him by the wife.

The record recites that, in fact, six witnesses testified on behalf of the prosecution regarding the defendant's prior bad acts and, after each witness' testimony, a limiting instruction was read. The defendant then called his wife's boyfriend who then recounted upon the State's cross-examination that the wife was afraid of the defendant.

The Supreme Court found that the trial court complied with the requirements for permitting Rule 404(b) witnesses, including holding an *in camera* hearing and offering a limiting instruction.

And, of course, the testimony given by the wife's boyfriend did not support a reversal since it was the defense counsel who called the witness and who did not object during the State's cross-examination of the witness.

The defendant also complained that he had not been "promptly presented" to a magistrate. The defendant was arrested at 11:30 p.m. and his waiver of rights occurred at 1:53 a.m. without his presentment to a magistrate. In the defendant's opinion, the delay was obviously for the purpose of obtaining a statement or confession.

The Supreme Court took note, however, that the testimony was that petitioner was not under arrest until after he was taken to the police station and he had given a statement. Any delay after the confession was given was not to be considered for the purpose of determining whether the confession itself was involuntary due to the failure of a prompt presentment. In the Supreme Court's opinion, the trip to the police station was seen as investigatory and not for the "sole" purpose of obtaining a confession and, therefore, did not make the statement involuntary.

Another issue was whether it was error to allow the victim's family to wear purple ribbons during the trial. The defense counsel had not advised the trial court about the ribbons until the fourth day of trial and made no request that the trial court inquire whether the jury had been influenced by the ribbons, whether a mistrial should be declared, or whether the wearers of the ribbon should be admonished. Nonetheless, the trial court, outside the presence of the jury, ordered that the ribbons be removed. The assignment of error was deemed to be waived under these circumstances.

The conviction was affirmed.

SENTENCE: GOOD TIME CREDIT IS TO BE APPLIED AGAINST THE TOTAL YEARS OF THE MINIMUM TERMS FOR CONSECUTIVE SENTENCES AND IS NOT TO BE CREDITED AGAINST EACH CONCURRENT SENTENCE.

State v. Rattliff, 2015WL511915

In the memorandum decision of *State v. Rattliff, 2015WL511915*, the issue was the defendant's motion to correct his sentence. The defendant pled guilty to the offenses of forgery, second degree robbery, and robbery. The sentence for the offense of forgery was to run consecutively to the robbery sentences. At the hearing, the court sentenced the defendant in accordance with the plea agreement, but gave 448 days of credit for time served against the concurrent sentences on the robbery charges. No credit was given on the sentence for the forgery conviction. Defendant claimed that this was error and in violation of the Double Jeopardy and Equal Protection Clauses which required "that time spent in jail before conviction shall be credited against all terms of incarceration to a correctional facility imposed in a criminal case as a punishment upon conviction when the underlying offense is bailable."

The Supreme Court reiterated, first, that the "granting of presentence credit is, in fact, mandatory" and, second, in calculating a defendant's parole eligibility date, "credit for time served by the defendant prior to being sentenced should be applied to the aggregated minimum term of all the consecutive sentences combined."

Accordingly, the Supreme Court found that the circuit court erred by crediting the time to each of the concurrent sentences rather than to the aggregated minimum of the consecutive sentences. However, the minimum term for the robbery sentence was ten years and, therefore, the credit was properly exhausted just on the robbery sentence and, therefore, the defendant was not improperly impacted by the refusal to credit time against the minimum term for the consecutive forgery sentence.

The sentencing order was affirmed.

EVIDENCE: A NEW TRIAL WILL NOT BE GRANTED ON GROUNDS OF "NEWLY DISCOVERED EVIDENCE" CONSISTING OF A WITNESS' TESTIMONY ABOUT DEFENDANT'S BEARD WHEN DEFENDANT KNEW HE HAD THIS ENCOUNTER BUT DID NOT DISCLOSE IT UNTIL AFTER THE TRIAL, THEREBY ESTABLISHING HIS LACK OF DILIGENCE IN SECURING EVIDENCE.

Settle v. Ballard, 2015WL5086766

In the memorandum decision of *Settle v. Ballard, 2015WL5086766*, the denial of a petition for post-conviction habeas corpus relief was reviewed. The facts involved the sexual assault of a

victim, who described her assailant as “shaggy, brown, dirty hair ... and closely shaven face” and as wearing a “bright green t-shirt and blue jeans.” After her statement had been taken, the victim was brought to a McDonalds to identify a person who was wearing clothes consistent with her description. The victim did not identify the assailant as her attacker because he was older and was not clean shaven.

Eleven days after the assault, the victim believed she saw her assailant boarding a bus. She reported the sighting to 911. The bus was stopped and a suspect was detained. When brought to the scene, the victim positively identified the petitioner. A bite mark was noted on the petitioner’s right calf consistent with the defense of the victim by her dog during the assault.

The petitioner moved to suppress the identification by the victim when she was brought to the scene of the stopped bus, because it was overly suggestive in that only one person was detained. However, the circuit court ruled that the identification had been made when the petitioner boarded the bus, not later after the stop.

At trial, the petitioner defended the case on the basis that, at the time of the attack, he had a mustache, beard, and long hair. He was not clean shaven until ten days after the attack when he needed to be more presentable for an unrelated domestic relations matter.

Petitioner was convicted and sentenced as a recidivist.

The most compelling point on the appeal was that a witness was identified who lived in the victim’s trailer park and who would testify that, after the attack, the petitioner asked to use her phone. The significance of the evidence is that this witness would state that petitioner was bearded, not clean shaven at the time.

The Supreme Court refused to consider this newly discovered evidence because the petitioner knew, if true, that he had this encounter, yet he failed to share it with his trial counsel or his trial counsel’s investigator. Accordingly, “petitioner’s failure to timely impart the information regarding the use of a neighbor’s ... phone shows the petitioner was not diligent in ascertaining and securing his evidence,” which is a requirement before a new trial will be granted on the ground of newly-discovered evidence.

The other problem for the petitioner is that he could not explain away the dog bite. He tried to pin it on another pooch, but the owners refused to corroborate the story.

The petition was deemed to be properly denied.

MISTRIAL: IMPROPER RULE 404(b) EVIDENCE ABOUT WITNESS OWING MONEY TO DEFENDANT CHARGED WITH DEALING DRUGS DID NOT WARRANT A NEW TRIAL DUE TO CURATIVE INSTRUCTION AND DUE TO ABSENCE OF ANY STATEMENT ABOUT WHY MONEY WAS OWED.

***Sate v. Ford*, 2015WL5125828**

In the memorandum decision of *Sate v. Ford*, 2015WL5125828, a confidential informant testified regarding her purchase of heroin from the defendant. The heroin cost \$120, but the confidential informant gave the defendant the entire \$150 of the pre-marked currency. When asked why, the confidential informant replied that it was to pay a debt “from, I don’t know, a previous time.” Defense counsel objected that this constituted improper Rule 404(b) evidence and the jury was instructed to disregard the statement. A motion for a mistrial was denied. The defendant was convicted.

The Supreme Court noted that the circuit court sustained the defendant’s objection and issued an instruction. Moreover, the testimony did not “explain why she owed petitioner a debt before the circuit court sustained the objection.” The Supreme Court does not postulate what the jury might conclude a “previous time” meant. In the Supreme Court’s opinion, the prejudice, if any, of the statement did not rise to the level of “manifest necessity” required to declare a mistrial.

The sentencing order was affirmed.

RULE 404(b): THE TESTIMONY OF A POLICE OFFICER ABOUT WHY DEFENDANT WAS NOT SEARCHED AFTER A CONTROLLED BUY FOR THE SUPPLIED MONEY, WHICH WAS THAT ANOTHER CONTROLLED BUY WAS PLANNED AND DONE, WAS GIVEN ON REDIRECT EXAMINATION AFTER DEFENSE COUNSEL HAD CRITICIZED THE OFFICER FOR NOT DOING A SEARCH AND THE TESTIMONY WAS, THEREFORE, INVITED ERROR NOT WARRANTING A REVERSAL.

***State v. Nicholas*, 2015WL5125465**

In the memorandum decision of *State v. Nicholas*, 2015WL5125465, a confidential informant was given fifty dollars and a recording device “on her body” to purchase “Percocet 10s” from the defendant. On cross examination, defense counsel soundly criticized the investigating officer for “failing to conduct a search of the petitioner’s residence to determine that he was in possession of the fifty dollar bill the C.I. used to make the controlled buy or to prove that petitioner was involved in the controlled buy.”

On redirect examination, therefore, the trial court permitted the prosecutor to elicit from the investigating office, over defense counsel’s objection, the reason for which no search was made, which was that the police wanted to, and did arrange another subsequent controlled buy from the defendant using the same confidential informant. The defendant presented no evidence and moved for a judgment of acquittal on the basis that no evidence tied the defendant to the controlled buy. The motion was denied and the jury convicted the defendant.

On appeal, the defendant argued that the testimony regarding the subsequent controlled buy violated Rule 404(b).

“Invited error” was the assessment of the Supreme Court. Notably, “an appellant or plaintiff in error will not be permitted to complain of error in the admission of evidence which he offered or elicited, and this is true even of a defendant in a criminal case.”

The conviction was affirmed.

TERRORISM: A TERRORIST ACT OCCURRED WHEN DEFENDANT THREATENED TO BOMB THE TOWN OF SUTTON IN A PHONE CALL TO A JUDGE’S OFFICE DUE TO A JUVENILE CASE AGAINST HER GRANDDAUGHTER PENDING BEFORE THE JUDGE IN THAT STATUTE DOES NOT REQUIRE SPECIFIC INTENT TO COMMIT THE ACT OR A PERCEPTION BY ANYONE THAT THE THREAT WAS REAL.

State v. Randles, 2015WL5125780

In the memorandum decision of *State v. Randles, 2015WL5125780*, the defendant was sentenced to a term of imprisonment of one to three years for threats of terrorist acts, although she received probation. Specifically, the defendant had called a judge’s office regarding her granddaughter’s juvenile case. The message was fairly straightforward: the granddaughter’s case was a “bunch of crap” and she was going to “bomb the town of Sutton, West Virginia.”

The issue on appeal was whether this threat constituted actions that “could have affected the conduct of a branch of government.” Moreover, the threat was argued to be unlikely to result in “serious bodily injury” because the defendant immediately apologized and the person receiving the threat did not “perceive any imminent danger.”

The Supreme Court found that a bombing typically results in serious bodily injury and that the intent of the threat was to have the judge dismiss her granddaughter’s case. Accordingly, the elements of a terrorist act under W. Va. Code §61-6-24 could have been found by the jury. Notably, the Supreme Court found that the statute “does not require petitioner to specifically intend to commit the act or that someone perceive the threat as real.”

The apology was deemed to be irrelevant.

SENTENCE: ADVANCED AGE DOES NOT HAVE TO BE CONSIDERED WHEN IMPOSING A SENTENCE AND RUNNING TERMS CONSECUTIVELY.

State v. Dailey, 2015WL5125788

In the memorandum decision of *State v. Dailey, 2015WL5125788*, the sixty year old defendant was sentenced to three consecutive terms of incarceration of five to twenty-five years, resulting from convictions on three counts of first degree sexual abuse. The defendant argued that the sentence was disproportionate to the criminal acts because, at his age, this was a “life sentence.”

The defendant felt that consideration should be given to the fact that the victims were spared additional trauma by his willingness to plead no contest.

The Supreme Court found that the sentences imposed were within statutory limits and that the decision to run the sentences consecutively was within the judge's discretion. The defendant failed to state any impermissible factors in the judge's decision, so the sentence was affirmed.

DUE PROCESS: AN INQUIRY INTO A DEFENDANT'S FINANCIAL ABILITY TO COMPLY WITH TERMS OF SUPERVISED RELEASE MAY BE APPROPRIATE.

State v. Roger G., 2015WL5125486

In the memorandum decision of *State v. Roger G., 2015WL5125486*, the defendant was charged with several counts of sexual assault against a six year old boy and a nineteen month old girl. The defendant pled guilty to one count. After serving two years of incarceration, the defendant was discharged and placed on supervised release.

The defendant was subject to several petitions to revoke his supervised release and, indeed, served three years for one such violation. The appeal concerned the latest petition to revoke the supervised release, which was granted and resulted in the defendant's incarceration for a period of ten years. Noting that the underlying sentence was one to five years, the appellate counsel argued that the ten year period of incarceration constituted Double Jeopardy and Cruel and Unusual Punishment. The Supreme Court gave these arguments short shrift, relying on its previous opinions. Similarly, the Supreme Court rejected the proportionality argument.

The defendant then argued that his supervised release was improperly revoked for not attending sex offender counseling classes because he was unable to pay for the classes.

The legal issue was skirted, however, because the Supreme Court found that the sentencing court actually did inquire into defendant's "financial ability to comply with the terms of his supervised release" and "ultimately based its decision to revoke...[the] supervised release upon his repeated, willful disregard for those terms, rather than his financial situation." The record was replete with statements by the defendant that he did not need counseling, that he was unemployed despite substantial assistance to find a job, and that the counselor had been waiving the fees for a long period of time.

The point is that the Supreme Court found that "an appropriate inquiry into petitioner's financial ability to comply with the terms of his supervised release" had been made. Accordingly defense counsel may have an argument in appropriate circumstances that a violation of the terms of supervised release was the result of financial issues and not an unwillingness to comply

EVIDENCE: A CONVICTION CAN BE SUSTAINED ON SOLELY CIRCUMSTANTIAL EVIDENCE.

State v. Breckenridge, 2015WL5125498

In the memorandum decision of *State v. Breckenridge, 2015WL5125498*, the incident involved the disappearance of cash and checks from a Kroger store. Through video surveillance and eyewitness testimony, the evidence established the following: (i) defendant was at the Kroger location; (ii) defendant knew the location of the store's drop box; (iii) defendant was seen in a restricted area of the store; and (iv) video showed defendant exiting a back door, examining the door; and reentering the door even though the door had no outside handle. Surveillance video showed that during the night a masked man entered the rear door without any hesitation, carrying a hammer that was used to break open the drop box. Twelve minutes after the crime was committed the defendant was stopped for speeding seven miles from the location.

The defendant moved for a judgment of acquittal based on this evidence, challenging the evidence as purely circumstantial. The Supreme Court found that the jury was properly instructed on the burden of proof and had the opportunity to determine the credibility of the defendant. Accordingly, the conviction on admittedly purely circumstantial evidence would not be overturned.

PROCEDURE: THE DENIAL OF A MOTION TO RECONSIDER A SENTENCE WITHOUT DETAILED FINDINGS OF FACT AND CONCLUSIONS OF LAW DOES NOT MEAN THAT COURT FAILED TO MEANINGFULLY REVIEW THE MOTION.

State v. Johns, 2015WL5125521

In the memorandum decision of *State v. Johns, 2015WL5125521*, the Supreme Court considered whether the defendant's motion for reconsideration of a sentence was properly denied. The defendant pled guilty to one count of first-degree robbery for which he was sentenced to a term of incarceration of forty years. Four motions for reconsideration of the sentence were denied. The defendant alleged that the court failed to meaningfully review the motions. The defendant also alleged the sentencing judge should have recused himself or herself due to a relationship with the County Sheriff and the victim.

The Supreme Court found that the simple denial of the motions without detailed findings of fact and conclusions of law did not mean that the circuit court failed to meaningfully review the motion. The Supreme Court pointed to the fact that hearings were held and rulings were issued, which "the court finds these orders [to be] sufficient." Moreover, the mere fact that the judge ruled against the defendant was not grounds to allege bias on the part of the judge.

SENTENCE: GIVING DEFENDANT PROBATION WOULD HAVE SEVERELY DEPRECIATED THE SERIOUSNESS OF PETITIONER'S CONVICTION ON DOMESTIC VIOLENCE CHARGES.

State v. Jarvis, 2015WL5125792

In the memorandum decision of *State v. Jarvis*, 2015WL5125792, the defendant pled guilty to a misdemeanor count of brandishing a weapon and a misdemeanor count of domestic battery, for which he was sentenced to a cumulative term of two years. The domestic count arose out of the defendant's drunken argument with his girlfriend that ended with the girlfriend being thrown into a door and against a dryer. The brandishing occurred when law enforcement arrived and the defendant informed them not to enter because he had a loaded rifle. An hour later, the defendant surrendered, and the loaded rifle was found inside the house.

The primary issue on appeal seemed to be the defendant's contention that the judge had sentenced him so harshly because he had been in contact with the victim in violation of his bond conditions. The defendant generally posited that consenting adults should not be so penalized. Moreover, this fact had not been set forth in the presentencing report and no hearing had been held to determine if it was, in fact, true. The contact had been mentioned in a conference between the circuit court and the probation officer at the sentencing.

The Supreme Court rejected the argument stating that, from a review of the record, this improper contact with the victim was not a factor upon which the sentencing court had relied. Instead the sentencing court had made reference to a serious substance abuse problem; untreated anger management issues; denial of responsibility for the crimes; and the potential threat, overall, to the public. This "litany of reasons" established the reasons for the sentence and the sentencing court's belief that "giving petitioner probation or other alternative sentencing would severely depreciate the seriousness of the offenses for which petitioner was convicted."

EVIDENCE: SEVERAL WITNESSES REFERRED TO MATERIAL AS A METH LAB WITHOUT BEING QUALIFIED AS EXPERTS, BUT THE CO-DEFENDANT AND AN EXPERT HAD SO IDENTIFIED THE MATERIAL AND THEREFORE THE WITNESSES WERE STATING FACTS, NOT OPINIONS.

***State v. Coriana C.*, 2015WL5125798**

In the memorandum decision of *State v. Coriana C.*, 2015WL5125798, the defendant had been convicted of two counts of gross child neglect arising out of the manufacturing of methamphetamine in the house where the defendant resided with her two and three year old children. The resulting sentence was two consecutive terms of incarceration of not less than one nor more than five years.

The defendant appealed on the basis that the co-defendant testified that only he and another accomplice knew about the manufacturing of the methamphetamine, which exonerated the defendant. The defendant did not believe sufficient evidence existed to convict her.

The Supreme Court disagreed with the defendant, relying on the circumstantial evidence in the case. The co-defendant testified to the "shake and bake" method of manufacturing methamphetamine, which was supported by material found in the defendant's home. Law

enforcement testified about drug residue and drug paraphernalia found in the home. Also, the children's clothing was found in the same room as a lab. And the co-defendant who purportedly exonerated the defendant gave a statement on the night of the arrests that "everybody ... pretty much knew." As the co-defendant's testimony was impeached by his previous statement, the jury could find a lack of credibility regarding the statement that the defendant did not know about the operations. Essentially, the circumstantial evidence was sufficient to convict the defendant.

The Supreme Court further rejected the argument that the trial court had permitted improper opinion testimony during the trial. Specifically, several witnesses referred to material as "meth labs" during the trial without any expertise on the subject having been established. The Supreme Court stated that the co-defendant admitted that the material constituted methamphetamine labs, which itself was bolstered by actual expert testimony. Accordingly, any other person's reference to a methamphetamine lab was considered to be merely a statement of truth and not an opinion.

The conviction was affirmed.

SENTENCE: THE FINDING THAT THE DEFENDANT WAS A SEXUALLY VIOLENT PREDATOR WAS ONLY REQUIRED TO IMPOSE SUPERVISED RELEASE FOR LIFE, NOT FOR ANY LESSER PERIOD.

EVIDENCE: COHABITATION IS NOT REQUIRED FOR A PERSON TO BE A "CUSTODIAN."

Eric F. v. Plumley, 2015WL3952668

In the memorandum decision of *Eric F. v. Plumley, 2015WL3952668*, the petitioner sought relief in habeas corpus from the sentencing on his binding plea. The petitioner pled guilty to two counts of sexual abuse by a parent, guardian, custodian or other person of trust for which he was to be sentenced to concurrent terms of ten to twenty years in prison and to supervised release for a period of fifty years. The Court accepted the plea and entered a sentence consistent with the agreement.

In his habeas proceeding, the petitioner first argued that he was never the child victims' custodian "because he and their mother did not have a romantic relationship." The Supreme Court stated that the "issue of cohabitation with the victims' mother is not determinative of whether petitioner was their custodian." Instead, the mere fact that the children lived in his home for a period of time made him a custodian.

The petitioner then argued that the sentencing court had to find that he was a sexually violent predator in order to sentence him to a period of supervised release. The Supreme Court ruled that the finding is only required when "supervised release is imposed for a life term." As the defendant's period of supervision was fifty years, the absence of such a finding was of no significance.

The petitioner then complained that he was not aware of the “number of strict conditions imposed with supervised release.” The Supreme Court found that the plea agreement informed him that he would not be allowed near children, that he would have to live in accordance with conditions of probation, and that additional conditions would be imposed. Accordingly, the Supreme Court determined that “petitioner understood the type and breadth of post-confinement supervision to which he was consenting when he signed the plea agreement.”

The denial of the habeas corpus petition was affirmed.

DOUBLE JEOPARDY: PLEADING GUILTY TO TWO COUNTS OF POSSESSION OF CONTROLLED SUBSTANCE FROM SAME TRANSACTION MAY HAVE CONSTITUTED A DOUBLE JEOPARDY VIOLATION, BUT THIS WAS WAIVED UPON ENTRY OF THE PLEA AGREEMENT.

State v. Ferrell, 2015WL3875748

In the memorandum decision of *State v. Ferrell, 2015WL3875748*, the defendant challenged on constitutional grounds the imposition of consecutive maximum sentences for his conviction of two misdemeanor charges of possession of a controlled substance.

The defendant requested the Supreme Court to remand the matter for the imposition of concurrent sentences. The defendant argued that the consecutive sentences were not “proportioned to the character and degree of the” offenses as required by Article III, Section 5 of the West Virginia Constitution. The primary point made by the defendant is that the sentences were for the same offense, i.e., possession of a controlled substance, and the only difference was the drugs, i.e., methamphetamine and hydrocodone.

In actuality, the defendant raised a Double Jeopardy issue in that he should have been subject to only one count pursuant to the Supreme Court precedent. However, the defendant waived the right to appeal his conviction on Double Jeopardy grounds when he entered into the plea agreement. Accordingly, the defendant was cleverly trying to reach the same result by arguing that he should not be sentenced, effectively, for two offenses through consecutive terms under the proportionality principle. If he could not have been convicted at trial for two offenses, then being sentenced twice is contrary to the character and degree of the offenses and violates the proportionality clause in the State’s constitution. The Supreme Court refused the gambit.

INSTRUCTIONS: DEFENDANT’S SELF-SERVING LETTER TO VICTIM OF HIS ABUSE WAS NOT COMPETENT EVIDENCE TO SUPPORT GIVING AN INSTRUCTION ON SELF-DEFENSE.

RULE 404(b): DEFENDANT’S REFERENCE IN A LETTER TO HIS VICTIM ABOUT HIS PRIOR BAD ACTS NEED NOT BE REDACTED BECAUSE IT WAS INTRINSIC TO THE SUBJECT OF THE LETTER CONTAINING ADMISSIONS BY THE DEFENDANT TO THE CHARGED CONDUCT.

PROCEDURE: MANAGING THE QUESTIONS ON CROSS-EXAMINATION OF A CHILD WITNESS WAS PROPER IN ORDER TO PREVENT HARRASSMENT OF WITNESS.

State v. Williams, 2015WL5684220

In the memorandum decision of *State v. Williams, 2015WL5684220*, the defendant was appealing from his jury trial conviction for two counts of domestic battery. The defendant was living with the two victims, a mother and her child. After some drinking, an altercation arose and the mother testified the defendant smacked her and, when the thirteen year old daughter intervened, the defendant grabbed the daughter by the hair. The defendant had admitted to some of the alleged conduct in a letter to the mother, but also indicated that the mother had been the aggressor.

On appeal, the defendant complained that the trial court should have given a self-defense instruction at his request. The Supreme Court noted that it was within the trial court's discretion to determine whether the instruction was justified by the facts. As the only evidence supporting self-defense was the defendant's own letter written after his arrest while sitting in jail in which he alleges the mother was the aggressor, the trial court properly determined that no competent evidence had been offered in support of the instruction. The Supreme Court wryly noted "allowing defendants to draft their own self-serving evidence after the fact of the crime is clearly bad policy and should not be accorded weight."

The defendant further complained that the letter he had written to the victim should have been redacted to prevent disclosure of Rule 404(b) evidence. Apparently, the petitioner hinted at other bad acts. The Supreme Court found that the admission of the letter in its entirety was proper. First, the letter was admitted into evidence because it contained the defendant's admissions and not because it proved the defendant's bad "character." Moreover, the incidents to which reference was made were considered to be part of the story set forth in the letter and were intrinsic in nature and should not be suppressed.

The defendant further complained that his counsel's cross-examination of the child victim was improperly interrupted by the trial court. The child had begun to cry and the trial court halted the examination and asked that all other questions be listed. Eventually, the trial court permitted all the questions to be asked. The defendant's apparent assertion was that "a full and fair opportunity to fully ... cross-examine" extended to causing a complete emotional breakdown of the child on the stand. The Supreme Court held that the limitation was designed to prevent harassment of the victim and the management of the questioning in this fashion was not an abuse of the court's general discretion regarding the extent of the cross-examination.

Finally, the defendant complained about the running of the sentences consecutively. The defendant noted that the injuries to the mother and daughter were not serious and he had been found to not be guilty of child abuse. The Supreme Court gave no consideration to this issue noting, simply, that it was statutorily permissible to run the sentences consecutively.

The sentencing order was affirmed.

PLEA AGREEMENT: A PLEA HEARING IS NOT TO BE A FORMAL ADJUDICATION OF GUILT BEYOND A REASONABLE DOUBT, BUT IS TO ASCERTAIN THAT THE PLEA IS VOLUNTARILY AND INTELLIGENTLY MADE.

SENTENCE: PROBATION IS NOT A RIGHT, AS IT IS, INSTEAD, A MATTER OF GRACE.

State v. Wright, 2015WL3875809

In the memorandum decision of *State v. Wright, 2015WL3875809*, the defendant was challenging the sentence entered after his binding plea agreement. The defendant pled guilty to eight counts of sexual abuse in the first degree. The binding plea agreement provided that the circuit court was to run petitioner's sentences consecutively on no more than five of the eight counts.

The presentence report described the defendant as a 68 year old male with a fourth grade education and a prior criminal history of driving on a suspended license, committing a breach the peace, and committing assault and battery. The victim was eleven years of age and was a member of the defendant's extended family. A diagnostic report concluded that the defendant possessed a low to moderate risk for sexual violence, had a low probability of recidivism, and was a good candidate for probation.

The sentencing court denied the motions for an alternative sentence and probation. The defendant was sentenced to a term of five to twenty-five years on each count, with four to run consecutively. The appeal followed.

The Supreme Court found that the defendant entered into the agreement knowingly and voluntarily. Specifically, "the circuit court was cognizant of the petitioner's limited educational background, and took great care in ensuring that petitioner understood the charges against him, the plea agreement, and his rights."

The defendant argued that he could not be guilty of the offenses because the touching of the victim was not for the purpose of sexual gratification, but, instead, was to teach the victim "what was going to happen and, you know, how it would be when she got older." Restated, the defendant claimed that he was not sexually gratified by the touching that occurred (and thus the caption for this summary).

The Supreme Court noted that the circuit court's role in a plea hearing is not to make a "formal adjudication of guilt beyond a reasonable doubt on the charge." Instead, the "court's role ... is to ascertain that the plea is voluntarily and intelligently made and that the defendant understands its consequences and the constitutional rights he is waiving." Moreover, "a guilty plea waives all antecedent constitutional and statutory violations save those with jurisdictional consequences." Because the record showed that the circuit court had ascertained the defendants understanding of

the charges against him and what would have to be proved to convict him, the court fulfilled its role.

The defendant further noted that he received, effectively, a life sentence considering his age. The Supreme Court relied upon its oft quoted precedent and found that “petitioner’s sentences are not disproportionate to the multiple instances of his admitted victimization of an eleven year old child.”

Obviously, therefore, the Supreme Court found no error in the circuit court’s refusal to give probation to the defendant, which is considered to be a “matter of grace.”

The sentencing order was affirmed.

JURY: DEFENSE COUNSEL SHOULD HAVE DISCOVERED A JUROR’S CONNECTION TO THE CLERK AND AN INVESTIGATING OFFICER DURING VOIR DIRE AND NOT AFTER THE TRIAL.

EVIDENCE: PICTURES OF OTHER MINOR VICTIMS IN SEXUAL SITUATIONS WERE PERMITTED TO BE INTRODUCED TO SHOW LUSTFUL DISPOSITION AND ABSENCE OF MISTAKE.

State v. Spaulding, 2015WL3875802

In the memorandum decision of *State v. Spaulding, 2015WL3875802*, the criminal charges were first degree sexual assault and possession of material depicting minors engaged in sexually explicit conduct. The investigation into the charges ensued when a “local pawn shop received a computer ... containing a substantial amount of material depicting minors engaged in sexually explicit conduct.” The investigation led to the defendant, to whom a substantial amount of the material on the computer had been transferred. The defendant’s computer was then seized under a search warrant which resulted in the discovery of numerous files depicting child pornography.

In resulting interviews with and without counsel, the defendant admitted that he knew “kiddie porn” was on his computer, but he denied knowing how the material came to be on his computer.

In the eventual trial, the prosecutor described the evidence as “bizarre.” The allegation was that the defendant’s source for the pornographic material also had access to two children, aged three and fourteen years, who eventually were proffered to the defendant for his sexual gratification.

In a Rule 404(b) ruling, the trial court was going to permit evidence of fourteen pictures on the computer of other victims in order to prove lustful disposition and absence of mistake. The prosecutor was not to mention that thousands of such images existed. After defense counsel’s opening statement in which it was claimed that the defendant was set up by the source of the material, the trial court modified its previous ruling to permit the prosecutor to refer to the number of images on the computer.

Based principally on the testimony of the person who provided the material and who had pled guilty, the defendant was convicted on three counts of sexual assault in the first degree and fifty counts of possession of material depicting minors engaged in sexually explicit conduct. The testimony was, frankly, disturbing and will not be repeated in this summary.

One assignment of error was the purported failure to authenticate text messages, which included pornographic images, sent to the defendant's phone from his alleged source. The Supreme Court found the evidence was sufficient to establish that the text messages were what they purported to be. The source confirmed that she texted the defendant. The investigating officer tied the phone number from the source's phone to a phone owned by the defendant. And the defendant confirmed ownership of the phone in his statement. Thus, authentication was not in question.

Another assignment of error concerned the use of the additional photographs found on the defendant's computer. The defense counsel had stated in the opening that the source had placed the images on the computer. The substantial number of actual images found, however, exceeded that found on the source's computer, suggesting that the defendant had placed his own material on the computer. The Supreme Court found any prejudice outweighed by this probative value.

Another assignment of error was that the defendant's second statement should have been played to the jury in addition to his first statement. The defendant tried to characterize the statement as part of his overall statement and therefore the rules of evidence required the entire statement to be played upon his objection. The Supreme Court affirmed that this was a separate statement and was subject to proper objections and exclusion.

Another assignment of error concerned alleged jury impropriety. This revolved around the fact that a juror worked in the circuit clerk's office and the clerk was the mother in law of an investigating officer in the case. The defense counsel failed to discover this connection until after the trial. The Supreme Court laid this issue at defense counsel's feet in that voir dire had not been limited in any fashion and no reason existed for this information not to have been discovered at the commencement of the trial.

Another assignment of error related to the court's refusal to permit the cross-examination of an investigating officer by a notarized, written statement of a victim implicating a person other than the defendant. The Supreme Court ruled, without discussion, that this was properly excluded as hearsay.

Another assignment of error was that defense counsel was prevented from introducing the younger victim's identification of another perpetrator. The defense counsel's problem was that he did not actually try to call any other witness to establish this testimony, claiming, instead, that the court's ruling on the written statement of the other victim made it futile for counsel to try. The Supreme Court characterized this argument as illogical.

Another assignment of error was that the testimony never established, in the defendant's opinion, that the young victim was ever in the control of the other person such that an encounter between

the young victim and the defendant could have been arranged as the source testified. The Court found the following evidence sufficient to establish this fact: (i) the source's testimony; (ii) text messages between the source and defendant consistent with the testimony; and (iii) pornographic images of the youngest victim consistent with the testimony found on the defendant's computer.

The circuit court's orders were affirmed.

EVIDENCE: ARGUMENT ON APPEAL THAT THE PROSECUTOR FAILED TO PUT FORTH EVIDENCE THAT THE 45 YEAR OLD DEFENDANT WAS OVER 18 YEARS OF AGE WAS NOT AN *APPRENDI* ISSUE REQUIRING A JURY FINDING AND THE DEFENDANT'S AGE WAS NOT CONTESTED BY EITHER PARTY AND WAS READILY ESTABLISHED FROM THE CIRCUMSTANCES.

MISTRIAL: A CURATIVE INSTRUCTION GIVEN IMMEDIATELY SUFFICIENTLY CURED WITNESS' BLURTING OUT PREJUDICIAL INFORMATION.

State v. Delbert R., 2015WL3875796

In the memorandum decision of *State v. Delbert R., 2015WL3875796*, the defendant was convicted of sexual abuse by a custodian and sexual assault in the first degree.

A backstory exists, however. The defendant had pled "no contest" to an information charging the defendant with unlawful assault. A three year period of probation was granted, during which the plea was held in abeyance. If he successfully completed the period of probation, the plea would be withdrawn and a plea would be entered, instead, to the misdemeanor offense of battery.

The current charges arose while the defendant was within the probationary period. As a result, the probation was revoked.

The defendant was convicted of the inappropriate touching of a twelve year old female.

The first assignment of error was that no testimony was ever presented that the defendant was over eighteen years of age, which is a necessary element of the sentence imposed for the underlying charge. An *Apprendi* argument was made that because age is an aggravating factor resulting in an enhancement to the sentence, the jury had to determine the issue. The instruction to the jury did not state that the defendant's age had to be over eighteen years. The complicating factor for the defendant is that his birth certificate was entered into evidence to which reference was made by the prosecuting attorney in the closing argument. Moreover, defense counsel had not presented any evidence that the defendant was under the age of eighteen (in fact, he was forty-five). The Supreme Court found that the "omitted age element was uncontested and supported by overwhelming evidence" and that a proper jury instruction would not have changed the jury's verdict.

The defendant further argued that he had been prejudiced by evidence that was not timely disclosed. Essentially, the State filed three supplemental discovery responses less than a month before trial identifying eight additional witnesses. The Supreme Court deemed the issue without merit because all the witnesses and the reason for their testimony were known to the defendant.

The most significant issue was one witness' testimony about another purported victim of the defendant. The witness was the defendant's brother who had contacted the defendant about an allegation by the brother's granddaughter that the defendant had sexually abused her. The Court ruled pretrial that the brother could discuss his contact with the defendant but could not specify the allegation. No sense is made of why the contact was relevant when the reason for the contact was not to be stated. In any event, the brother testified and blurted out the allegation of the improper sexual contact with his granddaughter. An objection was made and the court admonished the brother and instructed the jury to disregard the testimony. On appeal, the defendant argues that the incident was so prejudicial as to require the circuit court to declare a mistrial.

The Supreme Court's terse assessment was: "[the] prohibited testimony was sufficiently cured by the trial court's cautionary instruction, offered immediately upon the offense, and the circuit court did not abuse its discretion in *eschewing the drastic, disfavored declaration of a mistrial.*" [emphasis added]. And, if that was not sufficient enough, the Supreme Court then blamed defense counsel for not moving for a mistrial, stating a "party will not be permitted to remain silent hoping for a satisfactory verdict from the jury, and then complain when he is disappointed therein." The editor would comment, however, that courts often delay ruling on motions for a mistrial until the jury verdict is rendered for the very purpose of seeing if a satisfactory result is obtained.

Finally, the defendant complained about the revocation of his probation on the previous charge. Defendant argued that the evidence was insufficient at the hearing on the revocation to support the revocation. The Supreme Court refuted the claim with the following syllogism: You were not to commit a crime while on probation; we have just affirmed your conviction of a crime; and, ergo, you violated your terms of probation.

JURY: DEFENDANT MUST SHOW THAT THE JURY WAS BIASED BEFORE PREJUDICE CAN BE SHOWN FOR FAILURE TO STRIKE A JUROR FOR CAUSE.

State v. Lewis, 2015WL5125476

Petitioner Lewis was convicted of conspiracy to commit a felony, kidnapping, and first-degree robbery. During jury selection, one prospective juror revealed that he was the brother-in-law of the prosecuting attorney prosecuting Lewis' case. Another prospective juror was a CPS worker in a neighboring county. Both jurors denied bias or prejudice, and the trial court denied Lewis'

motion to strike for cause. Lewis subsequently used peremptory strikes for both prospective jurors, and after Ms. Lewis' conviction, she appealed the trial court's refusal to strike them for cause.

The Supreme Court affirmed the trial court's ruling because Ms. Lewis must show that she had a biased jury before it will find prejudice from a trial court's refusal to strike for cause. Lewis invited the Court to discard this rule, but the Court refused to do so, reasoning that "the overwhelming majority of states require a showing of prejudice with regard to prospective jurors who are not ultimately empaneled because, when a criminal defendant has been tried before an unbiased jury, he or she has received exactly what the constitution guarantees."

DUE PROCESS: STATE CAN IMPOSE LICENSING REQUIREMENTS UPON DRIVING A VEHICLE IN ORDER TO PROTECT CITIZENS GENERALLY WHEN DRIVING ON THE STATE'S HIGHWAYS.

City of Elkins v. Black, 2015WL5125468

Petitioner Black was convicted in Elkins Municipal Court for driving on a revoked license. Black appealed to the Circuit Court of Randolph County and had a *de novo* trial. Black "argued that he had various constitutional rights that permitted him to drive his vehicle on public highways as an American citizen without a state-issued license." Despite his patriotic appeal, the circuit court affirmed his conviction. Black again appealed his conviction to the Supreme Court, arguing that W.Va. Code §17B-4-3 "violates his constitutional rights to travel and to pursue life, liberty, and happiness." Black, citing a case from 1915, further argued "that the West Virginia Legislature lacks the authority to impose licensing requirements on citizens." However, the Supreme Court trumped Black's precedent with a 1928 case holding that it is necessary for highways to "be governed by certain laws, so that the rights of each citizen may be certain of protection."

PROCEDURE: WITHOUT ACTUAL PREJUDICE SHOWN, TWELVE YEAR PRE-INDICTMENT DELAY WILL NOT RESULT IN A DISMISSAL OF THE CHARGES.

EVIDENCE: ISSUE OF RELIABILITY OF THE VICTIM'S IN-COURT IDENTIFICATION OF DEFENDANT DUE TO THE PASSAGE OF TIME WAS FOR THE JURY TO DETERMINE.

State v. Howard C., 2015WL5125834

Petitioner Howard C. was indicted in January 2012 for an act of sexual abuse alleged to have been committed in July 1999. The circuit court denied Howard's motion to dismiss the indictment for pre-indictment delay. Howard appealed, arguing that pre-indictment delay in excess of twelve (12) years is inescapably prejudicial. The Supreme Court disagreed, finding that Howard "can only speculate that now-unavailable church attendance records could indicate that the victim was not present during the time of the abuse. Based on our review of the record, there is simply nothing that would suggest petitioner suffered actual prejudice."

Howard also appealed the trial court's ruling that allowed the victim to identify him during her testimony. Howard argued that the victim did not recognize him before she saw him at the courthouse the day of trial. However, the Supreme Court affirmed the trial court's ruling, stating that "the victim's in-court identification was properly a question for the jury, who were competent enough to discern the truth following extensive cross-examination of the victim by petitioner's defense counsel." Despite the lapse of time between the incident and indictment, the victim "immediately recognized petitioner upon seeing him again." The Court found further that "petitioner was an adult at the time of the abuse and there was likely not a significant change in his core physical traits between the time of abuse and his prosecution."

DOUBLE JEOPARDY: DEFENDANT CAN BE CONVICTED OF FIRST DEGREE SEXUAL ABUSE AND SEXUAL ASSAULT BY A PARENT, GUARDIAN OR CUSTODIAN FOR THE SAME ACT BECAUSE LEGISLATURE CLEARLY MADE THEM SEPARATE AND DISTINCT CRIMES.

State v. Samuel R., 2015WL5125441

Petitioner Samuel R. pleaded guilty to one count of first degree sexual abuse and one count of sexual assault by a parent, guardian, or custodian. Samuel received consecutive sentences. Samuel appealed his sentence, arguing that he was being punished twice for the same act in violation of the prohibition against double jeopardy. The Supreme Court affirmed Samuel's sentence because "the legislature has clearly and unequivocally declared its intention that the sexual abuse statute involving parents, custodians or guardians is a separate and distinct crime from the general sexual offenses statute for purposes of punishment."

JURY: WITHOUT EVIDENCE OF BIAS, INDIVIDUAL *VOIR DIRE* IS NOT JUSTIFIED.

APPEAL: APPEAL ON ISSUES WOULD BE DENIED WHEN BRIEF DID NOT POINT TO ANY PORTION OF THE RECORD AND DID NOT CITE ANY AUTHORITY.

State v. Flora, 2015WL5125880

Petitioner Flora was convicted of two counts of burglary, two counts of conspiring to commit burglary and one count of petit larceny. Flora's victim was the Sheriff of Webster County and his spouse. On appeal, Flora complained that the trial court did not grant his motion to change venue and denied his motion for individual voir dire. However, the appendix record transmitted to the Supreme Court did not include Flora's motion for change of venue, the order denying change of venue, or the transcript of hearing regarding this motion. Because the record did not point to any "portion of the record in his discussion of this issue," and Flora's brief failed "to cite any authority in support of his claims," the Supreme Court declined to address the change of

venue issue. The Supreme Court also found that the record did not show any evidence of juror bias that would justify individual voir dire, and denied this challenge.

HABEAS CORPUS: PAROLEES IN THE STATE PENAL SYSTEM MAY NOT FILE HABEAS PETITIONS.

***Gamble v. Williamson*, 2015WL5331874**

Petitioner Gamble filed a writ of habeas corpus in the Circuit Court of Pocahontas County, alleging that the Board of Parole's revocation of his parole constituted legal error. Gamble was placed back on parole before the circuit court ruled on the merits of Gamble's petition. After Gamble's release, Respondents filed a motion to dismiss the appeal as moot, and the circuit court granted this motion. Gamble appealed to the Supreme Court, arguing that his release on parole did not render his habeas petition moot. The Supreme Court affirmed the circuit court's dismissal, stating that "we settled the question of whether parolees in the state penal system may file habeas petitions by holding that they may not."

PROCEDURE: BOLD ALLEGATIONS OF CONSPIRACIES DO NOT SATISFY THE HEIGHTENED FACT PLEADING REQUIRED FOR INMATE LAWSUITS AGAINST PRISON OFFICIALS.

***Chance v. Chandler*, 2015WL5331443**

Petitioner Chance was transferred from Mount Olive Correctional Center to Northern Correctional Center. In response, Chance sued Cheryl Chandler, the executive assistant to MOCC Warden David Ballard, and Chandler's superiors. Chance alleged that he was transferred in retaliation for his pursuit of criminal charges against Mount Olive officials for various financial improprieties. Chance further alleged that Chandler threatened to have him killed by other inmates at Mount Olive. The Circuit Court dismissed Chance's complaint because the conclusory allegations did not satisfy the heightened fact pleading required for inmate lawsuits against prison officials. The Supreme Court affirmed the dismissal of the complaint.

Chance's "bold allegations of conspiracies do not survive the heightened pleading standard." Court further noted that "prison officials have discretion to transfer prisoners in an effort to maintain a satisfactory operational environment." The motivation for Chance's transfer is irrelevant, and inmates may only successfully sue prison officials when a fundamental right is violated.

PROCEDURE: NO ATTORNEYS' FEES WERE TO BE AWARDED TO REPORTER FOR QUASHING SUBPOENAS ISSUED BY PROSECUTOR FOR REPORTER'S TAX RETURNS IN ABSENCE OF A STATUTORY AUTHORIZATION OR VEXATIOUS OR BAD FAITH CONDUCT BY PROSECUTOR.

Ramezan v. Hough, 2015WL5331810

Gilmer County Prosecuting Attorney Gerald Hough subpoenaed Mr. Ramezan, publisher of The Gilmer Free Press, to appear before a grand jury and disclose the identity of the author of a letter published in the Free Press regarding a confidential juvenile matter. Mr. Ramezan asserted Reporters' Privilege under W.Va. Code §57-3-10 and refused to comply with the subpoena. In response, Mr. Hough subpoenaed Mr. Ramezan's income tax returns to determine whether Mr. Ramezan derived income from his reporting.

In the midst of this flurry of subpoenas, Mr. Ramezan sued Mr. Hough for harassment and asked to be compensated for attorney's fees incurred while defending against the subpoenas. Although the lower court quashed both subpoenas, Mr. Ramezan was not awarded attorney's fees.

Mr. Ramezan appealed the denial of attorney's fees. The Supreme Court held that, in the absence of a contract, attorney's fees may only be awarded if (1) a statute authorizes it, or (2) equity requires it. The Supreme Court affirmed the lower court's denial of attorney's fees because W.Va. Code §57-3-10 does not include a fee-shifting provision and Mr. Hough did not act vexatiously, wantonly, or in bad faith.

EVIDENCE: A LIBERAL THRUST EXISTS FOR THE ADMISSION OF EXPERT TESTIMONY WITH ISSUES OF CREDENTIALS, METHODOLOGY, OR LACK OF AUTHORITY GOING TO WEIGHT AND ADMISSIBILITY OF TESTIMONY.

APPEAL: ABSENT A PROFFER OF THE QUESTIONS THAT COUNSEL WOULD HAVE ASKED, COURT WILL NOT CONSIDER AN ARGUMENT THAT TRIAL COURT PRECLUDED EFFECTIVE CROSS-EXAMINATION.

DOUBLE JEOPARDY: PROOF OF PHYSICAL HELPLESSNESS AND MENTAL INCAPACITY ARE DIFFERENT REQUIREMENTS EVEN IF THE SINGLE ADMINISTRATION OF A DRUG CAUSED BOTH AND, THEREFORE, DEFENDANT COULD BE CONVICTED OF BOTH SECOND AND THIRD DEGREE ASSAULT.

State v. Wakefield, 236 W. Va. 445, 781 S.E.2d 222

In the published opinion, *State v. Wakefield*, 236 W. Va. 445, 781 S.E.2d 222 (2015), the Supreme Court of Appeals confirmed the defendant's conviction on two counts of sexual assault in the second degree and two counts of sexual assault in the third degree for which the effective sentence was ten to twenty-five years imprisonment.

The defendant was a 56 year old police officer with the Department of Homeland Security who lived in Pennsylvania and worked in Virginia. Rather than commute every day, the defendant

would stay in bunk rooms at his work site except for a period of time during which renovations were being made. During that time, he stayed in a guest room of a co-worker. And, eventually, the defendant regularly stayed at his co-worker's residence, which was located in Jefferson County.

The defendant spent an evening with the co-worker and the co-worker's female acquaintance, which consisted of drinking and eating at various locations in the Eastern Panhandle. The female acquaintance then testified that, around 1:00 a.m., "she recalled the ... [defendant] asking her and ... [the co-worker] if they were ready to leave, that she grabbed her phone, keys and purse, 'and I remember walking out the door, and that is the last thing I remember.'" The female acquaintance then testified that "her next memory was when '[she] woke up [in the co-worker's house] and [the defendant] was attempting to have sex with [her].'" During the time that the defendant performed oral sex and had vaginal intercourse with her, the female acquaintance "tried very hard to make [herself] move and [she] couldn't." Her general description of the circumstances was that "[i]t was like being outside your body watching everything happen, but you can feel everything, you can feel every little touch, but at the same time not being able to do anything to make it stop." The female acquaintance then testified that the next morning she was disoriented and that "she felt different than if she had a hangover."

The co-worker confronted the defendant, who did not deny the allegations of sexual assault but who first stated that he could not remember what happened and then made statements such as "I might as well eat my gun."

The first issue of appeal arises out of the State's introduction of testimony by an expert witness who opined that the female acquaintance had been subject to "GHB intoxication." The defense counsel objected to the testimony on the grounds that the witness was "simply a self-proclaimed expert" and that her testimony "constituted 'junk science.'"

Agreement existed that passage of time between the event and testing meant that the detection of an administration of GHB would not be possible, because "research has shown that living people not exposed to GHB were known to show up to ten micrograms of GHB per milliliter in their urine." The female acquaintance's testing had resulted in a finding of 9.5 micrograms of GHB per milliliter in her urine.

The State's expert witness was a former Los Angeles police officer who testified that the symptoms described by the female acquaintance, in the absence of other detectable drugs, meant that she had been administered a dose of GHB. On appeal, the defendant argued that the opinion should not have been admitted into evidence because it was based solely on her observations over a period of time as an officer and "there was no testing of her conclusion, no testimony concerning her peer reviewed articles, no testimony of the potential role of error and no information on how this theory had been accepted into the scientific community."

The Supreme Court noted the evolution of cases in which the "liberal thrust" was for the admission of such testimony rather than exclusion, with "disputes as to the strength of an expert's

credentials, mere differences in the methodology, or lack of textual authority for the opinion” going “to weight and to the admissibility of ... [expert’s] testimony.”

The Supreme Court noted that a *Daubert* hearing had been held and that the expert had established a lengthy career in dealing with, describing, and documenting the effects of drugs in facilitating sexual assault and had attained an “international” reputation as an expert in the field. Accordingly, the Supreme Court found that the circuit court had not abused its discretion in admitting the expert testimony.

The second issue on appeal concerned the circuit court’s ruling that the defendant could not question his co-worker, as a State’s witness, on “what activity if any took place immediately prior to [the purported victim] going into the house where she was allegedly assaulted.” Specifically, the co-worker testified that in the car on the way to his house, the female acquaintance was trying to get him into the back seat with her, which finally occurred. When defense counsel inquired about what then happened, the prosecutor objected that the inquiry was barred by the rape shield statute. The circuit court initially disagreed stating that the inquiry was more illustrative of the purported victim’s state of mind and degree of intoxication rather than her reputation. However, the prosecution continued to argue that the defense counsel intended to elicit testimony about a sexual encounter between the co-worker and his acquaintance, which is barred by the rape shield statute. The defense counsel countered stating that this was not the intent of the question, but if such activity did occur, then was it not relevant to the capacity of the purported victim to consent at a time during which she claimed she had no memory?

The twist for the appeal was that the circuit court permitted the inquiry with the admonition “that is not a license for you to, depending upon what this witness’ response may be to some of these questions, to ask inflammatory follow up questions or questions which may attempt to sort of link some kind of comment upon a connection or sort of salacious connection or anything of that nature.” On appeal, the defendant contended that, “as a result of the circuit court’s admonishment, a weak record was made about what happened in the backseat.” Essentially, the defendant argues his counsel was limited in cross-examining the witness when nonresponsive answers were given. Specifically, the defendant asserts that if the counsel could have explored the occurrence of any consensual activity in the backseat of the truck that evening, it would explain all the forensic evidence.

The Supreme Court of Appeals found that the only limitation placed on counsel by the circuit court was “how ... to frame the questions.” A review of the testimony does show that the defense counsel did not press the witness on what happened while the witness and the female acquaintance were in the truck after the defendant parked and left the truck at the co-worker’s residence. The Supreme Court opined, however, that “to the extent that ... [the defendant] had specific questions that he believed he could not ask Mr. Carper given the circuit court’s ruling, ... [the defendant] should have made a proffer on the record during trial so that this Court would have opportunity to review the alleged excluded questions on appeal.” In the end, the Supreme Court found that this issue was not properly preserved.

The third issue on appeal was the asserted violation of the Double Jeopardy clause by the circuit court when it permitted the jury to consider both second degree sexual assault, based on the victim being “physically helpless,” and third degree sexual assault, based on the victim being “mentally incapacitated ... because she was involuntarily intoxicated.”

The defendant argued that, in the circumstances of this case, the same act was used to prove both physical helplessness and mental incapacity; that is, the administration of a drug was the act underlying both charges. The defendant further argued that the requirement of physical helplessness related to actual physical incapacity that existed before the assault, i.e., a coma, stroke, etc.

Interestingly, the State argued that, even if it was a violation of double jeopardy, the sentences were structured in such a way that the error was harmless. The Supreme Court rejected this analysis, recognizing that four convictions rather than two convictions had significance. For example, the eligibility for parole for multiple offenses might be adversely effected or a recidivist statute might be implicated for future offenses. Accordingly the Supreme Court believed the “potential error by the circuit court on this issue must be substantively evaluated.”

The Supreme Court found that the requirement of proof differed in the two statutes and, therefore, double jeopardy did not exist. Restated, if one set of circumstances could result in both mental incapacity and physical helplessness, then both offenses of second degree sexual assault and third degree sexual assault can be charged.

Finally, a juror informed the bailiff after the testimony of a witness that a person mentioned by the witness was known to the juror. The bailiff reported this to the Court, who was informed by the prosecution that the identified person was not to be a witness. The defendant presented this as a Confrontation Clause issue. The Supreme Court noted that no objection had been lodged nor had a motion for a mistrial been made at the time that the disclosure was made by the lower court and found the error to be waived.

Justice Ketchum dissented. The Justice believed the expert should not have been qualified to give the opinion that she did “because it was based on mere subjective belief [and] unsupported speculation.” Moreover, the Justice believed that the prosecution’s objection to the line of questioning by invoking the rape shield law was “frivolous.” The Justice opined that the case law would have permitted the inquiry into sexual activity in the back seat of the truck because it tended “to prove that someone other than the defendant was the source of semen, injury, or other physical evidence.” See W Va. Rule of Evid. 412. Simply, “our rape shield law did not bar evidence of a victim’s sex with a third person that is ‘substantive exculpatory evidence of [the defendant’s] innocence.’” The Justice would have granted a new trial.

EVIDENCE: EVIDENCE ADMISSIBLE IN THE MERCY PHASE OF A MURDER TRIAL IS MUCH BROADER THAN THE GUILT PHASE AND NECESSARILY ENCOMPASSES THE DEFENDANT’S PAST,

PRESENT AND FUTURE AS WELL AS EVIDENCE SURROUNDING THE NATURE OF THE CRIME COMMITTED.

JURY: WHILE NO CLEAR AND CONVINCING EVIDENCE EXISTED THAT JURORS IMPROPERLY SPOKE WITH A THIRD PARTY, THE CIRCUIT COURT SHOULD HAVE HEARD FROM ALL JURORS PURPORTEDLY INVOLVED AND CASE WAS REMANDED FOR THIS PURPOSE.

State v. Jenner, 236 W. Va. 406, 780 S.E.2d 762 (2015)

In *State v. Jenner*, 236 W. Va. 406, 780 S.E.2d 762 (2015), the defendant was convicted of the offenses of first degree murder, without a recommendation for mercy, attempted murder, and malicious wounding. Using a rifle, the defendant allegedly shot and killed his aunt and then shot and wounded his uncle, shooting from the driveway of the relatives' home. Hours later, the defendant was found by the police walking on a roadway and muddied from his apparent traversal through the swamp near the relatives' property. The defendant subsequently made several conflicting statements about the ownership of a rifle and eventually admitted to shooting his uncle, but claiming it was in self-defense. He led the police to the place at which he had disposed the rifle. The motive was the defendant's anger over being thrown out of the uncle's and aunt's residence two years earlier.

Evidence at trial established a timeline during which the defendant had traveled from Tennessee to an area near the uncle's residence. The defendant then purchased a rifle from a local Wal-Mart and practiced shooting the firearm in an indoor shooting range.

Further evidence in support of mercy was testimony by a sister that the defendant "is very loving, is both emotionally and financially supportive of her and her children," and she "never witnessed him displaying anger or demonstrating a propensity toward violence."

The prosecution countered this evidence with impact statements from the husband and son of the victim and by the introduction of a photograph and a video game. The photograph showed the defendant's t-shirt on the night of the shootings which depicted two skulls and crossbones and was emblazoned with the words: "May God have mercy on my enemies because I sure as hell won't." The video game was "Assassin's Creed Revelations." Included in the description on the back of the video game package was the line: "My blades have dispensed death and justice in equal measure." The jury did not recommend mercy.

In post-trial motions, the defendant alleged juror misconduct and was permitted to subpoena two jurors and one alternate juror to testify at the hearing. The testimony was that a juror had been spotted by the defendant's relatives taking smoking breaks with the defendant's uncle, who was the husband of the deceased and the victim of the malicious wounding charge. Moreover, testimony was proffered that a juror and the alternate juror had been discussing the verdict before final deliberations.

Upon hearing the testimony from the defendant's witnesses regarding this conduct, the lower court determined that the defendant had not presented "clear and convincing evidence" of any juror misconduct. The defendant was then barred from examining the subpoenaed jurors and alternate juror. The lower court found, simply, that the defendant's witnesses were biased and the testimony was not credible when stating that, during every break, the juror and the uncle were smoking and conversing. The defendant was sentenced accordingly.

Two grounds for the appeal were the admission of the photograph and the video game during the mercy phase of the trial and the failure to find juror misconduct.

The defendant argued that the photograph and the video game were so inflammatory that Rule 403 of the Rules of Evidence required the exclusion of the evidence. The Supreme Court noted that the evidence admissible in the mercy phase is much broader than the guilt phase and "necessarily encompasses evidence concerning the defendant's past, present and future, as well as evidence surrounding the nature of the crime committed by the defendant." The Supreme Court found no error admitting this evidence as, "given the ruthless nature of these crimes, the message on the t-shirt worn on the very night of these crimes was probative of the petitioner's character." Moreover, the defendant's own expert testified that the defendant "loses himself in the fantasy world of ... video gaming" and, accordingly, the prosecution's admission of the video game was consistent with the defendant's own evidence. No error on this ground was found.

With respect to the alleged misconduct of the jurors related to the premature discussion of the verdict to be rendered, the defendant argued that the brevity of the deliberations supports the finding of misconduct. The Supreme Court found this argument was an "intrinsic challenge" to a verdict that the Court would not entertain. Moreover, the purported conversation between the juror and alternate juror could be explained in various ways and, therefore, the defendant's evidence was not "clear and convincing."

With respect to the private communications between a juror and a third party about the trial during its pendency, the Supreme Court reiterated the lower court's obligation to "conduct a hearing as soon as is practicable, with all parties present," and to make a "record ... in order to fully consider any evidence of influence or prejudice." This is commonly referred to as a *Remmer* hearing. See *Remmer v. United States*, 347 U.S. 227, 230 (1954). Notably, the defendant had the burden to prove more than simply the "mere opportunity to influence a juror," but, instead, must present proof of an "improper event."

The Supreme Court noted that the defendant had provided the sworn, detailed testimony of two witnesses, "claiming to have seen the victim and a juror socializing with one another over the course of multiple days of trial." The Supreme Court was troubled, therefore, that the "circuit court rejected the allegations without hearing from any of the people who allegedly engaged in the conduct." In the opinion of the Supreme Court, this violated the rule that "requires a full consideration of the evidence pertaining to alleged juror misconduct." Without having heard the

testimony of the involved jurors, the circuit court had not created a record which the Supreme Court could fully review.

The Supreme Court remanded the case for an additional hearing on the alleged misconduct which would permit the defendant to question the identified juror and the third parties with whom the alleged improper communications occurred. If the conduct is found to have occurred, the circuit court would then have to determine if prejudice resulted. If not, then the court's original denial of the post-trial motion would stand. The defendant's conviction was "conditionally" affirmed based on this limited remand.

TRAFFIC STOP: A WARRANTLESS SEARCH OF A VEHICLE INCIDENT TO AN ARREST IS PERMITTED ONLY WHEN THE ARRESTEE IS UNSECURED AND WITHIN REACHING DISTANCE OF THE PASSENGER COMPARTMENT OR IF THE VEHICLE IS REASONABLY BELIEVED TO CONTAIN EVIDENCE OF THE OFFENSE OF ARREST.

TRAFFIC STOP: FURTIVE GESTURES, WITHOUT MORE, ARE NOT SUFFICIENT TO ESTABLISH PROBABLE CAUSE FOR THE SEARCH OF A VEHICLE.

State v. Noel, 236 W. Va. 335, 779 S.E.2d 877 (2015)

In *State v. Noel*, 236 W. Va. 335, 779 S.E.2d 877 (2015), the Supreme Court of Appeals of West Virginia reversed a decision of the lower court and found that a search of the defendant's automobile was unlawful. Justice Davis wrote the primary opinion to which Justices Benjamin and Ketchum concurred, but filed separate opinions. Justice Loughry dissented.

The defendant was driving a car which had a cracked windshield. A patrolling officer attempted to pull over the defendant who then fled at a high rate of speed through streets of residences and a college campus. Eventually, the defendant pulled in front of a residence and attempted to flee on foot. When confronted, the defendant could not produce a driver's license. Moreover, the owner of the residence confirmed the identity of the defendant, but knew no discernible reason why defendant would claim to be visiting with her. Again, the defendant attempted to flee. The defendant was subsequently placed in handcuffs.

While standing next to the car in handcuffs, the defendant was described as constantly looking into the car at the center console through the open passenger door. The officer searched under the driver's seat and "discovered crack cocaine and methamphetamine."

On the way to the police station, the defendant asked the officer who ratted him out, which statement was suppressed.

A motion was made before trial on the resulting charges to suppress the evidence found during the search of the vehicle. The motion was denied. The defendant was convicted of fleeing in a vehicle and possession of controlled substances with the intent to distribute.

Two errors were asserted on appeal. First, the evidence obtained from the search of the car should have been suppressed. Second, the court should not have allowed the attorney to answer for the defendant regarding whether the defendant would or would not testify at the trial.

The Supreme Court of Appeals first noted that “probable cause” was not needed to stop the vehicle. The officer needed only to have “reasonable cause” to believe a safety standard was violated, which the cracked windshield provided. Accordingly, the stop of the vehicle was lawful contrary to the defendant’s assertion in order for the officer to determine whether the vehicle was unsafe for driving. Moreover, the defendant’s fleeing from the police officer with “reckless indifference” provided further justification for the stop as it constituted the active commission of a crime.

The Supreme Court reviewed federal precedent on the issue of the warrantless search and stated, “we now hold that ... police may conduct a warrantless search of a vehicle incident to a recent occupant’s arrest only if (1) the arrestee is unsecured and within reaching distance of the vehicle’s passenger compartment at the time of the search or (2) it is reasonable to believe that the vehicle contains evidence of the offense of arrest.” Moreover, it was emphasized that “this Court considers the circumstances justifying a search of a vehicle incident to a traffic stop to be quite narrow.”

In the circumstances of this case, the defendant was secured and the police officer had no reason to believe that evidence could be found in the car to support the crime for which he was arrested, i.e., fleeing with reckless indifference. The Court further emphasized that “furtive gestures,” without more, is not sufficient to establish probable cause for the search of a vehicle.

The defendant was awarded a new trial. Having found that this ground resulted in the need for a new trial, the Supreme Court merely admonished the lower court to ensure that it obtained a “voluntary, knowing and intelligent” waiver by the defendant of the right to testify on his own behalf.

Justice Benjamin concurred with the result, but further addressed any contention, as expressed by Justice Loughry in a dissenting opinion, that an inventory search of the impounded vehicle would have been proper. The primary concern would be ascertaining whether the inventory search was proper rather than merely a “pretext concealing an investigatory police motive.” The concurring opinion recites the absence of the necessary findings in this matter to have supported an inventory search. Specifically, “[t]o reiterate, our decision in [*State v. Perry*, 324 S.E.2d 354 (W. Va. 1984)] requires that the arrested driver ordinarily be given a reasonable opportunity to arrange to have the vehicle removed by means other than police impoundment [and] [i]f the vehicle is nonetheless impounded, then ... an inventory search of a vehicle [is authorized] only when items of personal property are in plain view within.” Neither condition was met in this matter in the opinion of Justice Benjamin.

Justice Loughry opined that under the “inevitable discovery doctrine,” an inventory search would have revealed the drugs and an inventory search was permissible in the circumstances.

Justice Ketchum's concurrence was based on the discussion of an "automobile exception" to the warrant requirement that the Justice opined had not been raised in the case. Specifically, "police officers do not need a warrant to search an automobile if they have probable cause to believe it contains evidence of criminal activity." Moreover, "police officers may search for evidence of any crime, not just of the offense that provided the basis for the arrest." However, "the word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." Essentially, "a warrantless search of an automobile must be reasonable in light of the diminished expectation of privacy that a person may have in his automobile as weighed against any exigent circumstances that may exist in a particular case."

PROCEDURE: A PRELIMINARY HEARING IS NOT A FEDERAL CONSTITUTIONAL MANDATE AND THERE IS NOTHING IN THE STATE CONSTITUTION WHICH WOULD GIVE AN INDEPENDENT STATE CONSTITUTIONAL RIGHT TO A PRELIMINARY HEARING.

PROCEDURE: IF STATE ELECTS TO INDICT A PERSON WITHOUT A PRELIMINARY HEARING OR BEFORE ONE CAN BE HELD, THE PRELIMINARY HEARING IS NOT REQUIRED BECAUSE PROBABLE CAUSE IS DETERMINED BY THE GRAND JURY, ELIMINATING THE NEED FOR A MAGISTRATE TO MAKE THAT DETERMINATION.

PROCEDURE: A PRELIMINARY HEARING IS NOT ABOUT PRETRIAL DISCOVERY, BUT, RATHER, IS ABOUT A COURT EXERCISING JURISDICTION OVER A PERSON BY EITHER INCARCERATION OR RELEASE ON CONDITIONS.

PROCEDURE: DISMISSAL OF A CASE IS TO BE CONSONANT WITH THE PUBLIC INTEREST IN THE FAIR ADMINISTRATION OF JUSTICE.

State v. Davis, W. Va., 782 S.E.2d 423 (2015)

In *State v. Davis, W.Va., 782 S.E.2d 423 (2015)*, the Supreme Court of Appeals of West Virginia reversed the circuit court's ruling that the defendant was entitled to a preliminary hearing on a criminal matter that was dismissed by the magistrate upon the prosecution's motion. The prosecution indicated that it might seek an indictment in the matter.

The underlying circumstance was a complaint that the defendant had "arranged for a person who was cooperating with law enforcement to sell sixteen grams of marijuana to a third person." At the preliminary hearing, the prosecutor indicated that the defendant's claim of entrapment was being investigated and, therefore, the prosecutor asked for dismissal at that time, with the possibility that the matter might be presented to a grand jury in the future. The defense counsel objected, although an offer was made to waive the preliminary hearing if the defense counsel could have access to the state's file on the criminal charge. The offer was declined, and the motion to dismiss was granted.

A writ of mandamus was filed with the circuit court to require the magistrate “to hold a pre-indictment hearing for the [respondent] so that [s]he may be able to protect [her] rights” and to obtain a “standing order requiring every magistrate in the county to ensure that the right to a preliminary hearing is observed in every criminal case.” The writ was granted, with the circuit court ruling that “the State may move to dismiss a criminal charge ‘altogether,’ but it has no right to seek the dismissal of a felony charge in order to directly present the matter to a grand jury, gain a tactical advantage over a defendant, or merely circumvent a defendant’s right to a preliminary hearing.” The order was stayed pending the appeal of the matter.

The Supreme Court of Appeals began its analysis with the acknowledgment that “a preliminary hearing is not a federal constitutional mandate, and that there is nothing in our *State Constitution* which would give an independent state constitutional right to a preliminary hearing.” The focus then turned to statutory and judicial rules.

Notably, the applicable statute and rules provide that “if the offense is to be presented for indictment, a defendant is entitled to a preliminary examination unless waived.”

The Supreme Court reiterated its precedent that “where the State proceeds ... to arrest the accused for an offense which must be brought before the grand jury, the defendant is entitled to a preliminary hearing under W. Va. Code, 62-1-8 (1965). If, however, the State elects to indict him without a preliminary hearing or before one can be held, the preliminary hearing is not required.” The reasoning is that the grand jury’s determination of probable cause eliminates the need for the magistrate to make the determination.

The Supreme Court noted that the preliminary hearing was not about pretrial discovery but, instead, concerned the court’s jurisdiction over the defendant for either incarceration or release on conditions. When the charge was dismissed, the defendant was not subject to the court’s jurisdiction and, therefore, a preliminary hearing served no purpose other than the defendant wanting to “obtain information from the State for purposes of defending against a possible future indictment.” The Supreme Court opined that a review of the governing statutes on the procedure of filing a complaint and obtaining an arrest warrant makes clear that “a preliminary hearing is only required when there is a pending criminal complaint.” While the Supreme Court had never expressly addressed the issue of whether the dismissal of charges obviated the need for a preliminary hearing, the Supreme Court wryly noted that “most defendants are not likely to object to the dismissal of their criminal charges.”

The Supreme Court held, therefore, that “where a criminal complaint initiated pursuant to West Virginia Code § 62-1-1 has been dismissed, the right to a preliminary hearing arising under West Virginia Code § 62-1-8 no longer exists.” Moreover, the Supreme Court confirmed that “a preliminary hearing is not a prerequisite for a grand jury indictment.” Finally, the Supreme Court noted that the rules provide that “the discharge of a defendant shall not preclude the state from instituting a subsequent prosecution for the same offense,” and, therefore, the dismissal of charges

upon the state's motion should not preclude the refiling of the charges or the seeking of an indictment on the charges.

The Supreme Court acknowledged that the prosecutor's motive for dismissing charges might be improper, but held that it was the magistrate's duty to rule on a motion to dismiss by determining whether "the dismissal is consonant with the public interest in the fair administration of justice." If an improper motive exists, the motion should be denied.

The circuit court's order granting the writ of mandamus was reversed.

PROCEDURE: TERMS AND CONDITIONS OF SUPERVISED RELEASE CANNOT BE MODIFIED WITHOUT A HEARING AND ASSISTANCE OF COUNSEL.

SENTENCE: A SPECIAL CONDITION OF SUPERVISED RELEASE MAY RESTRICT FUNDAMENTAL RIGHTS WHEN THE SPECIAL CONDITION IS NARROWLY TAILORED AND IS DIRECTLY RELATED TO DETERRING THE DEFENDANT AND PROTECTING THE PUBLIC.

State v. Hedrick, 236 W. Va. 217, 778 S.E.2d 666 (2015)

In *State v. Hedrick, 236 W. Va. 217, 778 S.E.2d 666 (2015)*, Justice Ketchum wrote the opinion for the Court. The defendant had been convicted of two counts of sexual abuse in the first degree. The charges arose out of the defendant's forcible touching of the buttocks and breasts of a twenty-five year old female employee. The defendant began serving his consecutive sentences and was granted release on parole. The original sentence included a twenty-five year period of supervised release that commenced when the defendant was discharged from parole.

The defendant owned the public vacation facility, Smoke Hole Caverns and Resort. Two handwritten conditions of his supervised release precluded the defendant from employment at the resort "in any capacity" and barred the defendant from the property, including the gift shop. The defendant's appeal was from the circuit court's denial of his motion to strike the two conditions. Notably, the circuit court imposed the conditions with the finding that the defendant was "one of the most hated people in Grant County" and the defendant's "presence at the Resort could have a negative impact on the business." Defendant's ex-wife was also an owner and operator of the Resort.

Additionally, the defendant was subject to a revocation of his supervised release for several matters that included the defendant's barring ingress to a farm owned by the defendant. Specifically, the defendant had locked the gate on his farm while staying at the farm, which the probation officers alleged needed to be unlocked "so that officers could determine his whereabouts." Notably, the defendant did have livestock and equipment on the property. The circuit court did not revoke the supervised release, but, without any hearing, did impose the additional condition banning the defendant from his farm, finding that this did constitute "efforts to evade supervision." Other conditions were "clarified."

An interesting footnote in the decision included the apparently relevant information that the defendant's assets exceeded \$7,000,000 in value. Presumably, the defendant did not have court appointed counsel or a public defender in the defense of the charges.

Another interesting footnote derived from the recitation that, upon his discharge from parole, the defendant "signed two forms pertaining to his supervised release." One form was the "Rules and Regulations Governing Probationers" and the second form was "Terms and Conditions of Supervised Release." The footnote states, "some of the conditions set forth in the two forms overlapped, such as the directive to remain gainfully employed and the prohibition against possession firearms." The editorial comment would concern the difficulty some persons on supervised release might have in consulting two documents regarding the multitude of conditions imposed on their release, some of which would be duplicated.

The primary contention regarding the two handwritten conditions relating to the defendant's ban from the Resort, of which he was an owner, was that the conditions had been "imposed outside the presence of counsel" and were simply unreasonable.

The Supreme Court reviewed the procedures governing supervised release, noting that the period of supervised release could be extended to the maximum period "consistent with the provisions of the West Virginia Rules of Criminal Procedure relating to the modification of probation." Notably, Rule 32.1 of the Rules governing modification of probation states, in part: "A hearing and assistance of counsel are required before the terms of probation can be modified." And the Supreme Court reviewed its decision in *Louk v. Haynes*, 223 S.E.2d 780 (W. Va. 1976), in which conditions on the defendant's probation had been imposed in the absence of the defendant's counsel. When probation was revoked for the violation of these conditions, the Supreme Court found the conditions to be "void as violative of procedural due process."

However, the Supreme Court refused to find the conditions in this matter to be void because the circuit court had heard the motion to strike the conditions and, therefore, the defendant did have a proceeding in which to assert his rights. Nonetheless, the Supreme Court's discussion seemingly supports the extension of *Louk* to instances when conditions are imposed on supervised release without a hearing or representation by counsel.

The Supreme Court further found that the conditions were not unreasonable. The Resort was a "vacation facility open to the public" and the defendant was evaluated as "at least a moderate risk for recidivism and reoffending." Moreover, the circuit court had commented that it was "common knowledge in the county that ... [the defendant] was a concern for the young girls that worked there as well as the other women." In short, the Supreme Court found that the defendant's "challenge to the two handwritten conditions prohibiting him from Smoke Hole Caverns and Resort must give way to protecting the public from future offenses." The Supreme Court cited to a federal decision, *United States v. Henson*, 22 Fed. Appx. 107 (4th Cir. 2001) which held, "a special condition of supervised release may restrict fundamental rights when the

special condition is narrowly tailored and is directly related to deterring the defendant and protecting the public.”

With respect to the conditions imposed after a hearing to revoke the defendant’s supervised release, the Supreme Court focused on the banishment of the defendant from his 500 acre farm on which he raised cattle and dogs. The concern on the part of the Supreme Court was that no tie was made between the farm and the defendant’s underlying convictions and no concern was shown for the “prospective maintenance of the farm.” The Supreme Court found this restriction to be “highly restrictive and on the borderline of reasonable discretion.” However, the Supreme Court did not eliminate the conditions as a matter of law, but, instead, remanded this “limited issue” to the circuit court.

SENTENCE: ALLOWING TRIAL COURTS TO ORDER DEFENDANTS TO MAKE RESTITUTION DIRECTLY TO INSURANCE COMPANIES FURTHER ASSISTS VICTIMS BY RELIEVING THEM FROM THE BURDEN ASSOCIATED WITH AN INSURER PURSUING ITS OWN SUBROGATION CLAIM AND THE POSSIBILITY OF INVOLVEMENT IN LITIGATION TO RESOLVE SUCH A CLAIM.

SENTENCE: A COURT MAY ORDER A DEFENDANT TO MAKE RESTITUTION TO AN INSURANCE COMPANY TO THE EXTENT THE INSURANCE COMPANY HAS COMPENSATED A VICTIM FOR LOSS ATTRIBUTABLE TO THE DEFENDANT’S CRIMINAL CONDUCT.

***State v. Wasson*, 236 W. Va. 238, 778 S.E.2d 687 (2015)**

In *State v. Wasson*, 236 W. Va. 238, 778 S.E.2d 687 (2015), the Supreme Court considered whether a defendant could be ordered to pay restitution to an insurance carrier when the insurance carrier was not a direct victim of the criminal act.

The defendant pled guilty to burglary of a residence. The stolen items included an X-Box gaming console, X-Box games, jewelry, three televisions, and nine firearms. The homeowners had been compensated for their loss, in part, by the insurance carrier. The defendant was sentenced and an order of restitution was entered that required payment to the insurance carrier in the amount the insurance carrier paid to the homeowners to settle the loss claim.

The resolution of the issue required the interpretation of the provisions of the Victim Protection Act, codified at W. Va. Code §§61-11A-1, *et seq.* The statutory directive is that the court “shall order ... that the defendant make restitution to any victim of the offense.”

The defendant tried to distinguish the insurance carrier in this matter from other instances in which the insurance carrier had been ordered to be paid restitution. For example, the Supreme Court had upheld an order of restitution to the provider of fire insurance coverage in an arson. The defendant argued that this was distinguishable because the entire purpose of the arson was to collect the proceeds of the policy. The fire loss insurer was the direct victim. In this matter, the defendant stole the items for their intrinsic value and not for the purpose of making any claim of

loss under an insurance policy. The defendant then pointed to a case in which the Supreme Court determined that “law enforcement authorities” were not “victims” under the Act such that restitution of the expenses of apprehending the victim could not be recovered.

However, the Act does contain a provision that provides “the court may, in the interest of justice, order restitution to any person who has compensated the victim for loss to the extent the person paid the compensation.” The defendant argued that the insurance carrier was not a “person” in this context. A general policy statement was made by the defendant’s appellate counsel as follows: “[I]t is inherently unfair and contrary to the interests of justice to require an indigent defendant to pay restitution to an insurance company for a settlement paid pursuant to an insurance contract given that the insurance company assessed and assumed the risk, collected premiums therefor, and has an adequate remedy through subrogation.”

The decisions of three states’ highest courts were reviewed in which restitution was denied to insurance carriers, primarily because the governing statute expressly precluded restitution to third parties.

The decisions of three other states’ highest courts were reviewed in which restitution was permitted to an insurance carrier. In these instances, the statute contained language evincing a broad discretion in the sentencing court to do justice on behalf of victims.

In the end, the Supreme Court believed the legislature intended a broad application of the West Virginia statute in order to assist victims and, therefore, “allowing trial courts to order defendants to make restitution directly to insurance companies further assists victims by relieving them from the burden associated with an insurer pursuing its own subrogation claim and the possibility of involvement in litigation to resolve such a claim.” Moreover, “absolving defendants from the financial consequences of their crimes when their victims have insurance would not comport with the rehabilitative and punitive aspects of restitution.” The Supreme Court stated that “restitution can aid an offender’s rehabilitation by strengthening the individual’s sense of responsibility” and the offender “may learn to consider more carefully the consequences of his or her actions.”

The Supreme Court held, therefore, “pursuant to West Virginia Code § 61-11A-4(e), a court may order a defendant to make restitution to an insurance company to the extent the insurance company has compensated a victim for loss attributable to the defendant’s criminal conduct.”

EVIDENCE: AN EXPERT OPINION REGARDING THE DEFENDANT’S CHARACTERISTICS THAT DID NOT FIT THE PROFILE OF A SEX OFFENDER WOULD NOT BE PERMITTED IN ABSENCE OF SCIENTIFIC ACKNOWLEDGMENT THAT A PROFILE EXISTED FOR A SEX OFFENDER.

HABEAS CORPUS: THE PRIMARY PURPOSE OF AN OMNIBUS HEARING IS TO PROVIDE THE COURT WITH EVIDENCE FROM THE MOST SIGNIFICANT WITNESS, THE TRIAL ATTORNEY.

Tex. S. v. Pszczolkowski, 236 W. Va. 245, 778 S.E.2d 694 (2015)

In *Tex. S. v. Pszczolkowski*, 236 W. Va. 245, 778 S.E.2d 694 (2015), the Supreme Court affirmed the circuit court's denial of a petition for habeas corpus relief.

The petitioner had been indicted on one count of sexual assault in the first degree and one count of sexual abuse by a parent or guardian.

Prior to the trial on the charges, the petitioner's retained counsel had a motorcycle accident, resulting in a head injury. Subsequently, the attorney's law license was suspended and local attorneys were appointed to represent the attorney's clients. Three months later, the attorney's law license was reinstated and, at the petitioner's request, the attorney was reinstated to the petitioner's case.

The underlying charges arose out of the petitioner's care of three step-children while the mother was at work. The four-year old stepdaughter told her mother one night that the petitioner had "put his pee pee in my mouth and peed and kept it there until I swallowed." The victim was taken to the hospital where a similar statement was made to the nurse, who then collected samples. Law enforcement then obtained the same statement and contacted the petitioner who after waiving his *Miranda* rights, gave a statement in which he alluded to his wife's traumatic brain injury from a car accident and stated his wife had been collecting his semen while he slept and forcing the daughter to drink it.

Forensic testing found the lip swabs to be positive for the presence of seminal fluid as was a sample collected from the pillow on which the victim had slept. However, no sperm cells could be found in the samples, meaning that either the male was sterile or had a vasectomy. Moreover, no Y chromosomes could be found, especially considering the lack of sperm cells, so no DNA analysis could be done. The seminal fluid could not be linked by forensic analysis to the petitioner.

A psychologist testified at the trial and gave an opinion that the four-year old stepdaughter had been sexually abused and that the child was not susceptible to suggestion.

A *Daubert* hearing was held regarding the expert testimony in the areas of psychology and professional counseling to be proffered on behalf of the defendant. The dispute was over an opinion that the petitioner did not "fit the profile of a sex offender." While the expert acknowledged that "there is no such thing as a sex offender profile," the expert was to opine that petitioner was at "the low end of being a sexual offender."

The circuit court ruled that this opinion could not be proffered since it was contrary to the admitted scientific knowledge regarding the absence of a profile, but the court permitted the expert to testify that the prosecution's expert opinion regarding the victim was improperly based on only the mother's testimony.

The defendant was convicted and sentenced to consecutive terms of imprisonment of fifteen to thirty-five years and ten to twenty years.

Shortly after the trial, the petitioner's trial counsel committed suicide.

An appeal followed, which the court permitted to be heard on the issue of allowing the child's testimony through the statements of the mother and the treating nurse. The child was deemed to be unavailable for the trial because the then seven-year old child could not recall the events from when she was four-year's old. The Supreme Court affirmed the conviction in a memorandum decision.

This habeas proceeding was then prosecuted.

The first issue raised on appeal was the failure of the circuit court to have an omnibus hearing. The petitioner proffered that testimony would have been provided from an expert in forensic science, an expert in forensic psychology, and an expert on an attorney's professional responsibility and competency. The circuit court believed that it had been fully briefed, including the petitioner's seventy page submission. Moreover, the circuit court's twenty-eight page order set forth detailed findings of fact and "painstakingly addressed each and every claim for habeas relief." Accordingly, the Supreme Court did not intend to find an abuse of the circuit court's broad discretion in whether to have a hearing.

Moreover, the Supreme Court noted that all the experts identified by the petitioner were essentially tied to the competency of the original trial counsel in defending the case without such expert testimony and that the "primary purpose of an omnibus hearing is grounded in providing the Court with evidence from the most significant witness, the trial attorney, in order to give that individual the opportunity to explain the motive and reason behind his or her trial behavior." With the death of the trial counsel, the omnibus hearing lost its essential purpose.

The remainder of the Supreme Court's opinion dealt with the allegations of the ineffective assistance of the trial counsel.

The petitioner complained that the trial counsel failed to investigate and contest the forensic testing identifying seminal fluid from the lip swabs of the victim. The petitioner asserted the trial counsel should have requested additional forensic testing, retained a forensic expert, performed independent testing, should have cross-examined the prosecution's witnesses regarding the identification of seminal fluid, failed to understand the significance of the forensic evidence, and failed to offer any legal argument on the evidence.

Significantly, any additional testing of the swab would have consumed the evidence. The petitioner instructed counsel to object to the State's testing so that an expert for the petitioner could be retained. Subsequently, consent by trial counsel was given for the additional testing to be done by an independent lab that would be observed by the petitioner's expert. And, subsequently to that instruction, trial counsel informed the court that an expert would not be observing the testing, but an expert might be retained to challenge the results. The petitioner responded affirmatively to the circuit court's inquiries about his understanding of trial counsel's

statements. In the end, trial counsel's strategy was to not challenge the finding of seminal fluid, but to emphasize through cross-examination that the fluid could not be linked to the petitioner.

Accordingly, the Supreme Court was not inclined to let the petitioner "embark on a journey filled with second-guessing a trial attorney's strategic decision in dealing with the investigation of forensic evidence, to the decisions made regarding experts, to the examination of witnesses, [and] to the arguments made in closing." And, oh by the way, the additional expert testimony would not have made any difference in the determination of guilt considering that the petitioner was the only adult in the house and the victim told a consistent story to three different people after the incident.

Additional arguments of ineffective assistance were summarily disregarded.

In the final analysis, the petitioner was trying to tie the counsel's traumatic brain injury to the overall assertion that the petitioner's counsel was incompetent. However, the Supreme Court took note that, at the conclusion of trial, the trial court stated: "I want to compliment you all on your professionalism, and I think this case can go either way due to the good efforts put in by both the state and defense counsel [and] I think you both did an excellent job." Moreover, as a posthumous commendation to the trial counsel, the Supreme Court stated, "our review of the record comports with the trial court's observations." Accordingly, the petitioner's portrayal of a confused and muddled trial lawyer was not accurate.

Justice Benjamin concurred with the result, but noted the disagreement with the majority's reasoning about why an omnibus hearing was not necessary. Specifically, Justice Benjamin disagreed with the contention that the primary purpose of an omnibus hearing is to receive the trial counsel's testimony. Or, restated, Justice Benjamin felt that the unavailability of trial counsel should not be an automatic basis for denying the opportunity for a hearing since other witnesses on the "subject of trial strategy may be particularly probative, depending on the specific facts of those cases." However, the Justice did agree that, in the facts of this matter, no hearing was necessary.

PROCEDURE: A REMEDIAL SENTENCE REDUCTION IS NOT A CRITICAL STAGE OF THE PROCEEDINGS; SO THE DEFENDANT'S PRESENCE IS NOT REQUIRED.

***State v. Tex B.S.*, 236 W. Va. 261, 778 S.E.2d 710 (2015)**

In *State v. Tex B.S.*, 236 W. Va. 261, 778 S.E.2d 710 (2015), the defendant appealed the entry of an order in the same proceeding from which the habeas corpus petition set forth in the preceding case emanated.

The defendant was first sentenced to an indeterminate term of twenty-five years to a hundred years for his conviction of first-degree sexual assault. The defendant filed a petition for habeas

corpus relief asserting that the statute in place when the offense occurred imposed an indeterminate sentence of fifteen years to thirty-five years.

At a hearing, the circuit court determined that the matter was not properly a subject of a habeas corpus petition. Instead, the matter would be decided under Rule 35. Everyone acknowledged that the defendant had not been sentenced under the statute in place when the crime was committed.

The defendant then demanded a new sentencing hearing because he was being “resentenced.” The circuit court refused the demand and corrected the sentence in a subsequent order without a hearing.

The issue on appeal was whether the circuit court abused its discretion in denying the request for a “*de novo* resentencing hearing.” The thrust of the appeal was that the defendant “was not allowed to appear in person” because he appeared by videoconferencing during the hearing on the habeas corpus petition and that he further “was not allowed to present evidence, put on witnesses, or give allocution to the court.”

The issue involved the interplay between (i) Rule 43(c)(4) of the West Virginia Rules of Criminal Procedure, giving the defendant the right to be present at an initial sentencing but not the right to be present at a “reduction” of sentence under Rule 35, which is expressly addressed in Rule 35(b), and (ii) Rule 35(a), which permits the correction of an illegal sentence at any time. Specifically, Rule 43 does not exclude, expressly, the hearing on a correction of a sentence under Rule 35(a) as a hearing at which the defendant need not be present.

In reviewing federal decisions on the issue, the recurring conclusion was, essentially, that “a remedial sentence reduction is not a critical stage of the proceedings; so, the defendant’s presence is not required.” Moreover, “there has already been a sentencing hearing at which the defendant had the opportunity to rebut evidence in the presentence investigation report and to present evidence in mitigation; the sentencing judge has made the necessary credibility determinations and exercised the necessary discretion to fashion a sentencing package which he has determined, in fact, is the appropriate penalty considering the defendant’s conduct and level of culpability.” Essentially, nothing is gained by another hearing.

The Supreme Court held, therefore, that “we now make clear that in correcting an illegal sentence under Rule 35(a) of the West Virginia Rules of Criminal Procedure, a trial court has discretion to correct the sentence without holding a *de novo* resentencing hearing [and] [f]urther, under Rule 43(c)(4) of the West Virginia Rules of Criminal Procedure, a defendant need not be present at a Rule 35(a) proceeding to correct a sentence.”

The Supreme Court affirmed the entry of the circuit court’s order correcting the sentence.

EVIDENCE: THE RULE THAT A COURT HAS NO AUTHORITY TO PERMIT USE OF CONFIDENTIAL JUVENILE LAW ENFORCEMENT RECORDS AS EVIDENCE IN THE STATE'S CASE DOES NOT PROHIBIT THE USE OF JUVENILE RECORDS AS A SHIELD TO REBUT OR IMPEACH EVIDENCE THAT IS PRESENTED BY A CRIMINAL DEFENDANT.

PROCEDURE: JUVENILE RECORDS ARE TO BE OBTAINED BY MEANS OF A PROPERLY NOTICED MOTION TO THE COURT TO UNSEAL THE RECORDS.

EVIDENCE: ANY REFERENCE TO A CRIMINAL DEFENDANT'S OFFER OR REFUSAL TO TAKE A POLYGRAPH EXAMINATION, AND THE RESULTS OF A POLYGRAPH EXAMINATION, ARE INADMISSABLE AND EVIDENCE THAT A DEFENDANT IN A CRIMINAL CASE TOOK A POLYGRAPH EXAMINATION IS ALSO INADMISSABLE.

APPEAL: THE IMPROPER ADMISSION OF POLYGRAPH RELATED EVIDENCE IS SUBJECT TO HARMLESS ERROR ANALYSIS.

INSTRUCTIONS: THE COURT NORMALLY PRESUMES A JURY WILL FOLLOW AN INSTRUCTION TO DISREGARD INADMISSABLE EVIDENCE INADVERTENTLY PRESENTED TO IT, UNLESS THERE IS AN OVERWHELMING PROBABILITY THAT THE JURY WILL BE UNABLE TO FOLLOW THE COURT'S INSTRUCTIONS AND A STRONG LIKELIHOOD THAT THE EFFECT OF THE EVIDENCE WOULD BE DEVASTATING TO THE DEFENDANT.

State v. Tyler G., 236 W. Va. 152, 778 S.E.2d 601 (2015)

In *State v. Tyler G., 236 W. Va. 152, 778 S.E.2d 601 (2015)*, the defendant appealed from his conviction after a jury trial on three sexual offenses against an infant.

The mother of a less than two year-old child contracted HPV. The defendant believed that she contracted the disease from the defendant "because he was the only person with whom she was intimate at that time."

The mother took the child to a pediatrician for an apparent diaper rash. Eventually, the rash was diagnosed as genital warts in and around her anal cavity and the child was diagnosed with HPV.

A report was made to DHHR and the local police. A determination was made that only the petitioner and the child's biological father were males who had possible contact with the child.

During an interview at the police station, the defendant "stated that when he stayed the night at ... [the mother's house] ..., he accidentally touched ... [the child], and that he was ashamed, embarrassed, upset that he did it." The defendant left the police station.

The defendant returned to the police station for a polygraph examination. Due to some noted inconsistencies, the defendant agreed to a post-examination interview. In the course of this interview, the defendant relayed a bizarre event that could have led to sexual contact with the child without his awareness. When asked if it was possible that he entered the child's rectum, the

defendant's response was, "it was possible, but he didn't really recall for sure." When asked more directly "is there any possible way that the penis did enter the anus of the baby?" the defendant responded, simply, "yes." Again, the defendant left the police station.

The defendant was subsequently arrested, tried, and convicted.

The first issue on appeal was the denial of the motion to suppress "inculpatory" statements made to the police. The involuntariness of the statements was not attributed to any failure to give *Miranda* warnings or any physical coercion, but, instead, was related to his age of nineteen years, his tenth grade education, his limited ability to process information, his intimidation by the questioning, his being questioned for ten to twelve hours over two days, and his being questioned by six different police officers. Notably, the interviews were not recorded. In addition to claiming the statements were involuntary, the defendant denied making the statements.

The circuit court refused to believe that the officers had coordinated the extensive testimony regarding the defendant's answers and, moreover, believed the defendant had more intellectual acuity than he portrayed in his motion. The circuit court refused to suppress the statements.

The Supreme Court found no abuse of discretion.

The second issue on appeal concerned the sufficiency of the evidence.

The defendant argued that the evidence did not dispel the possibility that the child suffered from the HPV infection through contact with the mother, who was infected. The evidence was that the child still had diapers intact on the night in question and the mother had no knowledge of any unusual activity while present that night.

The medical testimony attributed the genital warts to sexual contact, however. The defendant had not allowed testing to determine if he was infected with HPV. And the investigators reported that the defendant indicated it was possible that he had penetrated the child's rectum.

The Supreme Court of Appeals of West Virginia found this to be sufficient evidence to sustain a conviction.

The third issue on appeal was the allegedly improper use of information from the defendant's juvenile record.

The Supreme Court reviewed its precedent that a court had no statutory authorization to permit use of otherwise confidential juvenile law enforcement records "in a criminal case as evidence in chief in the State's case." However, "the rule does not prohibit the use of juvenile records as a 'shield' – to rebut or impeach evidence that is presented by a criminal defendant." In this matter, the records were used to contradict the defendant's claim on direct testimony that he had learning difficulties in that the records showed that the defendant missed school, was often in trouble in school, and had good grades in some classes. Accordingly, the prosecution was asserting that it was not learning difficulties that resulted in the defendant's tenth grade education.

The Supreme Court did note that it was error for the prosecution not to obtain the records by means of a properly noticed motion before the court. However, the error was deemed to be harmless because the motion would have been granted in any event. But, “this is not to suggest that we approve of the State’s failure to file a motion to have the record unsealed.” Because the juvenile records were used solely for purposes of impeachment, the ground for appeal was denied.

The fourth issue on appeal related to the mention of the polygraph examination by one of the State’s witnesses. The Supreme Court had previously held that the results of a polygraph examination were not admissible and that the defendant’s refusal to take a polygraph was not admissible evidence. However, the Supreme Court had not expressly addressed whether it was proper to merely mention that the defendant had taken an examination although most jurisdictions precluded this evidence.

Accordingly, the Supreme Court took the opportunity to state: “We now hold that, it is well-settled that any reference to a criminal defendant’s offer or refusal to take a polygraph examination, and the results of a polygraph examination, are inadmissible ... [and] [l]ikewise, evidence that a defendant in a criminal case took a polygraph examination is also inadmissible.” However, the Supreme Court also stated: “[W]e now expressly hold that, although polygraph-related evidence has been deemed inadmissible in this State, the improper admission of such evidence does not warrant a new trial.” Instead, a harmless error analysis is to be made.

In this matter, the error was found to be harmless. The polygraph was mentioned when the investigating officer explained when it was that he next met with the defendant during the investigation. The Supreme Court immediately instructed the jury to disregard the evidence. And the error was unforeseen because the State had not solicited the information. With respect to whether a jury really would disregard the information and assume that the defendant failed the polygraph, the Supreme Court observed that “we normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury will be unable to follow the court’s instructions, and a strong likelihood that the effect of the evidence would be devastating to the defendant.” In light of the “strong admissible evidence of his guilt,” the Supreme Court did not deem this passing reference to the polygraph as “devastating.”

The conviction was affirmed.

Justice Ketchum dissented based upon the accumulation of three errors. First, the confession was not voluntary given the age of the defendant and the “lengthy grilling ... to elicit a confession.” Second, the unsealing of the juvenile records without a motion and notice to the defendant was error. Third, the convenient blurting out by the police officer that the defendant took a polygraph test was suspect. This accumulation of errors potentially resulted in the jury’s disregard of the possibility that the child was infected by contact with the mother.

JURY: DEFENDANT IS ENTITLED TO A PRESUMPTION OF PREJUDICE WHEN A PERSON INTERFERES WITH A JUROR IF THE PERSON IS AN INTERESED PARTY, THAT IS, A PLAINTIFF, DEFENDANT, OR AN ATTORNEY REPRESENTING ONE OF THEM.

JURY: DEFENDANT MUST PROVE PREJUDICE WHEN THE PARTY INTERFERING WITH A JUROR IS NOT AN INTERESTED PARTY.

EVIDENCE: THE TYPE OF EVIDENCE THAT IS ADMISSIBLE IN THE MERCY PHASE OF A BIFURCATED FIRST DEGREE MURDER TRIAL IS MUCH BROADER THAN THE EVIDENCE ADMISSIBLE FOR PURPOSES OF DETERMINING A DEFENDANT'S GUILT OR INNOCENCE.

EVIDENCE: AUTOPSY OR CRIME SCENE PHOTOGRAPHS MAY BE PARTICULARLY RELEVANT TO DEPICTING THE NATURE OF THE CRIME COMMITTED BY THE DEFENDANT WHO HAS BEEN FOUND GUILTY OF FIRST DEGREE MURDER AND EVEN IF DEEMED GRUESOME, THE PROBATIVE VALUE OF THESE PHOTOGRAPHS IS GREATER AT THE MERCY PHASE OF A BIFURCATED TRIAL THAN AT THE GUILT PHASE OF SUCH TRIAL.

APPEAL: FAILURE TO GET A RULING ON AN OBJECTION WILL NOT PRESERVE AN ERROR FOR AN APPEAL BASED SOLELY UPON THE OBJECTION.

APPEAL: CREDIBILITY DETERMINATIONS ARE NOT A LEGITIMATE FUNCTION OF AN APPELLATE COURT.

***State v. Trail*, 236 W. Va. 167, 778 S.E.2d 616 (2015)**

In *State v. Trail*, 236 W. Va. 167, 778 S.E.2d 616 (2015), the defendant appealed her conviction after a jury trial of murder in the first degree and the resulting imposition of a sentence of life without mercy.

Essentially, the evidence was that the defendant hired her nephew to kill her husband in order to collect on "various policies of life insurance."

An issue on appeal was purported misconduct by a juror. After the trial, the defendant's lawyer received information that a juror may have discussed the trial with a co-worker. The circuit court conducted the so-called *Remmer* hearing to consider the evidence of misconduct. The co-worker testified that she had asked the juror if she was on the defendant's jury. The co-worker had some interest in the matter because her daughter had been married to the defendant's son and the resulting relationship was not pleasant. The co-worker stated that the juror said she could not discuss the matter and the conversation ended.

The juror testified differently saying that the co-worker actually tried to influence her on the defendant's guilt, but she promptly left the break room. The contact consisted of a few seconds on one occasion. The juror stated that she did not share the encounter with any other juror.

Another co-worker testified that the juror informed her that she had initiated the contact and sought information regarding the defendant. She believed the juror had been influenced by the other co-worker's opinions regarding the defendant and her probable guilt.

The issue became whether the defendant was entitled to a presumption of prejudice because the interfering party was "interested." If the misconduct is induced by a "stranger," then the proof of prejudicial effect must be proven.

The Supreme Court held that, notwithstanding the co-worker's ill will toward the defendant, "our past cases clearly require a more direct connection to the litigants involved in the trial affected by the misconduct than exists in this instance." Generally, an "interested party" is considered to be "the plaintiff, the defendant, or an attorney representing one of them." So, the communication with the juror did not create a presumption of prejudice. Acknowledging "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote," the Supreme Court reviewed the record and found that the circuit court had not abused its discretion in light of the "advantage of observing the witnesses and making appropriate credibility determinations."

The next ground for appeal was the propriety of allowing autopsy and crime scene photographs to be admitted during the mercy phase of the trial. The defendant did not assert that the photographs were "gruesome" and, therefore, should not be admitted. Instead, the defendant argued that, because the photographs were deemed to be inadmissible during the guilt phase of the trial, the photographs should remain inadmissible during the mercy phase. Specifically, "bifurcation does not permit the circuit court to relax admissibility requirements during the mercy phase of trial to admit evidence that had been found to be inadmissible during the guilt phase."

The Supreme Court deemed the matter to be one of first impression and analyzed the issue as whether the "gruesome objection" should apply to the mercy phase in a bifurcated trial.

Notably, the Supreme Court's precedent establishes that "the type of evidence that is admissible in the mercy phase of bifurcated first degree murder trial is much broader than the evidence admissible for purposes of determining a defendant's guilt or innocence." For example, evidence of the defendant's character becomes relevant and admissible.

The Supreme Court had previously stated "the nature of the crime committed" is a valid consideration for the grant of mercy. The Supreme Court noted that "particularly relevant in the context of gruesome photographs is their depiction of the nature of the crime committed." Accordingly, "we now expressly hold that, autopsy or crime scene photographs may be particularly relevant to depicting the nature of the crime committed by the defendant who has been found guilty of first degree murder [and] [e]ven if deemed gruesome, the probative value of these photographs is greater at the mercy phase of a bifurcated trial than at the guilt phase of such trial."

Another ground for appeal was the reading of the “Slayer Statute” to the jury during the guilt phase of the trial. The defendant was attributed with the statements that she had foregone payment of any life insurance proceeds to her. Indeed, testimony was elicited that the defendant had not received any proceeds. The “Slayer Statute” was introduced, therefore, to establish that, if the defendant “was found to be guilty of participating in the murder of her husband, ... [she] would be prohibited by law from receiving any proceeds from these policies.” Essentially, the prosecutor argued that she was not giving up anything and, therefore, her refusing the proceeds did not imply she was innocent.

Another ground for appeal was the prosecutor’s argument that a finding of “no mercy” would also improperly atone for the defendant’s involvement in the beating of another person by her brother with a claw hammer, for which the defendant was also convicted. However, the Supreme Court noted that it was the defense counsel who raised the issue of “atonement” and, therefore, the prosecutor’s reference to atonement was not error.

Another ground for appeal was the prosecutor’s statements in closing argument to the jury implying a motive for the murder in that the defendant’s husband was looking at her bank accounts and her mismanagement of credit cards. The defense counsel objected that this was not supported by the evidence, but was stopped by the judge and asked to approach the bench. The prosecutor then stated that he would move on. Closing argument resumed without resolution of the objection. The failure to obtain a ruling resulted in the Supreme Court’s determination that this error had not been properly preserved for the appeal.

Additionally, the defendant complained that a chart of all the life insurance policies on the victim was improperly given to the jury because it was misleading and inaccurate. However, the record contained no objection to the admission of the chart and, accordingly, the Supreme Court deemed the issue to be waived.

Finally, the defendant argued that the jury made improper credibility determinations, acknowledging essentially that the evidence was sufficient to convict her if it was believable. The Supreme Court summarily resolved this by stating, “such a review is not a legitimate function of this Court.”

INDICTMENT: COURT CANNOT CONSIDER THE EVIDENCE PRESENTED TO THE GRAND JURY UNLESS AN ALLEGATION OF WILLFUL, INTENTIONAL FRAUD IS MADE.

EVIDENCE: NO MISCONDUCT ON PART OF PROSECUTOR WHO ONLY ASKED A GENERAL QUESTION THAT RESULTED IN THE EXPERT’S IMPROPER STATEMENT THAT VICTIM WAS AFRAID OF THE DEFENDANT.

State v. Booker, 2015WL7628831

In the memorandum decision, *State v. Booker*, 2015WL7628831, the defendant was tried on the charge of misdemeanor domestic battery. The defense concentrated on the victim's recanting her claims of abuse during family court proceedings and in an affidavit. The victim testified at the trial, and her testimony was bolstered by an expert witness on the behavior of victims, especially "victims who feared their abusers." The jury found the defendant guilty of the charge.

Although a misdemeanor, the conviction constituted a third offense. The defendant was sentenced to a term of one to five years of imprisonment.

On appeal, the defendant attacked the indictment, stating that the grand jury was never informed that the defendant had recanted the events that gave rise to the indictment. The Supreme Court recited its previous holding that the court could not consider the evidence presented to the grand jury unless an allegation of willful, intentional fraud was made. The Supreme Court noted that the State was unaware of the recantation which had occurred in sealed family court proceedings. Accordingly, no willful or intentional deceit had occurred, and the trial court's denial of the motion to dismiss the indictment was proper.

The defendant further argued that the prosecutor improperly elicited from the expert witness a statement in front of the jury that the victim was afraid of the defendant. According to defendant's counsel, the elicitation of the statement was an "attempt to tip the battle of credibility in its favor." The credibility issues related to the victim's various recantations of the charges before finally testifying against the defendant in the trial.

The Supreme Court found no misconduct by the prosecutor as the expert witness' statement was made in response to the question, "describe ... the problems you had or encountered in working with [the victim]." The Supreme Court concluded that, "the State was entitled to ask the question and had no control over Ms. Burton's response thereto." This ignores the fact, however, that the prosecutor and the expert witness had surely rehearsed the questioning and, specifically, this question. Presumably, the response would have been anticipated, but no discussion about pretrial preparation was had. No misconduct was found.

The Supreme Court noted that the circuit court upheld an objection to the statement as "hearsay and an improper characterization of the victim's feelings." The puzzling part of this discussion is that the Supreme Court found "no error in the circuit court's sustaining petitioner's objection to this testimony." Obviously, the petitioner was stating that the testimony was improper, so the finding is incongruous in that this would not have been an assignment of error. The Supreme Court continued, however, by criticizing the defendant for "misstat[ing] the record when he alleges that the circuit court offered no curative instruction," noting that, before deliberations began, the circuit court had instructed the jury to "completely disregard all questions ... to which any objections were sustained."

EVIDENCE: TWELVE YEAR OLD EVIDENCE OF SEXUALLY RELATED VIOLENCE COULD BE ADMITTED TO SHOW A LUSTFUL DISPOSITION TO YOUNG FEMALE RELATIVES AND TO SHOW PROOF OF OPPORTUNITY.

EVIDENCE: REMOTENESS IN TIME OF PRIOR BAD SEXUAL ACTS GOES TO WEIGHT TO BE ACCORDED EVIDENCE AND NOT ADMISSIBILITY.

State v. David M., 2015WL7628829

In the memorandum decision, *State v. David M., 2015WL7628829*, the issues concerned the admission of evidence regarding prior bad acts and the admission of DNA evidence. The defendant had been charged with one count of incest and one count of second degree sexual assault. The victim was a niece. The crimes occurred in 1982.

The prosecution proposed the use of acts allegedly committed by the defendant in the 1970(s). The prior acts involved the purported “systematic and routine pattern” of abuse of his several nieces and a nephew. Additional acts involved the defendant’s forcing the nephew to do sexual acts with the nieces while he observed.

The defendant objected to the introduction of the evidence as “too remote in time” and “more prejudicial than probative.” The trial court ruled that, if the acts constituted “sexually related violence,” the evidence could be admitted to show “his lustful disposition toward young female relatives” and “proof of an opportunity.”

The prosecution also wanted to introduce DNA evidence linking the defendant to the child born to the victim. The defendant objected stating that the “State failed to show a proper chain of custody.” Principally, the investigator for the prosecutor’s office had possession of the test swabs which he kept at his home before delivering to the laboratory. The trial court found that the investigator had “sole and exclusive possession of the evidentiary items while they were in his custody.”

The Supreme Court found the ten year span between the prior acts and the charged acts did not affect the relevancy of the testimony. The Supreme Court opined that the time span fell within the rule that “remoteness goes to the weight to be accorded the evidence by the jury, rather than to admissibility.” The Supreme Court further upheld the trial court’s balancing test regarding the evidence and the finding that the evidence was more probative on the issue of lustful disposition than it was prejudicial.

The Supreme Court summarily upheld the admission of the DNA evidence finding that the defendant does not “allege or point to any evidence in the record to show that the evidence was not genuine or had been tampered with in any manner.” Accordingly, the Supreme Court found no abuse of the trial court’s discretion.

Notably, the Supreme Court in a final footnote alerted the parties to the appeal to “a potential discrepancy between the sentence imposed ... and the sentence required by statute.” Noting that

it is the sentencing statute in effect at the time of the commission of the offense that controls unless the defendant elects otherwise, the Supreme Court noted that “the parties and circuit court may wish to address the issue pursuant to the circuit court’s authority in Rule 35 of the West Virginia Rules of Criminal Procedure.” As noted above, the crime had been committed in 1982 and only charged in 2012. The 1931 code provisions applied, therefore, not the more recent enactment.

PLEA AGREEMENTS: W. Va. R. Cr. P. 11 GIVES A TRIAL COURT DISCRETION TO REFUSE A PLEA BARGAIN AND NO CONSTITUTIONAL RIGHT EXISTS TO A PLEA BARGAIN.

SENTENCE: A PALPABLE ABUSE OF DISCRETION MUST OCCUR BEFORE THE DECISION TO DENY PROBATION WILL BE OVERTURNED.

State v. Richard D., 2015WL7628835

In the memorandum decision, *State v. Richard D., 2015WL7628835*, the defendant appealed the lower court’s rejection of his plea agreement and the resulting conviction on one count of sexual abuse by a custodian and one count of first-degree sexual abuse. The charge arose out of the defendant’s forcing an eight-year old girl, whom he babysat, to touch his penis. The defendant admitted to the touching, but attributed it to an accident facilitated by the fact that he was wearing swimming trunks.

A *nolo contendere* plea was negotiated with the prosecutor, but at the hearing the prosecutor represented that the family of the victim wanted “something much stronger” than the misdemeanor plea and “that he had not discussed the plea with the investigating officer directly.” The plea was rejected, but the lower court stated “it would reconsider its ruling if the parties presented another plea agreement or returned with the investigating officer present.”

The Supreme Court notes, at this point, “the record on appeal contains no objection to the circuit court’s order rejecting his plea agreement, no motion for reconsideration thereof, and no discussion of a second plea agreement.”

Trial ensued; the young girl testified; and the defendant was found guilty. At sentencing, the defendant sought an alternative sentence, “citing his record as a veteran and ... no criminal history.” The lower court sentenced the defendant to ten to twenty years and an extended period of twenty years of supervised release.

With respect to the issues on appeal, the Supreme Court reiterated that “West Virginia Rules of Criminal Procedure, Rule 11, gives a trial court discretion to refuse a plea bargain” and that “no constitutional right” exists to a plea bargain. It was noted, moreover, that the lower court had not foreclosed the possibility of a reconsideration of the agreement. The Supreme Court found sufficient the testimony of the child and the defendant’s own admission to uphold the conviction. Finally, the Supreme Court emphasized that “a palpable abuse of discretion” must occur before

the decision to deny probation will be overturned. Without discussion, the Supreme Court found no such abuse in this matter.

SENTENCE: CIRCUIT COURT JUDGES DO NOT HAVE TO USE THE RESULTS OF THE LS/CMI IN THEIR SENTENCING DECISIONS.

State v. J.N., 2015WL7628823

In the memorandum decision, *State v. J.N., 2015WL7628823*, the defendant argued that the imposition of consecutive sentences was improper for his conviction on one count of sexual abuse by a custodian and one count of incest. Further, the defendant argued that incarceration was a cruel and unusual punishment considering his medical conditions.

The defendant pled guilty to two of eighteen counts relating to conduct with his granddaughters, both of whom were under the age of sixteen years. The resulting LS/CMI evaluation found “that petitioner had medium risk/need level with a twenty-three percent chance of recidivism.” The prosecutor argued for lengthy incarceration for commission of the “heinous crimes” and the resulting sentence was consecutive prison terms of ten to twenty years and five to fifteen years.

Not surprisingly, the Supreme Court found no abuse of discretion in running the sentences consecutively, which is the default under the statutory provisions. However, the Supreme Court again addressed the LS/CMI, stating “circuit court judges do not have to use the results of the LS/CMI in their sentencing decisions, emphasizing that the use of the information in an LS/CMI assessment is ‘entirely left to [the circuit judges] discretion’” (quoting Justice Loughry’s opinion in a concurrence in *State v. Rogers*, No. 14-0373). The paradox is that a negative report will almost certainly be used to support a harsh sentence, but a positive report does not have to be used to support a more lenient sentence.

With respect to the cruelty of incarceration, the petitioner reported in his presentence interview that “he has a steel plate in his head and has a history of back pain, several broken bones, and unspecified problems with his nasal passage ... [and] continues to suffer from blindness in one eye, heart disease, diabetes, glaucoma, prostate cancer[,] and high blood pressure.” The Supreme Court noted, however, that the defendant had no evidence that his medical needs were not being met. The argument that it was “unrealistic for the [Division] of Corrections to care for him adequately for the full length of his sentence” was deemed to be an “abstract proposition,” the “decision of which would avail nothing in the determination of controverted rights of person or property.” To rub salt in the alleged wounds, the Supreme Court also noted that “the record on appeal provides no evidentiary support for petitioner’s medical conditions beyond his self-report to the probation officer.”

SUPPRESSION: A WARRANTLESS ELECTRONIC INTERCEPT OF A CONTROLLED BUY DID NOT WARRANT SUPPRESSION OF SUBSEQUENT SEARCHES EVEN THOUGH THE APPLICATIONS FOR WARRANTS WERE BASED ON THE WARRANTLESS INTERCEPT.

JUDGE: A FAMILY RELATIONSHIP BETWEEN A MAGISTRATE AND A LAW ENFORCEMENT OFFICIAL DOES NOT AUTOMATICALLY DISQUALIFY THE MAGISTRATE.

State v. Curran, 2015WL7628702

In the memorandum decision, *State v. Curran, 2015WL7628702*, the facts centered on an initial controlled buy of controlled substances from the defendant by a confidential informant who was equipped with electronic monitoring devices. No “electronic intercept” warrant had been obtained under the provisions of the state’s Wiretapping and Electronic Surveillance Act, W. Va. Code §§62-1D-1, *et seq.*, with respect to the controlled buy. Subsequent buys were done by timely obtained warrants, but the probable cause for the warrants was, or included, the initial warrantless controlled buy. Finally, a search warrant was obtained for the defendant’s residence and, again, the application made reference to the initial controlled buy for which no warrant had been obtained. The lower court denied the resulting motion to suppress all evidence obtained from all the controlled buys and the search of defendant’s residence, except for the audio recording of the initial controlled buy.

The defendant entered into a conditional guilty plea to one charge of delivery of a controlled substance.

The Supreme Court affirmed the lower court’s reasoning that, while the audio recording could not be used due to the lack of a preceding electronic intercept warrant, the confidential informant’s observations after being invited into the defendant’s home could be used.

The defendant also attacked the sufficiency of the affidavits used to obtain subsequent warrants. The Supreme Court found that the “first-hand” information of the confidential informant, when read in a “common sense and realistic fashion” provided more than a “mere allegation of suspicion and belief.” Essentially, the officers were outside the defendant’s home after the informant was invited into the defendant’s residence and when the confidential informant come out of the house, the informant did not have the money provided by the officers and had a quantity of drugs.

The defendant further argued that the family relationship of the magistrate with a member of the law enforcement task force violated the right to a probable cause determination by an impartial magistrate, especially when it was the family member who “handled” the confidential informant. Moreover, the warrant that issued for search of the defendant’s residence stated no grounds for probable cause except “see affidavit,” which further attested in the defendant’s opinion to a lack of independent judgment by the magistrate.

The Supreme Court summarily dismissed the grounds related to the family relationship. The magistrate's brother "did not request the warrant and his name did not appear on any affidavit or the warrant itself." The Supreme Court reiterated its precedent that the family relationship between a magistrate and a law enforcement official does not automatically disqualify the magistrate. And the Supreme Court found no error in simply referencing the affidavit in the statement of grounds for a probable cause determination.

Finally, the defendant contended that the identification testimony of the confidential information should have been suppressed. The circumstances were that the confidential informant was shown a photograph of the defendant on an officer's phone several hours before a controlled buy. The controlled buy was conducted. Subsequently, the confidential informant identified the defendant from a photo lineup before buying drugs in a second controlled buy. This identification was tied to the suggestive nature of being shown a picture of the defendant before the first controlled buy. The Supreme Court found that, in these circumstances, "there was no chance of misidentification," especially since the confidential informant had actually purchased drugs from the defendant.

The denial of the motion to suppress was affirmed.

SEARCH AND SEIZURE: WARRANTLESS ENTRY INTO A HOUSE IS VALID WHEN BASED UPON THE CONSENT OF A THIRD PARTY THAT THE POLICE, AT THE TIME OF ENTRY, REASONABLY BELIEVE TO POSSESS COMMON AUTHORITY OVER THE PREMISES EVEN IF THE THIRD PARTY DOES NOT POSSESS SUCH COMMON AUTHORITY.

State v. Jarvis, 2015WL7628838

In the memorandum decision, *State v. Jarvis, 2015WL7628838*, the appeal was taken from a motion to suppress evidence obtained during a search of the defendant's home.

A fugitive was believed to be hiding in the defendant's residence. When police knocked on the door, the man who opened the door immediately bolted and ran to the back of the residence to where the owner apparently was. The police were then admitted by another person within the residence, who was not the owner. The person who bolted was, interestingly, not the person for whom the officers were searching. However, upon entering the home and seeking out the owner of the residence in the back of the house, the smell of methamphetamine was detected and a "methamphetamine lab in a bottle on a nightstand" was observed. The owner and another individual then executed written permission forms for the officers to search the residence, resulting in the discovery of precursor material, marijuana, diazepam, and klonopin.

The lower court denied the defendant's motion to suppress, primarily based on the defendant's voluntary consent. A conditional plea was then signed.

The defendant argued on appeal that the officer's initial entry into the home was illegal, which made the subsequent consent ineffective.

The Supreme Court acknowledged its previous holdings that “in making a factual assessment concerning the existence of voluntary consent, the inquiry focuses upon whether the facts available to the officer at the moment of entry warrant a man of reasonable caution in the belief that the party had voluntarily authorized the officer’s entry onto the premises.” Pause was given to the issue of whether the person who admitted the officers had “common authority over the home such that he could authorize the officer’s entry.” The pause was only momentary as the Supreme Court quoted the United States Supreme Court’s holding that a “warrantless entry is valid when based upon the consent of a third party whom the police, at the time of entry, reasonably believe to possess common authority over the premises, even if that third party does not possess such common authority.” The appellate court found that the entry into the home was not illegal under this standard.

The final issue was whether threatening to make a person to wait “outside in the cold” while a warrant was obtained constituted a coercion of the defendant’s consent to a search of the home. The Supreme Court did not find such a statement in the record of the matter, however, and determined “it is clear that no threats were used to obtain petitioner’s consent to search the premises.” It is not obvious from the decision, but it can be presumed that this fact had not been presented originally to the lower court or had not found its way into the appendix for the appeal.

The denial of the motion to suppress was affirmed.

EVIDENCE: IF A CLIENT WAIVES THE RIGHT TO REMAIN SILENT, THEN WHATEVER IS NOT SAID IN THE RESULTING STATEMENT IS PROPERLY COMMENTED ON.

WITNESSES: INVESTIGATING OFFICER COULD OFFER A LAY OPINION ON WHAT HAD CAUSED INJURIES TO A CHILD’S BACK.

PROCEDURE: STATE HAS NO OBLIGATION TO CALL A WITNESS SO DEFENSE CAN ELICIT TESTIMONY FROM HIM OR HER.

State v. Hopkins, 2015WL7628840

In the memorandum decision, *State v. Hopkins, 2015WL7628840*, the defendant was convicted by a jury of the felony offense of child abuse by a parent resulting in bodily injury. The defendant was placed on a one year period of probation.

The incident underlying the offense was the defendant’s disciplining of her eleven year old son by striking him with a “switch.” The event purportedly left bruises on the son’s back and several tender spots, which were reported by the son to the director of the son’s daycare center. The son is described as a child with mental disabilities.

The defense was that the injuries to the son were caused by a go-cart accident that had not been mentioned in the defendant’s original statements to the law enforcement personnel and child

protective services. Two construction workers testified to witnessing the accident and stating that any back injuries might be related to the son's overturning the go-cart.

An issue on appeal was the consistent examination of the lead investigator and other witnesses by the prosecution regarding the fact that the defendant never mentioned the go-cart accident as a potential source of her son's injuries. The defense counsel objected to the first question regarding if anyone had informed the investigator about the go-cart accident as hearsay, which was overruled. The defense counsel did not object to the repetition of this questioning ending in the investigator's statement that, "if I was in the middle of a CPS investigation, a law enforcement investigation, and she [petitioner] knew that that's how he received these injuries, according to her from a go-cart wreck, I think that I would have informed CPS and law enforcement of that real quick."

The defense counsel cross-examined the investigator and asked, if "[defendant] told her lawyer about it and he chose not to do it [advise police or CPS of the go-cart accidents], then who's to blame?" When an objection to this question was sustained, the defense counsel then asked "for the jury to be instructed that the fact that [defendant] remained silent and didn't volunteer this should not be interpreted against her." The prosecution objected on the basis that the plaintiff had waived her right to remain silent by executing an *Interview & Miranda Rights Form* prior to her original statement. The court sustained the objection, but proffered to give any instruction wanted by the defense counsel. No instruction was ever given.

The defendant was then similarly cross-examined on her failure to mention the go-cart accident to any law enforcement official. The defense counsel objected, stating that the client "had a right to remain silent [and] [s]he had counsel." The prosecution again asserted that the defendant had waived this right to which defense counsel's eloquent and concise reply was, "[o]h, come on." The defense counsel's objection was overruled.

The CPS worker similarly testified, to which no objections were interposed.

The Supreme Court of Appeals found that no constitutional violations occurred and were harmless in any event. The linchpin was that the defendant did not assert her right to remain silent. She spoke and her statement was admitted without objection. Accordingly, what was not said in the statement was properly commented upon or, because it was obvious that her story was not included in the statement, it was harmless commentary by the prosecutor upon the statement. Simply, if your client chooses to speak, what he or she chooses to say and not say becomes evidentiary.

The second issue was whether the investigating officer was impermissibly permitted to testify as an expert on what caused the injuries to the son's back. The Supreme Court found the lay opinion testimony to be proper because "his opinions were rationally based on his perception, were helpful to clearly understand his testimony or determine a fact in issue, and were not based on any scientific, technical or specialized knowledge." The Court also noted that many of the opinions were elicited by the defense counsel on cross-examination.

The final issue was the state's failure to call the son, who, again, was described as a "child with mental disabilities." The defendant wanted an instruction that the jury could infer the testimony to be favorable to her because the state chose not to call him. The Court readily dismissed this ground stating that the appellate counsel "has cited no law that requires the State to call witnesses just so petitioner could elicit testimony from them." Obviously, the defendant "had a mechanism to obtain the witness and chose not to do so." As a note, however, the defendant's parental rights had been terminated.

Other grounds were summarily disregarded and the conviction was affirmed.

EVIDENCE: STATE IS REQUIRED TO PRODUCE EVIDENCE TO SUPPORT THE CRIME BUT IS NOT GENERALLY OBLIGATED TO PRODUCE EVIDENCE THAT ONLY THE DEFENDANT MAY DEEM TO BE RELEVANT.

SENTENCE: DEFENDANT IS NOT ENTITLED TO CREDIT FOR TIME SERVED WHEN HIS INCARCERATION IS RELATED TO REVOCATION OF PAROLE FOR A PRIOR CONVICTION.

State v. Bragg, 2015WL7628836

In the memorandum decision, *State v. Bragg, 2015WL7628836*, the defendant was convicted of drug offenses relating to the transportation into the state and subsequent sale of prescription drugs. The defendant was on parole at the time of the arrest and, pending his trial, was incarcerated due to the drug transaction and then revocation of his parole. The trial centered on a confidential informant's testimony that he called the defendant who agreed to transport drugs from South Carolina to the informant's house in Fayette County, West Virginia. When the defendant arrived at the house, the transaction was completed by and between a co-defendant and an undercover officer. The undercover officer testified that the defendant stood in "a defensive stance, just kind of like he was there to watch, to observe, make sure everything was – nothing happened." Upon completion of the transaction, the undercover officer shook everyone's hands and then the defendant and others were immediately arrested.

All the relevant evidence was found on the co-defendant. Indeed, the drugs were in a prescription bottle with the co-defendant's name on the label.

The defendant testified at trial, stating that he had not received any phone calls from the confidential informant and that he had not discussed selling pills with any co-defendant.

The defendant then argued for an instruction on "missing evidence," citing the State's failure to properly inspect the confidential informant's cellular phone records prior to trial or to present the records. The instruction was rejected and the jury returned its verdict of guilty.

The Court readily found sufficient evidence to find that the defendant was a principal in the transaction. Essentially, the defendant was present during the transaction and was described by

the undercover officer as warily observing. With regard to the missing evidence argument, the Court articulated the assigned error as being “the circuit court allowed the CI to testify to cellular phone calls he made to petitioner ..., when the State failed to inspect or test the cellular telephones recovered by police to provide them to petitioner for his inspection.”

The Court first found that the issue was waived because the defense counsel never objected on this basis during the testimony of the confidential informant. The Court then found that the defendant had no authority for the proposition that the State was obligated to produce the cellular records. The defendant had not requested and been denied the records, so no discovery abuse occurred. As in *State v. Hopkins, supra*, the State is required to produce evidence to support the crime, but is not generally obligated to produce evidence that only the defendant may deem to be relevant.

The missing evidence argument was also disregarded for the reason that the evidence was not missing; it was simply not presented by the State and not requested by the defendant.

Finally, the Supreme Court affirmed, consistent with its prior decisions, that the defendant was not entitled to credit for time served once his incarceration was related to the revocation of parole for a prior conviction, unrelated to the current charges.

STATUTE OF LIMITATIONS: A CRIMINAL TRIAL IN MAGISTRATE COURT MUST BE COMMENCED WITHIN ONE YEAR OF THE EXECUTION OF THE CRIMINAL WARRANT AND LACK OF GOOD CAUSE FOR DELAY BEYOND ONE YEAR SHOULD BE PRESUMED FROM A SILENT RECORD.

Munoz v. Adams, 2015WL7628822

In the memorandum decision, *Munoz v. Adams, 2015WL7628822*, the petitioner was pro se. The issue was the petitioner’s request for the issuance of a writ of prohibition against the magistrate presiding over his DUI charges. After several continuances, the trial date for the DUI charge was set for a jury trial, but the jury was not called to appear due to the petitioner’s stated intent to enter a plea. However, the petitioner balked at entering a plea, and the magistrate dismissed the charge without prejudice.

The charges were refiled as a “second offense” DUI. The defendant moved to dismiss the charges as outside the statute of limitations. The motion was denied by the magistrate.

The Supreme Court noted that a “statute of limitations” is not explicitly set forth in the governing statute, but that the controlling precedent is that, “a criminal trial in magistrate court must be commenced within one year of the [execution] of the criminal warrant and lack of good cause for delay beyond one year ... should be presumed from a silent record.” In the Supreme Court’s opinion, the record was “clear” that the petitioner had moved three times for a continuance, and the statute specifically states that an exception is made where “the failure to try [the defendant] was caused by ... a continuance on the motion of the accused.”

And this is a punchline for the case. The petitioner claimed that the record did not contain any actual motions made by him for a continuance. The *pro se* petitioner was, in fact, a licensed attorney in the State of West Virginia and the magistrate testified in the circuit court that she had not reduced the oral requests for a continuance to writing because the petitioner was an “officer of the court” and it was her belief that “he could be trusted to proceed accordingly.” The Supreme Court further noted that the record was silent “to any party other than the petitioner requesting a continuance.” The state had not sought any continuances. Accordingly, the delay in the trial had to be solely attributed to the petitioner. The denial of the writ of prohibition was thereby affirmed.

EVIDENCE: NON-TESTIMONIAL STATEMENTS BY AN UNAVAILABLE DECLARANT ARE NOT PRECLUDED FROM USE BY THE CONFRONTATION CLAUSE.

HEARSAY: VICTIM’S STATEMENT ABOUT DEFENDANT HITTING HER MADE TO A POLICE OFFICER WAS NOT HEARSAY WHEN OFFICER IS TESTIFYING ABOUT WHY HE TOOK CERTAIN STEPS.

EVIDENCE: VICTIM’S STATEMENT TO NURSE THAT DEFENDANT CAUSED THE INJURIES WAS NOT TESTIMONIAL, BUT WAS HEARSAY, ALTHOUGH HARMLESS.

State v. Bazar, 2015WL7628722

In the memorandum decision, *State v. Bazar, 2015WL7628722*, the defendant, who was convicted of a battery, claimed “his rights under the Confrontation Clause of the Sixth Amendment were violated, in that the victim in the matter did not testify.”

The testifying officer had responded to a domestic violence call and found a woman with whom the defendant lived bleeding profusely from the side of her head and crying hysterically. The testifying officer then recounted the statements of the woman to him that the defendant had punched her. Other witnesses testified to the defendant’s treatment of the woman on that evening, including their witnessing the defendant hitting her, pulling her hair, and knocking her into a doorway. A treating nurse testified that the woman told her that her boyfriend had hit her and had choked her.

The jury convicted the defendant of unlawful assault and battery as a lesser included offense of malicious assault.

The Supreme Court restated the requirement that only “testimonial statements” cause the declarant to be a “witness” subject to the Confrontation Clause. The converse is that “non-testimonial statements by an unavailable declarant ... are not precluded from use by the Confrontation Clause.”

The Supreme Court found that the circumstances in which the officer had heard the woman's statement constituted non-testimonial statements because "the primary purpose of the statement is to enable police assistance to meet an ongoing emergency." The statements also were not hearsay because the prosecutor was careful to have the officer testify why he asked the questions, which was to determine what steps the officer needed to take. The statements were not asserted, therefore, for the truth of the matter.

Similarly, the statements to the nurse were not testimonial in nature because the statements were made in the "midst of an ongoing medical emergency." However, the Supreme Court seemingly acknowledged that the statements were hearsay, but relied upon its precedent that "an error in admitting hearsay evidence is harmless where the same fact is proved by an eyewitness or other evidence clearly establishes the defendant's guilt."

Simply, the testimony of the other witnesses to the events of the evening was sufficient to convict the defendant, rendering the statements to both the officer and the nurse harmless.

DUE PROCESS: THE DENIAL OF THE RIGHT OF APPEAL CONSTITUTES A VIOLATION OF DUE PROCESS WHICH RENDERS THE SENTENCE IMPOSED BY REASON OF THE CONVICTION VOID AND UNENFORCEABLE.

APPEAL: APPROPRIATE REMEDY FOR DENIAL OF A TIMELY APPEAL WAS NOT UNCONDITIONAL RELEASE, BUT SUCH REMEDIAL STEPS AS WILL PERMIT THE EFFECTIVE PROSECUTION OF THE APPEAL.

APPEAL: JURISDICTIONAL ERROR COULD BE IGNORED IN ORDER TO PROTECT PRINCIPLES UNDERLYING NOTIONS OF JUDICIAL ECONOMY AND INTEGRITY BY ALLOCATING APPROPRIATE RESPONSIBILITY TO THE DEFENDANT FOR INDUCING THE ERROR.

State v. Plymail, 2015WL7628723

In the memorandum decision, *State v. Plymail, 2015WL7628723*, the defendant was sentenced to life imprisonment upon conviction of the second degree assault of a woman he had met at bar near the campus of Marshall University. The case was complicated by the admission that defendant and the alleged victim had engaged in consensual intercourse before the alleged circumstances of the assault. At the trial of the matter, the jury informed the judge that it was hung at a vote of "6-4-2." The judge asked for a show of hands by the jurors, admonishing the jurors to not say anything, about whether continued deliberations might result in a verdict. Three hands were raised. The judge returned the jury to its room for more deliberations. About forty-five minutes later, the jury had a verdict, which was guilty of second degree sexual assault.

Two previous felony convictions supported a recidivist information. The information provided to the defendant failed, apparently, to attach a copy of the indictment and conviction order for a

burglary charge. Instead, two copies of an escape charge were attached. Eventually, defendant admitted to the two previous charges, and petitioner received his life sentence.

The first assignment of error was the fact that his appeal was not filed until twenty (20) years after his conviction in 1994. The Supreme Court recited its precedent that “the denial of the right of appeal constitutes a violation of due process which renders the sentence imposed by reason of the conviction void and unenforceable.” However, the Supreme Court recited its additional precedent that “the appropriate remedy for denial of a timely appeal was not unconditional release, but such remedial steps as will permit the effective prosecution of the appeal.”

The reality was that the defendant had at least eight counsel appointed to him and the State’s counsel pointed out that “the withdrawal of these attorneys was due, in large part, to petitioner’s accusatory, abrasive and belligerent attitude.”

And thus comes the paradoxical ruling. Because the defendant’s appeal had no merit, “there is no prejudice to petitioner for delay in the filing of his appeal.”

The next assignment of error alleged that the lower court had coerced a verdict. Two prospective jurors indicated on Wednesday during jury selection that they would not be available for a trial on Friday and would not be available generally after that date. The jurors remained on the jury and the lower court advised the parties, counsel and the jury that “the case was going to take two days to try.” When the case was submitted to the jury, the court informed the jury that the deliberations had to be finished that evening and mentioned the possibility of an overnight sequestration. Apparently, the court stated in jest that “he would hate to have to put them in jail overnight to make sure that they would be there the next day”, apparently referring to the fact that two jurors had other commitments the next day. The defendant felt that these comments combined with the judges’ insistence on continued deliberations created a coercive atmosphere leading to his conviction.

The Supreme Court noted, however, that no such complaints had been made to the lower court at the time. And the Court refused to consider the matter as plain error because the Supreme Court did not believe the circumstances warranted the use of the plain error doctrine in order to “avoid a miscarriage of justice.” Essentially, the paradox arises again. You were found guilty so the plain error doctrine would not avoid a miscarriage of justice.

The next assignment of error was based on the defendant’s arraignment on the recidivist charge after the end of the term of court in which he was convicted. The defendant acknowledged that he requested a continuance of the matter when it was first brought before the court, to which the court replied, “I am willing to give you that time so long as we don’t have any claim of a denial of a speedy trial.” The defendant argued on appeal that the timing was jurisdictional and, therefore, the Supreme Court had to uphold his assignment of error. Instead, the Supreme Court treated this as an “invited error” by the defendant and, therefore, the jurisdictional issue could be ignored in order to “protect principles underlying notions of judicial economy and integrity by allocating appropriate responsibility for inducement of error.”

The next assignment of error went to the defendant's election to not testify because of the prosecutor's threat to introduce evidence of other assaults and criminal acts on which the defendant had been indicted at the same time as the present charge. The defendant asserted that, in fact and as a matter of law, it would have been improper to use such evidence and, therefore, he was wrongfully dissuaded from testifying. The lower court had actually ruled that such matters might be admissible if the defendant opened the door. Because the court had not made a "grossly erroneous mis-statement ... about the areas of conduct or criminal record that a defendant can be cross-examined about if he elects to testify," no reversible error existed. Again, the paradox is evident. I cannot tell you if this evidence would be admissible until you testify and you did not testify so I did not tell you incorrectly.

Significantly, Justice Davis and Justice Ketchum dissented from this decision, stating that the jury was, in fact, coerced by the judge's imposition of a "time limitation." The judge's admonition to the jury "to get it finished," and the judge's statement about "the possibility of overnight sequestration to secure their attendance, and he would hate to put them in jail overnight" were viewed as coercive, as evidenced by the speed of the deliberations and a verdict 52 minutes after informing the judge that they were hung.

RULE 403: PROBATIVE VALUE MUST BE SUBSTANTIALLY OUTWEIGHED BY A DANGER OF ONE OR MORE OF THE FOLLOWING: UNFAIR PREJUDICE, CONFUSING THE ISSUES, MISLEADING THE JURY, UNDUE DELAY, WASTING TIME, OR NEEDLESSLY PRESENTING CUMULATIVE EVIDENCE.

RULE 404(b): FAILURE TO GIVE LIMITING INSTRUCTION AT TIME OF INTRODUCTION OF EVIDENCE WAS ERROR, BUT IT WAS HARMLESS ERROR INCLUDING THE FACT THAT DEFENSE COUNSEL FAILED TO MOVE FOR THE LIMITING INSTRUCTION.

State v. White, 2015WL7628721

In the memorandum decision, *State v. White, 2015WL7628721*, the issues arose out of the defendant's conviction on two counts of first degree felony murder after introduction of evidence establishing that the defendant was a drug dealer and not adverse to violence. The underlying facts were that two men entered a "known drug house," and, after shots were heard, the two men left, with one person limping. Inside the house, law enforcement personnel found one dead person and one seriously injured person, who subsequently died. Around this time, the defendant entered a hospital seeking treatment for a bullet wound to his abdomen.

The defendant's accomplice was apprehended and questioned. The vehicle in which the men had arrived at the drug house was found near the scene and was determined to be registered in the name of the defendant's girlfriend. In the car, a gun was found which had the defendant's prints and blood.

Also, the accomplice's phone was found in the drug house and the defendant's phone was found in an area around the house together with the keys for the vehicle. Phone calls between the accomplice's phone and the defendant's cell phone were discovered that corresponded with the time period before and during the events. Text messages from the defendant's phone were also obtained.

The prosecutor gave notice that he intended to use as Rule 404(b) evidence "call logs" setting forth the communications between the alleged accomplice and the defendant and the text messages found on the defendant's phone. The text messages regarded the distribution and sale of drugs, except that the last message threatened overt violence against another person. The defendant was purportedly the sender of the text messages. The trial court permitted the admission of the evidence as proving the defendant's intent and/or motive, holding that "I think that kind of goes to [defendant's] business plan ... of how [defendant] did business as a drug dealer, which seems to very neatly fit into [the State's] theory that [defendant and defendant's accomplice] went [to the drug house] to further their business and get more drugs with a possible use of violence."

The evidence was admitted at trial, but the Court did not give a limiting instruction, nor did defense counsel ask for an instruction. In instructing the jury, however, a limiting instruction regarding the evidence was given. The defendant did not testify.

During deliberations, the jury asked a question regarding "which phone related to the call logs, and which related to the text messages." The court identified the phone to which the call logs related as the accomplice's phone, but the court could not connect the text messages to a phone. The foreman commented, "So it's all the same phone?", to which the judge replied, "[I] can't really tell you more."

With respect to whether the text messages were properly admitted, the Supreme Court of Appeals found that the evidence of other drug transactions was properly admitted to show motive and intent, i.e., "to enhance ... [the defendant's] illegal 'business' by robbing a known drug house." The Supreme Court did not find this evidence to be more prejudicial than probative, because the evidence was obviously prejudicial but its probative value was not proven to be "substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

The Supreme Court characterized the defendant's further issue as a belief that the admission of the Rule 404(b) evidence was error because the jury's question related to this evidence and resulted in a verdict shortly after the question was answered. The Supreme Court found this argument "speculative" and further found it to be harmless even if it was error to admit the text messages.

Finally, the Supreme Court addressed the failure of the court to give a limiting instruction at the time of the admission of the Rule 404(b) evidence. While error was committed, the Supreme

Court found it to be harmless. The significance of the harmless error analysis is that it included the failure of the defense counsel to move for the limiting instruction, even though the requirement has been imposed by case law upon the court is to give such an instruction. But, again, it is significant, perhaps for habeas corpus relief, that the failure to give the instruction was deemed harmless, in part, due to defense counsel's failure to move for the instruction.

WITNESSES: CONFRONTATION CLAUSE WAS VIOLATED WHEN DEFENSE COUNSEL WAS NOT PERMITTED TO CROSS-EXAMINE POLICE OFFICERS ON WHY THE CHARGES WERE NOT FILED AS FELONIES, FIRST, RATHER THAN AFTER MISDEMEANOR CHARGES HAD BEEN FILED AND THEN DISMISSED.

WITNESSES: CROSS-EXAMINATION TO IMPEACH IS NOT, IN GENERAL, LIMITED TO MATTERS BROUGHT OUT ON THE DIRECT EXAMINATION.

***Plumley v. Mayfield*, 2015WL7628694**

In the memorandum decision, *Plumley v. Mayfield*, 2015WL7628694, the Supreme Court affirmed the circuit court's order granting the respondent's petition for a writ of habeas corpus.

The underlying circumstances involved a scuffle between two women at an apartment complex which the defendant, who was one of the combatant's boyfriends, was trying to quell. In the ensuing scum among the wrestlers, the boyfriend and the law enforcement personnel, the respondent became physically entwined with the law enforcement personnel and was arrested on the misdemeanor charge of "obstructing an officer." This would be a second offense due to a previous incident. The undisputed fact is that neither law enforcement officer was injured. It also came to light that the respondent's girlfriend was pregnant, thus accounting for his attempt to aid and protect his girlfriend.

The original charge was dismissed on the prosecutor's motion and, nineteen days later, the respondent was charged with two felony counts of battery on a police officer. Apparently, the upgrade in charges was the result of the respondent's refusal to make a deal in which he would plead guilty to attempted murder in an unrelated matter.

At the trial of the matter, the respondent was not permitted to testify that he had been originally charged with the misdemeanor offense and the prosecution was permitted to introduce as Rule 404(b) evidence the previous conviction for battery on a police officer.

The result was a jury conviction resulting in the respondent's incarceration for a term of life imprisonment as a recidivist, involving the offense of wanton endangerment involving a firearm and possession with intent to deliver a Schedule I controlled substance.

The habeas court granted the respondent a new trial on the finding that it was improper to deny the respondent the opportunity to cross-examine the officers with the fact that, initially, he was

charged with the “relatively minor misdemeanor offense” and on the further finding that it was improper to admit as Rule 404(b) evidence the previous conviction for battery on a police officer. The conviction for battery on a police officer, second offense, was vacated as was his sentencing as a “lifetime habitual offender.”

Notably, the felony offense with which the respondent was charged required that the physical contact with the law enforcement personnel had to be “of an insulting or provoking nature.” The underlying question is why the respondent’s actions became “insulting or provoking” nineteen days after the misdemeanor offense was dismissed by the prosecution.

The Supreme Court agreed that the Confrontation Clause’s protections had been vitiated by the circuit court’s refusal to permit cross-examination of the officers on why their first assessment of the seriousness of the offense changed. As the Supreme Court noted, “the officers were not only the key witnesses against respondent, they were also the victims of the alleged battery [and] [a]s such, the credibility of their testimony was critical to the State’s case.” Accordingly, “given this fact, respondent was entitled to impeach the officers with evidence of their decision, at the time of the altercation, to charge respondent with a much lesser offense.” And, even more notably, the Supreme Court found “this line of questioning would have been particularly significant given that the battery charge was determined by the sentencing court to be a violent crime that carried capital sentencing implications for respondent.” The constitutional error was not harmless beyond a reasonable doubt because “allowing the jury to consider the officers’ testimony in this regard would have afforded the jury the opportunity to fully assess the credibility of the officers, within whose discretion the initial charging decision was made, and would not have infringed upon the prosecuting attorney’s decision to charge respondent with battery.”

The State had argued that the cross-examination would have been inappropriate as it would have exceeded the scope of the direct examination. The Supreme Court noted that the argument had no merit because “cross-examination to impeach is not, in general, limited to matters brought out on the direct examination.”

The Supreme Court did not discuss, therefore, the propriety of the admission into evidence of the prior conviction to show intent, motive or knowledge under Rule 404(b).

Justice Loughery dissented and would have reversed the circuit court’s order finding that both grounds were improper grounds to reverse on a habeas corpus petition. An interesting point in the dissent is that the officers did not dismiss the charges and did not obtain the indictment on the more serious charges – the prosecutor did.

EVIDENCE: ANOTHER INCIDENT ALMOST IDENTICAL TO THE FACTS IN THIS MATTER WAS ALLOWED AS EVIDENCE TO DEMONSTRATE A SPECIFIC PLAN OR COURSE OF ACTION ON BEHALF OF DEFENDANT AND ALSO TO SHOW THAT THERE WAS NO MISTAKE ON HIS PART AND THAT THERE WAS NO INSTANCE OF A HEAT-OF-PASSION INCIDENT.

State v. Stewart, 2015WL7628700

In the memorandum decision, *State v. Stewart*, 2015WL7628700, the defendant and two other individuals beat up another individual who was accompanying them on an abandoned mission to buy drugs. Purportedly, the defendant took money from the victim's wallet.

A common trial pattern emerges. The investigating officer recounts the statements given to him by the alleged accomplices. The objection of hearsay is overruled on the grounds that the testimony is not proffered for the truth of the matter, but, instead, was presented "to explain the chronology of actions that he [the investigating officer] took in the investigation." The statements the investigating officer recounted was that all three of them, including the defendant, "engaged in the beating in some part." The investigating officer was then recalled later to again testify about the accomplice's statement implicating the defendant in the robbery.

An interesting twist in this matter is that the accomplices' trial testimony aided defendant, even though they had entered pleas of guilty to the charges. The female accomplice testified that she was in an alcoholic and drug-induced haze during that period and could not remember anything. The other accomplice assumed complete responsibility for the beating, contrary to his statements to the police.

As an editor's note, the prosecution did not need to elicit the officer's statement as a "chronology," but could have waited and used the statements to impeach the witnesses. Nonetheless, the prosecutor chose to elicit it during the case-in-chief, perhaps because the prosecution needed to call the accomplices as witnesses and it would be difficult for the prosecutor to impeach his or her own witness subsequently.

The prosecution did seek to impeach the female accomplice by having the driver of the transportation van, who was not on the witness list, recount that he heard the female accomplice state her love for the defendant and state, "I got your back."

During cross-examination of the other accomplice, the prosecutor had the accomplice recount a separate trial in which another beating was involved and in which he took the stand and "professed" the defendant's innocence of that beating as well. The prosecutor made known during this questioning that the defendant had been found guilty of this other matter notwithstanding the accomplice's testimony by stating "the jury didn't believe you either, did they?" An objection was lodged to the solicitation of a reference to the prior conviction, but no limiting or cautionary instruction was given.

And, in closing, the prosecution referenced the statements of the female accomplice as substantive proof of a conspiracy and referenced the guilty pleas of the accomplices as evidence of the defendant's guilt. No objections were interposed during the prosecutor's closing argument.

The first and prominent argument on appeal was that the reference to the guilty pleas constituted reversible error, notwithstanding the court's instruction limiting the use of the pleas to

the determination of credibility of the witnesses and not the guilt of the defendant. The Supreme Court found that the limiting instruction precluded any error.

The prosecutor's remarks in closing were not found to constitute plain error, and the Supreme Court noted that the reference to the prior convictions was simply use of evidence that had been admitted to refute the defense theory that the defendant had no part in the beating.

Another ground for error was the testimony by the investigating officer about the statements made to him. The defendant argued that the explanation given for eliciting the testimony was "a mere pretext to get otherwise admissible hearsay before the jury." The Supreme Court found that the officer's next statement about getting a "warrant" substantiated the use of the statements as part of the chronology of the investigation.

Plain error was not found in using the statement of the accomplice that she loved the defendant and had his back. In context, the prosecutor was attacking the witness' credibility.

Finally, the eliciting of the information about the defendant's prior conviction for a beating in conspiracy with the same individuals was found to be proper 404(b) evidence to "demonstrate a specific plan or course of action on behalf of [defendant] and also to show that there was no mistake on his part, that there was no instance of a heat-of-passion incident." The Court noted that a pretrial hearing had been held on the matter and that limiting instructions had been requested and given. Interestingly, no discussion was had regarding the prejudicial effect of using an identical set of facts in another case to prove guilt in this case.

The conviction of the defendant was affirmed.

APPEAL: THERE MUST BE NO EVIDENCE TO SUPPORT A CONVICTION BEFORE A JURY VERDICT WILL BE SET ASIDE OR, RESTATED, VERDICT WILL BE UPHeld IF "SOME" EVIDENCE EXISTS.

WITNESSES: A DEFENDANT DOES NOT HAVE A CONSTITUTIONAL RIGHT FOR HIS INCARCERATED WITNESS TO BE DRESSED IN OTHER THAN PRISON ATTIRE, BUT IT IS DESIRABLE FOR THE WITNESS TO BE SO ATTIRED.

WITNESSES: IT IS DEFENDANT'S BURDEN TO MOVE THAT AN INCARCERATED WITNESS SHOULD TESTIFY IN CIVILIAN CLOTHES AND, AT THE TIME, THE JUDGE MUST SET FORTH ON THE RECORD THE REASONS FOR DENYING THE MOTION.

State v. Messer, 2015WL7628699

In the memorandum decision, *State v. Messer, 2015WL7628699*, the defendant was convicted of several counts of burglary, one count of second degree robbery, and one count of conspiracy.

The allegations were that the defendant and his co-conspirator had robbed one home, but, in doing so, the defendant's co-conspirator was cut so severely that it required stitches. At the

hospital, the investigating officer questioned the defendant and his alleged co-conspirator about the recent robbery. After treatment and questioning, the defendant and his co-conspirator then went to another residence and robbed another home, wearing ski masks and using a gun to force a safe to be opened. The victims were able to identify the co-conspirator by his voice.

Shortly into the investigation, the co-conspirator called to confess, implicating the defendant in the commission of the crimes.

At trial, the co-conspirator changed his testimony and attempted to exonerate the defendant.

Without any actual eyewitness testimony, with the co-conspirator's recanted statement, and with only the defendant's identification in the course of the crime as "J," which is the first letter of his first name "James," the defendant was convicted of all the burglary charges and the lesser included offense of second degree robbery.

The Supreme Court first found that the delay in the trial of the defendant was attributable to the withdrawal of defendant's first two court-appointed counsel and not to any failure on the part of the court or the prosecution. Accordingly, the defendant had not been denied a trial without unreasonable delay. Moreover, defendant had failed to articulate any actual prejudice.

A focus on the appeal was the sufficiency of the evidence. The defendant put forth that the only evidence of his complicity in the crimes was the "false" statement by his purported co-conspirator, who recanted at trial. Because the precedent requires "no evidence" before a jury verdict will be set aside, the Supreme Court pointed to the fact that the co-conspirator had implicated the defendant and that the defendant's first initial was spoken during the commission of the crime and that the defendant had knowledge of the location of certain of the stolen items in the victims' homes. So, "some" evidence existed and "sufficiency" was satisfied.

The Supreme Court also found that no *Brady* violation occurred because the prosecutor withheld medical reports until trial showing that the defendant was in the hospital until several minutes before the second robbery occurred, thus clearing him, and the prosecutor further withheld 911 tapes for the time that the second robbery was reported because the tapes were destroyed routinely after one year. The Supreme Court noted that the defendant did receive the medical records for his co-conspirator, but the records were not exculpatory because the time relied upon by the defendant was merely the time of a final entry and other evidence existed that the defendant and the person being treated had left earlier. The Supreme Court further found that the 911 tapes were not suppressed by the prosecutor and the exculpatory value was simply speculative. The Supreme Court further noted that the defendant's "quarrels with his initially-appointed counsel resulted in a large amount of time" passing, during which the tapes could have been requested.

The defendant also objected to the fact that his co-conspirator was required to testify in orange prison attire. While the Supreme Court noted that this is not a constitutional right, it is desirable for a witness to not be so attired. However, the burden is placed on the defendant to move that

the incarcerated witness be permitted to testify in civil clothes and the judge must then “set forth on the record the reasons for denying said motion.” The defense counsel had not carried this burden. Also, the defendant’s questioning of the witness required disclosure of his conviction and incarceration and, therefore, the jury knew of his status notwithstanding the witness’ prison attire.

The remaining nineteen assignments of error were summarily dismissed.

HABEAS CORPUS: GIVEN THE HEINOUS NATURE OF THE OFFENSES, IT WAS NOT INEFFECTIVE FOR DEFENSE COUNSEL TO FORGO AN ARGUMENT FOR PROBATION AT THE SENTENCING HEARING AND INSTEAD TO HOPE FOR CONCURRENT SENTENCES.

HABEAS CORPUS: WHEN A KNOWING AND INTELLIGENT WAIVER OF CONSTITUTIONAL RIGHTS IS CONCLUSIVELY DEMONSTRATED ON THE RECORD AT A PLEA HEARING, THE MATTER IS RES JUDICATA IN SUBSEQUENT ACTIONS IN HABEAS CORPUS.

Christopher S. v. Plumley, 2015WL7628693

In the memorandum decision, *Christopher S. v. Plumley, 2015WL7628693*, the denial of the petitioner’s habeas corpus writ was affirmed. For his convictions on five counts of sex offenses, the petitioner was sentenced, in effect, to twenty-five to fifty-five years in prison.

The petitioner pled guilty to the charges upon which he was sentenced. At the plea hearing, the petitioner answered all the inquiries regarding his decision to enter into a plea, including his acknowledgment of his attorney’s effective representation. However, by sentencing, the petitioner was trying to retain another counsel and to withdraw his plea. The court refused, pointing to the petitioner’s acknowledgments at the plea hearing.

The petitioner alleged ineffective assistance of counsel in his petition for habeas corpus relief and further alleged his guilty plea was involuntarily made and his motion to withdraw the plea should have been granted.

Several grounds were presented for the ineffective assistance of counsel, including the following that should serve as guidelines for public defenders: (i) the attorney met with petitioner twice prior to trial while petitioner in jail, with the last of the two meetings being held on the day before commencement of the trial; (ii) the attorney failed to timely plea bargain by waiting until the night before trial was to begin; (iii) attorney failed to subpoena witnesses to trial; (iv) the attorney failed to adequately prepare for sentencing by waiting until the day before sentencing to meet with petitioner, resulting in no witnesses being available to speak for petitioner; (v) the attorney failed to request an evaluation for petitioner to be considered for probation; and (vi) the attorney failed to present mitigating evidence at sentencing.

The Supreme Court’s view on the ineffective assistance claim is best reflected in the following statement: “[G]iven the heinous nature of the petitioner’s offenses, it was not ineffective for ...

[the attorney] to forgo an argument for probation at the sentencing hearing, and instead to hope for concurrent sentences.” The objective evaluation of the attorney’s performance was that it was not deficient.

With respect to the involuntariness of the plea, the Supreme Court reiterated its precedent that “a criminal defendant can knowingly and intelligently waive his constitutional rights, and when such knowing and intelligent waiver is conclusively demonstrated on the record, the matter is *res judicata* in subsequent actions in *habeas corpus*.” The proper colloquy was performed by the Court, and, accordingly, the guilty plea would not be revisited.

The denial of the petition for a writ of habeas corpus was affirmed.

SENTENCES: MOTION MADE, PRO SE, TO CORRECT A SENTENCE WAS UNTIMELY WHEN MADE TWO YEARS AFTER THE SENTENCE WAS IMPOSED.

PLEA AGREEMENTS: HAVING RECEIVED ALL THE BENEFITS FROM HIS NEGOTIATED AGREEMENT, THE DEFENDANT OUGHT NOT NOW BE HEARD TO COMPLAIN OF HIS BARGAIN, EVEN IF HIS PERIOD OF SUPERVISED RELEASE WAS NOT LEGALLY MANDATED.

State v. Michael Austin S., 2015WL7304499

In the memorandum decision, *State v. Michael Austin S., 2015WL7304499*, the issue was the defendant’s motion to delete the “sentencing provision placing him on supervised release for a term of fifty years.” The defendant was convicted of sex offenses arising out of the victimization of his stepdaughters. The State agreed to the entry of a *Kennedy* plea in consideration for which the State would not file for a recidivist enhancement based on prior convictions of the offenses of armed robbery, aggravated robbery, and engaging in a fraudulent scheme. The defendant agreed to serve three consecutive one to three year sentences and to waive parole eligibility.

In the course of the colloquy, discussion centered upon the requirements for convicted sex offenders, *i.e.*, the registration requirements and the imposition of a period of supervised release. At one point, the defendant acknowledged that he had seen the terms and conditions of the supervised release, thus relieving the court of the obligation to read all the pages for the record. During sentencing, the court admonished the defendant, “if you violate the terms and conditions of this you can be returned to prison for up to 50 years.”

The documentation of the plea in an order did not mention supervised release, but the sentencing order set forth the terms and conditions of a fifty year term of supervised release. Another order entitled “Order of Terms and Conditions of Probation” was subsequently entered and “recounted once more that the petitioner had been placed on extended probation at the completion of your sentence for fifty (50) years.” No appeals were taken from any of the orders.

One year later, the defendant filed, *pro se*, a motion for correction of sentence asserting that the crimes of which he was convicted did not invoke the provisions on supervised release.

The lower court ruled “the defendant is correct that ... supervised release is not part of the requirements for pleading guilty to Attempt to Commit a Felony charge.” However, the lower court noted that a finding was that the crimes were “sexually motivated” and that the court would not have accepted the plea but for the requirement of registration and supervised release. An appeal followed for which counsel was appointed.

The Supreme Court of Appeals found that the circuit court did not need to deconstruct its order to justify the imposition of the period of supervised release. Instead, the appellate court found that the motion to correct the sentence was untimely when made two years after the imposition of the sentence notwithstanding the defendant’s “protestations of ignorance.” The essence of the affirmance of the denial of the motion was that “having received all of the benefits from the agreement he negotiated and agreed to, the petitioner ought not now be heard to complain of his bargain.” In summary, “his time to object was at the time of his sentencing, not some two years later.”

In short, the petitioner may have agreed to a term of his sentence that was not legally mandated, but having so agreed in a negotiated plea, he could not complain about the bargained term when the time came to fulfill the agreement.

PROMPT PRESENTMENT: WHEN DEFENDANT VOLUNTARILY TESTIFIED AT TRIAL, HE WAIVED ANY ERROR THAT HE MAINTAINED OCCURRED AS A RESULT OF HIS ALLEGATION THAT THE PROMPT PRESENTMENT STATUTE WAS VIOLATED.

State v. Hubbard, 2015WL7025873

In the memorandum decision, *State v. Hubbard, 2015WL7025873*, the defendant received a sentence of life imprisonment without mercy upon his conviction of first degree murder without a recommendation of mercy. The issue on appeal was the admission of the defendant’s statement into evidence after the defendant asserted that law enforcement personnel had violated the prompt presentment provisions of the state code.

The allegation was that the defendant and a high school friend “devised a plan” to kill the high school friend’s husband. Subsequently, the husband was shot, beaten with the gun, and shot, again, in the head. The defendant fled and hid in a camper in the woods. The high school friend confessed and the defendant was subsequently apprehended at the site of the camper. During transportation to the state police detachment, the defendant indicated he wanted to make a statement. After arriving at the detachment and being fed and given something to drink, the defendant proceeded to make two statements – one not recorded and one recorded. An

acknowledgment of his Miranda rights and a waiver were signed by the defendant. About five hours after arriving at the detachment, the defendant was taken before a magistrate.

During pretrial motions, the defendant raised the issue of a violation of the requirement of a prompt presentment, but the suppression of his statement was denied. The defendant testified and mirrored the statements he had earlier given.

The Supreme Court of Appeals of West Virginia found no violation of the prompt presentment rule in the matter because the evidence established the defendant wanted to make a statement and so no coercion existed upon the defendant to give the statement. Moreover, the Supreme Court put forth the proposition in a footnote that “when petitioner voluntarily testified at trial he essentially negated or waived any error that he maintained occurred as a result of his allegation that the prompt presentment statute was violated.” The facts of the case were that the defendant’s testimony at trial was consistent with his previous statements. Accordingly, the “waiver” of the prompt presentment statute may not apply if the trial testimony is different from the initial statement; however, this distinction is not made in the decision.

APPEAL: COUNSEL HAD MEMORIALIZED IN CORRESPONDENCE HIS ADVICE THAT DEFENDANT NOT TAKE AN APPEAL AND, THEREFORE, COURT DISREGARDED DEFENDANT’S ASSERTION THAT HE HAD BEEN COERCED INTO NOT TAKING AN APPEAL.

Richard M. v. Plumley, 2015WL6954985

In the memorandum decision, *Richard M. v. Plumley, 2015WL6954985*, the petitioner’s second petition for a writ of habeas corpus had been denied by the lower court. The petitioner stood convicted of sexual molestation charges involving the granddaughter of his girlfriend. The sentence was concurrent terms of imprisonment of ten to twenty years.

The petitioner was advised by privately retained counsel that he should not file a petition for appeal as no non-frivolous grounds for appeal existed. The petitioner was further advised that his claims of ineffective assistance of trial counsel should be pursued in a petition for habeas corpus. The petitioner purportedly agreed with counsel’s advice and did not file a petition for appeal.

The first petition for habeas corpus relief was denied. In the course of the hearing, the court continually admonished the petitioner that if any grounds for the petition were not presented, the grounds would be waived and the decision would be *res judicata* as to such claims. The petitioner affirmed on the record that all the grounds for the petition had been raised. The record contained the cautionary inquiries of the court which were also memorialized in the final order denying the petition. The Supreme Court denied the resulting appeal, but informed petitioner that claims regarding his habeas counsel’s effectiveness should be raised in a separate petition.

The second petition alleged that the habeas counsel had been ineffective. However, the grounds for the *pro se* petition seemingly included grounds for an appeal and grounds that could have been asserted in the first petition. Specifically, habeas counsel was criticized by petitioner for not raising issues of the trial counsel's ineffectiveness in failing to claim petitioner was not promptly presented before a magistrate and that certain jury instructions were erroneous. Again, no appeal had been taken by petitioner. The circuit court found the claims about the trial counsel's ineffectiveness were without merit and, therefore, the habeas counsel was not ineffective in failing to raise these issues in the omnibus hearing. The second petition was denied.

On appeal of this denial, the petitioner raised the issue that he was coerced into not filing an appeal. The Supreme Court found that the record supported a knowing and voluntary waiver by petitioner, which only now the petitioner regretted. Overall, the Supreme Court found that the petitioner was not presenting any new arguments and affirmed the denial of the petition.

The reason this case is summarized is that it demonstrates the advisability of memorializing the reasons for not filing an appeal on behalf of a client. The counsel's correspondence gave the Supreme Court sufficient confidence that the counsel was not ineffective. Moreover, the record at the omnibus hearing contained the petitioner's own affirmation to the court that all grounds had been raised, thus insulating habeas counsel from any claims regarding effectiveness of representation. A practitioner should adopt these safeguards.

MISTRIAL: A PURPORTED GROUND FOR A MISTRIAL WILL BE IGNORED ON APPEAL IF IT WAS NOT STATED AS A GROUND TO THE TRIAL COURT.

IMPROPER REMARKS BY PROSECUTOR: DEFENSE COUNSEL MUST OBJECT TO PRESERVE ERROR WHEN PROSECUTOR SAYS "THE ONLY EVIDENCE THAT YOU HAVE AND THERE'S NOT ANOTHER GOOD EXPLANATION" WHICH POTENTIALLY IS A REFERENCE TO THE DEFENDANT'S FAILURE TO TESTIFY.

***State v. Morris*, 2015WL6143401**

In the memorandum decision, *State v. Morris*, 2015WL6143401, the defendant appealed his conviction on two counts of delivery of a controlled substance, resulting in two concurrent terms of imprisonment of one to fifteen years. Two grounds were raised.

First, the defendant argued that the lower court should have declared a mistrial when the state's confidential informant referenced multiple drug deals between her and the defendant during her trial testimony. As a result of pretrial motions, the court had ruled that the witness could testify to drug transactions preceding the controlled buys that gave rise to the indictment. The court found the transactions to be "intrinsic to the charges" because it established why the witness informed police she could buy drugs from the defendant and why she could be used by police to target the defendant. However, the court did rule that the witness should not talk about the number of such

transactions, which exceeded fifty times. Specifically, the court ordered that “the State is directed not to illicit [sic in original] testimony from [the informant] regarding the number of times she purchased controlled substances from the defendant.”

In establishing the preexisting relationship between the confidential informant and the defendant, the prosecution asked a question which was answered by the witness’ detailing the places where she had dealt “times” with the defendant. An objection ensued, but “the substance of the conference was mostly deemed ‘unclear’ by the court reporter.” Questioning resumed. On cross-examination, the witness responded to a question by stating, “Everybody in ...[the city] that does drugs knows that he sells crack.” A motion for mistrial was made and denied, but the jury was instructed, of course, to “disregard what she said here recently.” Subsequently, the prosecution elicited a response that “nine times out of ten” the drugs would be wrapped in a lottery ticket, which again quantified the prior transactions to some extent.

The defendant argued on appeal that a mistrial should have been declared because it was apparent the prosecution wanted to have the number of transactions brought out in the witnesses’ testimony.

The Supreme Court denied this ground for appeal stating that the defense counsel never moved for a mistrial on any ground other than the statement that the defendant was a known drug dealer throughout the city which was promptly addressed by the instruction to disregard the answer. Accordingly, a mistrial on the grounds that the state had violated the order regarding eliciting the number of prior drug transactions was not made and no issue existed for the appellate court to review. Two lessons emerge. One, you should make sure the court reporter can hear the bench conference. Two, you should include in any motion for mistrial all reasons for a mistrial, not just the one that is immediately in front of you. The mere fact that you moved for a mistrial will not preserve the error if it is not articulated as a grounds for the motion.

The second ground for appeal was the assertion that the prosecution had improperly referred to the defendant’s failure to testify in the closing argument. The prosecution made statements such as “the only evidence you have heard is...” and “there is no other evidence, that is, [defendant’s] cell phone” and “there’s not another good explanation that is reasonable for the presence of the crack cocaine on [the informant] when she returns [from meeting with the defendant].” Unfortunately, the defense counsel made no objections at the time of the statements in the closing. So, not surprisingly, “we deem this issue waived for appellate review purposes.” Plain error was not considered. The teaching point is that, if the prosecutor makes a reference to the “lack” of evidence presented by the defense, objection should be made if the defendant has not testified and the evidence is implicitly referencing the lack of testimony to contradict another person’s story.

SPEEDY TRIAL: THE PURPORTED DELAY WAS PRE-ARRAIGNMENT WHICH DOES NOT COUNT TOWARD THE RUNNING OF THE THREE TERM RULE.

HABEAS CORPUS: HABEAS COUNSEL FOUND CONTRADICTION AN ARGUMENT THAT THE SPEEDY TRIAL STATUTE WAS VIOLATED AND THAT TRIAL COUNSEL'S MOTION TO CONTINUE THE TRIAL SHOULD HAVE BEEN GRANTED AND, THEREFORE, WAS NOT INEFFECTIVE IN NOT RAISING THE SPEEDY TRIAL CLAIM.

Pendleton v. Ballard, 2015WL6955134

In the memorandum decision, *Pendleton v. Ballard, 2015WL6955134*, the appeal was taken from the denial of a petition for writ of habeas corpus.

The petitioner was sentenced to life imprisonment, with mercy, for a robbery, kidnapping, and severe beating of the victim. The initial appeal and an appeal from the first habeas corpus proceeding were denied. The petition from which this appeal was taken concerned a claim that the habeas counsel had been ineffective.

Specifically, the petitioner argued that the habeas counsel should have presented as grounds for relief the violation of his right to a "speedy trial" and an improperly obtained indictment.

With respect to the speedy trial argument, the lower court determined that habeas counsel's decision to not raise the argument was a strategic decision, based on the apparent contradiction between this ground and the ground that the trial counsel's motion for continuance should have been granted because the counsel did not have sufficient time to prepare for trial. The Supreme Court agreed and would refrain "from engaging in hindsight or second-guessing of trial counsel's strategic decisions." The Supreme Court noted, in any event, that the purported delay was "pre-arraignment," which "does not count toward the running of the three-term rule and, therefore, does not violate our speedy trial statute."

The second criticism of counsel related to the fact that the grand jury was never provided the victim's statement which, in the petitioner's mind, had to be exculpatory. Interestingly, the petitioner did not know if the statement was actually withheld from the grand jury, but presumed it must have been if he were indicted. The petitioner had moved for a copy of the grand jury transcript, which was denied. The Supreme Court read the victim's statement and did not find that it exonerated the defendant as it contained the victim's affirmation that he believed the petitioner "must have been present." Accordingly, the trial court's opinion was affirmed.

HABEAS CORPUS: PETITION WAS PROPERLY DENIED FOR FAILING TO STATE A CLAIM BECAUSE THE PRISONER'S CLAIMS AGAINST WARDEN DID NOT RISE TO THE LEVEL OF CONSTITUTIONAL VIOLATIONS.

Delgado v. Ballard, 2015WL6955016

In the memorandum decision, *Delgado v. Ballard, 2015WL6955016*, the defendant filed a writ of habeas corpus alleging that prison officials "retaliated against him for filing inmate grievances

and monetary claims regarding lost, destroyed, or damaged property. The trial court dismissed the petition.

The petition was dismissed for failure to state a claim because the claims “concern routine discipline, safety and security measures at ... [Mount Olive; thus,] it would be legally inappropriate and unwise for the Court to substitute its judgment for that of ... [Mount Olive] officials.” Moreover, the lower court found that none of the claims “rise to the level of constitutional violations, and [petitioner] is clearly not entitled to the relief requested.”

The allegations concerned the breaking of petitioner’s bars of soap and opening of petitioner’s shampoo bottles by correctional officers. As hiding places for contraband, the correctional facility routinely does this when searching a prisoner’s cell. The Supreme Court agreed that this claim should be rejected.

The other allegation concerned the failure of the correctional facility to charge an inmate with stealing the petitioner’s CD player. The petitioner alleged discrimination because he was Hispanic and the other inmate was white. The Supreme Court found that it was lack of evidence and not discrimination that motivated the lack of charges.

Finally, the petitioner argued he should not have been disciplined for giving the CD player to another inmate in violation of a disciplinary rule that inmates were not to engage in transfers of property, for profit or not for profit, to one another. The irony of the disciplinary action is that the allegation that the CD player was transferred improperly was based on the claim that the other inmate had stolen the CD player. However, this apparent paradox was not discussed. The petitioner alleged that the other inmate demanded the CD player and because of the other inmate’s gang affiliation, the petitioner ceded the CD player. For this he was disciplined. The Supreme Court affirmed the disciplinary conviction.

The Court found no evidence of any retaliation for filing the grievances, especially considering that the petitioner had another action pending in circuit court and no further retaliation had been described for filing the civil action.

RULE 404(b): PREVIOUS ATTEMPT TO KILL THE VICTIM AS EVIDENCE WAS DEEMED TO BE HARMLESS ERROR BECAUSE DEFENDANT’S OWN STATEMENTS PROVIDED THE NECESSARY ANIMUS TOWARD THE VICTIM TO SUPPORT A FIRST DEGREE MURDER CONVICTION.

State v. Meadows, 2015WL6181490

In the memorandum decision, *State v. Meadows, 2015WL6181490*, the defendant was sentenced to a term of imprisonment of fifteen years to life upon his conviction of first-degree murder, for which the jury recommended mercy. The issue on the appeal involved Rule 404(b) evidence and the “constitutional” ineffectiveness of counsel.

The facts were essentially uncontested. The defendant owned a trailer which was occupied by the victim, who was living with the defendant's daughter. The defendant had apparently referred to the victim as a "freeloading son of bitch," specifically referring to the victim's habit of returning gifts to the defendant's grandson and pocketing the cash. One day, the defendant drove to the location of the trailer and shot the victim "at a distance" as he exited the trailer. The defendant then called 911 and remained at the scene. When questioned at the scene, the defendant was reported to have stated, that he "had four more subjects ... to take care of..." In a subsequent statement after waiving his *Miranda* rights, the defendant indicated that he had once before entered the trailer and placed a gun to the head of the victim while he was sleeping, but did not shoot when he realized that the grandson was present in the trailer.

A plea agreement was reached for the offense of manslaughter. The defendant changed his mind, rejected the plea agreement, and moved for, and was granted, new counsel.

Trial commenced and the prosecutor's opening statement included the fact that the defendant had been in the trailer on the previous occasion with the intent to kill the victim. Defense counsel objected on the basis this was improper Rule 404(b) evidence and moved for a mistrial. The lower court overruled the objection. The defendant was subsequently convicted of first degree murder.

With respect to the admission of the evidence regarding the previous entry into the trailer with the intent to kill the victim, the Supreme Court did not discuss the admissibility of the evidence, but, instead, held that the admission of the evidence was, at most, harmless error considering the substantial evidence that the defendant killed the victim. The defendant's own statements provided the necessary animus toward the victim to support the first degree murder conviction.

The issue of the ineffective assistance of counsel was not considered as it was deemed to be more properly the subject of a petition for a writ of habeas corpus.

However, Justice Ketchum wrote a short dissent acknowledging that it was the "extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal," but "it is also the extremely rare case when counsel for a criminal defendant fails to give an opening statement, fails to properly argue 'heat of passion' or self-defense in a murder case under these facts, calls only the defendant and the defendant's grandson to testify on his behalf, *and has his law license annulled shortly after trial.*" Justice Ketchum stated that a more vigorous defense on the "provocation" by the victim might have resulted in a potential verdict of manslaughter. Moreover, some physical provocation by the victim had been included in the record, but was not pursued by defense counsel at the trial. Accordingly, Justice Ketchum would have permitted argument on whether "defendant's trial counsel was per se ineffective."

HABEAS CORPUS: WE ONLY ASK WHETHER A REASONABLE LAWYER WOULD HAVE ACTED, UNDER THE CIRCUMSTANCES, AS DEFENSE COUNSEL ACTED IN THE CASE.

HABEAS CORPUS: AS A RESULT OF THE RULES AND PRESUMPTIONS ESTABLISHED, THE CASES IN WHICH A DEFENDANT MAY PREVAIL ON THE GROUND OF INEFFECTIVE ASSISTANCE OF COUNSEL ARE FEW AND FAR BETWEEN ONE ANOTHER.

HABEAS CORPUS: THE CONTENTION WAS REJECTED THAT DEFENDANT WOULD HAVE ACCEPTED THE INITIAL PLEA OFFER IF COMMUNICATED TO HIM WHEN THE DEFENDANT REJECTED A SUBSEQUENT PLEA OFFER THAT WAS MORE FAVORABLE.

HABEAS CORPUS: WHILE THE TRIAL MAY NOT HAVE BEEN PERFECT, GIVEN THE REALITY OF THE HUMAN FALLIBILITY OF THE PARTICIPANTS, THERE CAN BE NO SUCH THING AS AN ERROR-FREE, PERFECT TRIAL, AND THE CONSTITUTION DOES NOT GUARANTEE SUCH A TRIAL.

Foster v. Ballard, 2015WL6756866

In the memorandum decision, *Foster v. Ballard, 2015WL6756866*, the appeal was taken from the denial of a habeas corpus petition for relief based upon the ineffective assistance of counsel.

The facts of the case related to an ongoing dispute and physical conflict between the petitioner and another individual which resulted in gunplay between the victim and a group of people including the defendant. The factual dispute was over who fired the first shot and whether the gunplay was simply the culmination of a plan to kill the individual with whom the petitioner had the confrontation or was self-defense in an ambush by the individual after an invitation to “talk things out.” Two persons died in the gunplay. The petitioner denied, however, shooting anyone, although he was in the midst of the gunplay.

The petitioner was convicted of two counts of second degree murder and was sentenced to consecutive forty-year terms of imprisonment.

At the omnibus hearing, the trial counsel “admitted to suffering from alcoholism during the time he represented the petition.” With respect to the period of time encompassing the trial, the counsel admitted “he was drinking alcohol during the evenings of the petitioner’s trial,” but testified that “he never consumed alcohol during trial, nor was he intoxicated during trial.”

The Supreme Court reviewed its precedent and reiterated that “as a result of the rules and presumptions established ..., the cases in which a defendant may prevail on the ground of ineffective assistance of counsel are few and far between one another.” Specifically, “the test of ineffectiveness has little or nothing to do with what the *best* lawyers would have done ... [n]or is the test even what most good lawyers would have done.” Instead, “we only ask whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.” In short, “we are not interested in grading lawyers’ performances; we are interested in whether the adversarial process at the time, in fact, worked adequately.”

The claim of ineffective assistance of counsel began with the allegations that trial counsel never conveyed a pretrial plea offer which required a conviction on one count of second degree murder and one count of voluntary manslaughter. The complicating factor is that, on the first day of trial an offer was extended for a plea of guilty to a single count of second degree murder.

The Supreme Court rejected the contention that the petitioner would have accepted the pretrial plea offer of which he did not have knowledge when, as an uncontested fact, the petitioner rejected a more favorable plea offer on the first day of trial.

With respect to counsel's overall representation, the Supreme Court acknowledged the precedent that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." The petitioner believed that the defense counsel failed to interview and present a witness who would have testified that the victims were the aggressors and were under the influence of drugs. The Supreme Court noted that defense counsel had cross-examined various witnesses that "included identifying deficiencies in the police investigation and indicated the toxicology report that demonstrated the victims were under the influence of narcotics." The Supreme Court remarked that "we remain mindful that where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense counsel would have so acted in the defense of an accused." The witness who was not interviewed had given statements and had testified in a co-defendant's trial and, accordingly, the trial counsel asserted he knew the substance of the witness' testimony. Moreover, the witness would have potentially contradicted the petitioner regarding from where the first shot came and would have placed a weapon in the petitioner's hand. The decision to not call the witness had some strategy behind it. The Supreme Court affirmed the circuit court's decision, therefore, to not view the counsel's decisions through the "lens of hindsight."

Further, the Supreme Court found no ineffective assistance in the counsel's "brief" closing in which the defense counsel did not address "intent, malice or concerted action." Instead, the Supreme Court found that the jury was properly instructed on these elements and the attorney's closing was a matter of tactics and strategy. Moreover, the petitioner could not show that, but for the brief argument, the result would have been different.

Finally, the Supreme Court took note that considering the undisputed circumstances, "it is clear that the adversarial process at the time ... worked adequately, particularly where the petition was tried on two counts of first degree murder, but was convicted on the lesser included offense of two counts of second degree murder."

In short, "while the petitioner's trial might not have been perfect, given the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial."

SENTENCE: A PROPER FACTOR IN SENTENCING WAS THE USE OF A FIREARM EVEN THOUGH THE PLEA WAS TAKEN FOR THE CRIME OF ROBBERY WITHOUT THE USE OF A FIREARM.

State v. Fields, 2015WL6181504

In the memorandum decision, *State v. Fields, 2015WL6181504*, the defendant asserted that the circuit court abused its discretion in sentencing him to thirty years of imprisonment upon his guilty plea to first-degree robbery without the use of a firearm. The statutory sentence for the offense was a term of imprisonment of not less than ten years.

While the petitioner robbed a gas station at “gun point,” the plea that was offered and taken was the lesser included offense of “robbery without the use of a firearm.”

The defendant requested the “minimum sentence of ten years of imprisonment” and placement in an in-patient drug addiction treatment facility. The State recommended the minimum sentence of ten years of imprisonment. The circuit court imposed a thirty year sentence.

Because the sentencing for first degree robbery involves no statutory maximum limit, the constitutional prohibition against a disproportionate sentence can be applied. However, the Supreme Court did not find that the thirty year term shocked the conscience of the court or society. The recited facts supporting this conclusion, however, included the defendant’s use of a gun, despite the offense being one that presumed no use of a firearm.

The sentencing order was confirmed.

CONSPIRACY: CONSPIRACY AND DELIVERY OF CONTROLLED SUBSTANCES WERE PROPERLY FOUND BY JURY FROM THE CIRCUMSTANTIAL EVIDENCE.

State v. Brown, 2015WL6181476

In the memorandum decision, *State v. Brown, 2015WL6181476*, the defendant was indicted on “six felony counts related to possession and delivery of controlled substances, including crack cocaine, hydrocodone, morphine and alprazolam.”

The investigation into the offenses began with the report about a stolen all-terrain vehicle which was found at the defendant’s residence. The defendant claimed that the owner had run out of gas and simply left the ATV at that location. However, the key to the ATV was found on the defendant. Further investigation resulted in the conclusion that the ATV had not been stolen, but, instead, was traded for drugs.

A search warrant was obtained and, during the search, bags of narcotics were being thrown out of a house window as the search began. The defendant was found in the house and was in position to have thrown the bags out the window. Moreover, “they found a bag of pills, crack cocaine, white tablets, a gun, and a pair of jeans reportedly belonging to ... [the defendant] that

contained another bag of pills, more crack cocaine, prescription cough medicine, and hydrocodone.”

The defendant was tried and convicted of delivery of a controlled substance and conspiracy.

On appeal, the defendant argues that the lower court should have granted the motion for a judgment of acquittal. The testimony at trial involving the drug transactions was given by an informant. The informant testified that the defendant was “just there” and “that the actual exchange of crack cocaine for the vehicle occurred between a woman and ... [a] co-defendant.” The argument was, therefore, that no testimony existed that the defendant had delivered or transferred any drugs.

As noted by the Supreme Court, the record reflected, however, that the informant “testified that they [defendant and his co-defendant] weighed [the crack cocaine] out and handed it to her.” Considering the defendant’s presence at the exchange, the defendant’s possession of controlled substances when the house was later searched; the defendant’s friendship with the co-defendant; and the defendant’s possession of the key to the ATV, the Supreme Court found the evidence sufficient, “while mostly circumstantial,” to support the “jury’s verdict beyond a reasonable doubt on the counts of delivery of a controlled substance and conspiracy.”

The denial of the motion for judgment of acquittal was affirmed.

TRAFFIC STOP: THE REASONABLE SUSPICION NEEDED FOR A TRAFFIC STOP IS A LESS DEMANDING STANDARD THAN PROBABLE CAUSE.

SUPPRESSION: THE THREAT TO ARREST DEFENDANT AT A TRAFFIC STOP WAS NOT COERCIVE BECAUSE A MISDEMEANOR CRIME WAS BEING COMMITTED IN THE OFFICER’S PRESENCE AND, THEREFORE, AN ARREST COULD BE MADE.

State v. Farley, 2015WL6181512

In the memorandum decision, *State v. Farley, 2015WL6181512*, the defendant claimed that the police officer did not have reasonable suspicion necessary to warrant a traffic stop. The offense of conviction was the defendant’s driving a “minivan with multi-colored lights lining the front, sides, and rear of the van” including “red, blue, green, purple, and orange stars were lit up and facing forward on the roof of the minivan.” Essentially, the lights were placed around the windshield. In short, the defendant’s van was “covered with various lights, slogans, and decorations.”

The defendant had been pulled over and informed that she could not have the adorning lights on her van displayed. The defendant refused to turn off the lights. Under threat of arrest, the defendant turned off the lights and was given a citation.

Upon conviction of the citation and affirmation of the conviction by the circuit court, this appeal ensued.

The defendant argued the traffic stop was improper because the lights did not violate state law. However, the Supreme Court noted that “reasonable suspicion” is a “less demanding standard than probable cause.” The Supreme Court found, therefore, “the police officer performing the traffic stop had the requisite reasonable suspicion to warrant a stop as he observed petitioner displaying forward-facing, multi-colored lights around the top of the windshield in violation of” state law.

The real crux of this sordid affair was the defendant’s claim that the conviction violated her First Amendment rights in that “the use of multi-colored lights on her minivan is part of her art and necessary for her to display her political and religious messages.” The principle underpinning her argument was that the “substantive evil of speech must be extremely high before utterances can be punished.” Apparently, the defendant was arguing that the lights were necessary so that the political and religious slogans could be discerned. The Supreme Court found no evidence existed that the “lights on her minivan are of a serious nature.” Moreover, the Supreme Court refused to concede that the lights represented speech.

The defendant argued that a *Brady* violation had occurred in that the traffic camera video from the dash of the police car was not furnished to the defendant. The hard drive containing the footage had been damaged and was not available. The defendant could not articulate how the footage would be exculpatory or impeachment evidence considering that audio transcripts were available. Moreover, the State did not willfully or inadvertently suppress the video.

Finally, the Supreme Court did not find persuasive that the threat to arrest the defendant was coercive. The fact is that a misdemeanor was being committed in the presence of the police officer and, therefore, an arrest could be made.

The defendant’s conviction was affirmed.

EVIDENCE: IT IS FUNDAMENTAL THAT WHERE THE SUBJECT MATTER OF A QUESTION HAS BEEN INTRODUCED BY A DEFENDANT ON CROSS-EXAMINATION, IT MAY PROPERLY BE COVERED ON REDIRECT.

State v. Warburton, 2015WL6181817

In the memorandum decision, *State v. Warburton, 2015WL6181817*, the defendant appealed from his convictions on the grounds that “the circuit court committed reversible error in allowing a police officer to testify as to witnesses’ prior statements.”

A police officer responded to a report of a possible burglary and house fire. When he arrived at the scene, he found the defendant and others covered in black soot and observed the defendant and another person burning copper wire in a trash can in the front yard of the residence. The officer also observed a truck parked at the location, containing a “large load of scrap metal.” However, the officer left the scene without any official action.

A second call was made regarding a possible burglary, and the police officer again responded. At the scene, defendant's neighbors informed the police officer they had made the calls and believed that the defendant was burglarizing a vacant home in the neighborhood. The police officer then spoke again with the now showered and freshly clothed defendant. The neighbors then identified the defendant and his companion as the persons they had seen at the vacant house. The officer then went into the vacant house and saw evidence that "most of the residential copper wire had been removed along with the light fixtures, cabinets, stoves, a bathtub, and a hot water heater." An arrest of the defendant ensued. At the police station, incriminating items were found the defendant's backpack. Further investigation found a recycling site at which the defendant on the same day had sold thirty-two pounds of copper wire.

At trial, the police officer recounted his investigation including the statements he obtained from the individuals who were with the defendant on that day and who had subsequently pled guilty to misdemeanor destruction of property in the course of aiding the defendant in stripping the vacant house. An objection was made to the direct examination of the officer regarding these statements. The objection was sustained, but an admonition was given that if anyone opened the door, the police officer might be allowed to explain the statements.

On cross-examination, the defense counsel questioned the police officer about the testimony of one of the individuals, in both his testimony at trial and in his statements to the police officer. The prosecution made an objection, which the Court sustained. The Court then stated that the door had now been opened in the circuit court's opinion to the officer's testimony as to the prior statements. On redirect examination, therefore, the officer testified regarding the prior statement of the identified individual.

The Supreme Court recited that "it is fundamental that where the subject matter of a question has been introduced by a defendant on cross-examination, it may properly be covered on redirect." So, the questioning by the prosecution was properly permitted.

But, even if the questioning was not proper, it was error invited by the defense counsel.

Moreover, the error was harmless in that, while the officer's "testimony could possibly have had [an] effect on the jury's weighing of the evidence, he did not have a substantial impact on the result of the trial." After all, petitioner's backpack contained a pair of wire cutters and copper wire sheathing. And the neighbors spotted the defendant carrying a stove beside the vacant house. And the defendant sold thirty-two pounds of copper wire. And, so forth.

The circuit court's order was affirmed.

EVIDENCE: NO BRADY VIOLATION IN NOT DISCLOSING THAT DEFENDANT HAD REFUSED TO SELL TO UNDERCOVER LAW ENFORCEMENT BECAUSE IT IS NEITHER EXCULPATORY OR INCULPATORY.

EVIDENCE: BEFORE A PHYSICAL OBJECT CONNECTED WITH A CRIME MAY PROPERLY BE ADMITTED INTO EVIDENCE, IT MUST BE SHOWN THAT THE OBJECT IS IN SUBSTANTIALLY THE SAME CONDITION AS WHEN THE CRIME WAS COMMITTED.

State v. Coffey, 2015WL6143414

In the memorandum decision, *State v. Coffey, 2015WL6143414*, the defendant was convicted of two counts of possession with intent to deliver a controlled substance and one count of conspiracy to deliver a controlled substance. Specifically, a dealer sold one hundred Opana pills at forty dollars a pill on two occasions to a middleman for the defendant, “because ... [the defendant] was distrustful and would not deal with people he did not know.” On a third occasion, the dealer sold directly to the defendant, although the middleman was present. The defendant was arrested on the day after the third sale.

The arrest resulted from “anonymous tips” that multiple vehicles were coming and going from petitioner’s residence without “staying long” and that the defendant was selling drugs. A search of the residence pursuant to a warrant resulted in the seizure of \$7,000. A search of the defendant’s person revealed twenty-two Opana pills in the right jacket pocket in a silver metal pill bottle, thirty 15 milligram oxycodone pills in the right front shirt pocket in a piece of aluminum foil, and an additional Opana pill in a piece of aluminum foil.

The defendant argued at trial that the drugs were for personal use. In closing, the prosecutor hammered on the \$7,000 in cash, the defendant’s possession of three four-wheelers, his \$5,000 purchase of drugs, and the absence of 78 Opana pills from the recent purchases in order to create the circumstances supporting the defendant’s sale of the drugs.

The first ground on appeal involved a purported *Brady* violation in that the defense was not informed that a witness and several law enforcement officers had failed on various occasions to purchase controlled substances from the defendant. The Supreme Court found this evidence to not be exculpatory nor impeachment evidence, especially considering the defendant was “notoriously paranoid and would often turn others away.” Moreover, the decision indicates that the evidence was available before cross-examination of these witnesses.

The second ground was the purported prejudicial effect of the prosecutor’s closing argument in which it was stated that the defendant was “unemployed” and was yet found in possession of substantial cash. Apparently, no evidence was adduced during the trial regarding the defendant’s employment or lack of employment. The Supreme Court found this to be a “reasonable inference” to be drawn from the elicited testimony that the defendant was home when the warrant was executed on a Friday afternoon and that the defendant “always seemed home” whatever the time of day. Accordingly, the remarks did not result in “clear prejudice or manifest injustice.” It was noted that defense counsel had not objected to the remarks during the closing argument.

The final ground for appeal concerned the authentication of the evidence seized from the defendant during the search and seized from the residence. The officer who had seized the evidence was no longer employed by the law enforcement agency and was not a witness at the trial. Essentially, “before a physical object connected with a crime may properly be admitted into evidence, it must be shown that the object is in substantially the same condition as when the crime was committed.” Moreover, “factors to be considered in making this determination are: (1) the nature of the article, (2) the circumstances surrounding its preservation and custody, and (3) the likelihood of intermeddlers tampering with it.” Ultimately, the admission of the evidence is within the discretion of the trial court and, “absent abuse of discretion, that decision will not be disturbed on appeal.”

The trial contained the testimony of a police officer who had been present when the evidence was seized and who tracked the evidence to the station and subsequently to the laboratory for testing. The Supreme Court found from the record that “the circuit court thoughtfully considered the chain of custody of the evidence in this matter, and selectively excluded evidence that it believed was improperly authenticated.”

Significantly, the circuit court did exclude pills that had been contained in two pill bottles seized from the residence. The police officer had taken the pill bottles to the evidence locker and, without anyone else present, had removed the pills from each bottle to count the different type of pills and then had returned the pills to the bottles. It was not stated why this was considered a break in the chain of custody and not simply an inventory.

APPEAL: PROSECUTOR’S OFFICE IS NOT DISQUALIFIED BY AN ASSISTANT’S PREVIOUS REPRESENTATION OF A DEFENDANT IF THE ASSISTANT PROSECUTOR HAS EFFECTIVELY AND COMPLETELY BEEN SCREENED FROM INVOLVEMENT, ACTIVE OR INDIRECT, IN THE CASE.

EVIDENCE: THE DIFFERENCE IN GENDERS OF CHILD VICTIMS DID NOT PRECLUDE INTRODUCTION OF THE OTHER ACTS IN THE TRIAL BECAUSE IT COULD SHOW A LUSTFUL DISPOSITION TOWARD CHILDREN GENERALLY.

State v. Reed, 2015WL6143394

In the memorandum decision, *State v. Reed, 2015WL6143394*, the defendant was sentenced for convictions of sexual assault in the first degree and sexual abuse by a custodian.

A motion to sever five counts of sexual offenses had been granted.

The defendant was previously tried and convicted on two of the severed indicted sex offenses.

During a hearing on which the revocation of probation on unrelated charges was being considered, the defendant’s public defender on these earlier charges, who was now employed by the prosecutor’s office, was seen by defendant pointing to a document in the assigned

prosecutor's file. The defense counsel moved to disqualify the prosecutor's office, which was denied upon the former public defender's testimony. The defendant was tried and convicted on the remaining charges. The defendant's sentence was a term of twenty-five to one-hundred years on the sexual assault conviction and ten to twenty years on the sexual abuse conviction.

On appeal, the defendant argued that the prosecutor's office should have been disqualified. However, the Supreme Court referred to *State ex rel. Tyler v. MacQueen*, 447 S.E.2d 597, 598 (W. Va. 1994), which held that the prosecutor's office is not disqualified by an assistant's previous representation of a defendant if "the assistant prosecutor has effectively and completely been screened from involvement, active or indirect, in the case." The circuit court's discretion in not disqualifying the prosecutor's office was not abused in light of the "unrebutted testimony" that the former public defender had no involvement with the prosecution of the defendant. The former attorney's presence in court was attributed to his responsibility for another case on the docket.

Another ground for appeal was the circuit court's ruling that the victim in the first trial could testify in the second trial from which this appeal was taken to demonstrate lustful disposition. The defendant's argument was that the victim in the first case was a "pubescent female" while the victim in this case was a "pre-school aged boy" and, therefore, the matters were "substantially different." However, *State v. Edward Charles L.*, 398 S.E.2d 123 (W. Va. 1990), holds that "collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition towards children generally, or a lustful disposition to specific other children provided such evidence relates to incidents reasonably close in time to the incident giving rise to the indictment." Accordingly, the Supreme Court of Appeals of West Virginia reasoned that the difference between the genders of the children did not undermine the finding of a lustful disposition toward children generally.

The Supreme Court affirmed the defendant's convictions.

APPEAL: BY PLEADING GUILTY, THE DEFENDANT LIMITED THE APPEAL TO WHETHER THE PLEA WAS VOLUNTARY, WHETHER THE SENTENCE WAS CORRECT, AND WHETHER JURISDICTION IS PROPER.

***State v. Dailey*, 2015WL6181494**

In the memorandum decision, *State v. Dailey*, 2015WL6181494, the defendant appealed from the sentencing on his conviction of three counts of third-degree sexual assault for which the circuit court imposed three consecutive terms of imprisonment of one to five years. The convictions arose out of the petitioner's sexual intercourse with a fourteen year old girl. Notably, the conviction arose from the defendant's entry into a plea agreement.

The plea agreement provided for the dismissal of certain felony charges for which the sentences would potentially reach 90 years. The prosecution agreed to propose that the counts of conviction be concurrent with another term of imprisonment to be imposed for charges in another county. The agreement specifically recounted that it was not binding upon the circuit court.

When asked at sentencing if he had been promised concurrent sentences by anyone, the defendant replied that he had not. The court then sentenced him to the three consecutive terms and ran the sentences consecutively to the term of imprisonment imposed in the other county. The circuit court based this sentencing on the facts that the child had been “missing for three days while ... [the defendant] and co-defendant committed multiple sex acts with the victim.”

The Supreme Court criticized appellate counsel for articulating two grounds for an appeal while citing to no authority. The attorney made “broad generalizations while arguing that policy considerations support” the defendant’s position. Accordingly, the Court felt “free to disregard such errors.”

The additional ground for appeal was that the plea agreement “did not clearly state whether the State would recommend that the sentences in this case be served consecutively or concurrently.” However, the brief from the defendant stated “the terms of the plea agreement from the State included the sentences for the three [sexual assault charges] would run consecutively to one another.” Indeed, the plea agreement provided the effective incarceration would be three to fifteen years, which is the statutory term for the charge multiplied by three. Moreover, the brief contained the further admission that the defendant “entered into this plea voluntarily, knowing that the [circuit court] would make the ultimate decision as to what the punishment ... would be.” Essentially, this ground was belied by the defendant’s own brief.

Finally, the defendant complained that the circuit court erred “in limiting the issues he could raise on appeal.” The defendant pled guilty, thus effectively limiting the appeal to “whether the plea is voluntary; whether the sentence is correct; and whether jurisdiction is proper.” In other words, a plea by its nature limits the issues on appeal. Accordingly, no merit was found in this argument.

In short, the Court made short shrift of the appeal.

HABEAS CORPUS: COUNSEL’S FAILURE TO APPEAL A CONVICTION, IN AND OF ITSELF, DOES NOT NECESSARILY CONSTITUTE INEFFECTIVE ASSISTANCE.

HABEAS CORPUS: A COURT MAY DENY A PETITION FOR A WRIT OF HABEAS CORPUS WITHOUT A HEARING AND WITHOUT APPOINTING COUNSEL FOR THE PETITIONER IF THE PETITION, EXHIBITS, AFFIDAVITS, OR OTHER DOCUMENTARY EVIDENCE SHOW TO THE COURT’S SATISFACTION THAT THE PETITIONER IS NOT ENTITLED TO RELIEF.

Tincher v. Dingus, 2015WL6181436

In the memorandum decision, *Tincher v. Dingus*, 2015WL6181436, the appeal was taken from a summary denial of a petition for writ of habeas corpus. The defendant was serving a term of imprisonment of ten to twenty years for his conviction, by reason of a voluntary plea, to bank robbery without a handgun.

The habeas alleged that the sentence was disproportionate to the crime and that his counsel was ineffective for not filing an appeal of the sentence. The petition was summarily denied, without an evidentiary hearing or without any findings of fact. This appeal was then taken on the grounds that the circuit court should have held an evidentiary hearing and should have entered findings of fact.

The Supreme Court noted its precedent that “a court ... may deny a petition for a writ of habeas corpus without a hearing and without appointing counsel for the petitioner if the petition, exhibits, affidavits or other documentary evidence filed therewith show to such court’s satisfaction that the petitioner is entitled to no relief.”

With respect to the sentence, the lower court noted that the issue of the proportionality of the sentence had been decided in the ruling on the petitioner’s motion for a reduction of sentence. Accordingly, the circuit court properly refused to consider this ground any further.

Moreover, the Supreme Court opined that “counsel’s failure to appeal a conviction, in and of itself, does not necessarily constitute ineffective assistance.” Notably, “given petitioner’s entry of a guilty plea in the criminal proceedings below and his failure to allege any facts that would give rise to an ineffective assistance claim in this regard, such as incompetent advice of counsel or an involuntary plea, the circuit court clearly did not err in denying petitioner relief on his ineffective assistance of counsel claim.”

The summary denial of the petition for a writ of habeas corpus by the circuit court was affirmed.

APPEAL: A JUDGMENT WILL NOT BE REVERSED FOR ANY ERROR IN THE RECORD INTRODUCED BY OR INVITED BY THE PARTY SEEKING REVERSAL.

***State v. Bowman*, 2015WL6181457**

In the memorandum decision, *State v. Bowman*, 2015WL6181457, the defendant was sentenced to a cumulative term of incarceration of nine to one hundred years after he pled guilty to five counts of burglary, three counts of conspiracy, and one count of bringing stolen property into the state. The appeal asserts that the circuit court erred in “imposing the maximum allowable sentences for these offenses.”

The defendant was part of a massive crime spree that spanned a time period of nine months and spanned across three states. The plea agreement resulted in the dismissal of “at least

fourteen other offenses.” The sentences for each count to which the defendant pled were to run consecutively.

The defendant complains that, at sentencing, the prosecution informed the Court about crimes for which the defendant had not been convicted. However, the fourteen other crimes which were dismissed by the plea agreement were “first referenced” by the defendant’s counsel, although the context for making this reference is not set forth. Accordingly, the Supreme Court recited its precedent that “a judgment will not be reversed for any error in the record introduced by or invited by the party seeking reversal.” Moreover, the prosecution made reference to the fourteen other counts only in describing the benefit to the defendant to enter into the plea agreement. The Supreme Court simply did not consider these to be impermissible factors in the defendant’s sentencing.

The prosecution asserted that the “sentence needed to speak justice for multitudes of victims.” The Supreme Court was not certain from the record if this was a reference to the victims of the counts on which the defendant was convicted or of all the counts, including the dismissed counts. But the Supreme Court concluded that, “either way, there is, again, no evidence that the circuit court based its sentences on any impermissible factors.”

EVIDENCE: THE DEFENDANT’S KNOWLEDGE THAT CHECKS WERE FORGED WAS SUFFICIENTLY ESTABLISHED BY A CHRONOLOGY OF EVENTS FROM WHICH HE HAD TO KNOW.

State v. Watts, 2015WL6143413

In the memorandum decision, *State v. Watts, 2015WL6143413*, the defendant was indicted on three counts of forgery and three counts of uttering, but was convicted on only two of the uttering charges and acquitted of all other counts.

The first ground for appeal was that the prosecution had failed to introduce any evidence that he committed forgery. This ground was immediately disregarded as the Supreme Court noted “petitioner was not convicted of forgery.”

The second ground for appeal was that the prosecution had presented no evidence that the defendant knew that the uttered documents were forged.

The statute of conviction provided that “if any person ... utter or attempt to employ as true such forged writing, *knowing it to be forged*, he shall be guilty of a felony....” W. Va. Code §61-4-5(a).

The prosecution did prove, however, a chronology of events which involved defendant’s presentment at Chase Bank of a check that had been stolen but was made payable to him, at which time he was informed that the check could not be cashed and he needed to get another check. The next day the defendant then presented two more checks that had been stolen again

made payable to him or to cash. "Work" was written in the memorandum section of the checks. The last two checks were the basis for the two uttering charges upon which the defendant was convicted.

The Supreme Court found this chronology to be sufficient evidence to permit the jury to find that the defendant knew the checks were stolen and forged. Notably, the opinion does not state whether the Chase Bank representative told the defendant why the check could not be cashed. The Supreme Court seems to assume that the defendant was told and, therefore, had to know the checks were forged when he presented the checks the next day, which, significantly, were lowered numbered checks than the one presented to Chase Bank.

The convictions were affirmed.

DUE PROCESS: PROCEEDINGS FOR VIOLATION OF CONDITIONS OF SUPERVISED RELEASE IS A CONTINUATION OF THE PROSECUTION OF THE ORIGINAL OFFENSE AND, THEREFORE, IS NOT A SEPERATE CRIMINAL TRIAL REQUIRING ALL THE INCIDENTS OF A CRIMINAL TRIAL.

SENTENCE: THE GOVERNING STATUTE IMPOSING PERIODS OF SUPERVISED RELEASE UP TO LIFE IS NOT FACIALLY UNCONSTITUTIONAL AS CRUEL AND UNUSUAL PUNISHMENT.

SENTENCE: IMPOSITION OF THE LEGISLATIVE MANDATED ADDITIONAL PUNISHMENT OF A PERIOD OF SUPERVISED RELEASE AS AN INHERENT PART OF THE SENTENCING SCHEME FOR CERTAIN VIOLATIONS IS NOT IN CONTRAVENTION OF THE DOUBLE JEOPARDY CLAUSE.

State v. Parker-Bowling, 2015WL6143403

In the memorandum decision, *State v. Parker-Bowling, 2015WL6143403*, the supervised release of the defendant, a registered sex offender, was revoked and the defendant was incarcerated for a four year term for reason of the violation of the conditions of her supervised release. The decision of the court was three votes to affirm the conviction, one vote by Justice Davis to affirm the conviction in part and reverse in part, and one vote by Justice Ketchum to overturn the circuit court's order. No reasoning is provided in support of Justice Davis' and Justice Ketchum's votes.

The underlying conviction involved the defendant and another adult female having sexual intercourse with a fourteen year old boy in a bathroom at the boy's home during a party held by the boy's mother. The defendant had been drinking alcohol, smoking marijuana, and popping pills at the time of the incident. The defendant pled guilty to one count of sexual assault in the third degree. The defendant discharged the sentence.

On two different occasions, the defendant was incarcerated for violation of the terms and conditions of her supervised release.

On the third occasion, the defendant was alleged to have failed to report to her probation officer within twenty-four hours of her release from her second conviction on violating conditions

of supervised release; tested positive for alcohol within forty-eight hours of her release; failed to account for 76 missing benzodiazepine pills from her prescription, but tested negative for the drug; never applied for a job although representing that she had; failed to maintain a verifiable residence in that the shelter was releasing her due to her behavior; and provided deceptive responses to a polygraph test regarding unreported sexual contact and illegal drug use. The circuit court found that these violations occurred and sentenced the defendant to four years of incarceration.

A ground for appeal was that the violations were unrelated to the original offense and, therefore, her due process rights were violated. Seemingly, the argument was that the revocation proceeding was a separate criminal prosecution, requiring all the incidents of a criminal trial. The Supreme Court readily dismissed this ground, repeating its previous holdings that a “revocation proceeding where incarceration is imposed is construed to be a continuation of the prosecution of the original offense.” So, no due process rights were violated.

The second ground for appeal was that the twenty-five year term of supervised release was cruel and unusual punishment in light of the one to five year term of imprisonment for the original charge. The ground was summarily dismissed due to the Supreme Court precedent that the governing statute imposing periods of supervised release up to a term of life “is not facially unconstitutional on cruel and unusual punishment grounds.”

The third ground for appeal was that the twenty-five year term of supervised release and the four year sentence for a violation were disproportionate to her crimes and her “technical” violations. The Supreme Court found that the sentences imposed on the defendant were less than that imposed on the defendant in *State v. Hargus*, 753 S.E.2d 893 (W. Va. 2013), and thus, “her term of supervised release and current four-year revocation sentence are not disproportional to those imposed for other offenses within the same jurisdiction.”

Additional grounds for appeal were that the “four-year revocation sentence is an additional sentence that violates the proscription against double jeopardy given that her underlying criminal sentence has already been discharged.” Again, the Supreme Court relied on its precedent that this “imposition of the legislatively mandated additional punishment of a period of supervise release as an inherent part of the sentencing scheme for certain offenses” and is not in violation of the double jeopardy provision.

Other grounds were summarily disregarded.

The defendant argued, further, that she was denied procedural due process because a jury did not hear and decide the charges and the burden of proof was less than beyond a reasonable doubt. The argument was based on language in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) that “other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”

Because the supervised release can be imposed based solely upon the jury verdict, *Apprendi* was deemed not to apply. Essentially, the supervised release is part of the sentence at final disposition and is not “an additional punishment” requiring additional facts to be found. The facts surrounding the conviction give the court sufficient basis upon which to determine a sentence within the permissible range, which, with respect to sex offenses, includes a period of supervised release. Restated, the period of supervised release constitutes the permissible range of the term of imprisonment for the offense, not an additional punishment.

A final hail Mary pass was the argument that all the revocation violations related to the defendant’s inability to obtain housing and, therefore, the incarceration is based on discriminatory grounds “because it is based *primarily* on the fact that she cannot afford housing.” Instead of discriminatory, the Supreme Court found the revocations to be reasonable because the defendant lost her housing primarily due to her behavior and, furthermore, the revocations were based on numerous other serious violations.

The circuit court’s order of incarceration was affirmed. Again, the reasons for noting a dissent to the opinion are not set forth.

